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AND
GENERAL LAND OFFICE
IN
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TABLE OF CASES REPORTED.

	Page.		Page.
Adams, Lamb <i>v.</i>	548	Bramwell <i>v.</i> Central and Union Pacific Railroad Companies...	326, 462
Adams <i>et al.</i> <i>v.</i> Northern Pacific R. R. Co.....	529	Briskey <i>v.</i> Northern Pacific R. R. Co.....	435
Adams, Tustin <i>v.</i> (on review)...	188	Brown <i>v.</i> Anderson <i>et al.</i> (on review).....	26
Adkinson, Francis.....	590	Bryant <i>v.</i> Begley.....	188
Alps Consolidated Mining Co., McGowan <i>et al.</i> <i>v.</i>	113	Bucknam <i>v.</i> Byram <i>et al.</i>	251, 455
Anderson <i>et al.</i> , Brown <i>v.</i> (on review).....	26	Buley, State of Montana <i>v.</i>	116
Anderson, Nilson <i>v.</i>	138	Bulger Hill and Nugget Gulch Placer, Aurora Lode <i>v.</i>	95, 348
Anderson <i>et al.</i> , Smith <i>v.</i>	580	Burns, G. A., <i>et al.</i>	430
Ashleman <i>v.</i> Northern Pacific R. R. Co.....	513	Butler, Welch <i>v.</i> (on review)....	8
Aspen Consolidated Mining Co. <i>v.</i> Williams.....	34, 256	Bynum, B. F., <i>et al.</i> (on review)...	389
Aspinall <i>et al.</i> <i>v.</i> Stocks <i>et al.</i>	502	Caldwell, Meagher <i>v.</i>	256
Aurora Lode <i>v.</i> Bulger Hill and Nugget Gulch Placer.....	95, 348	California, State of.....	423
Axford, Charles <i>et al.</i>	393	California, State of (on review)....	230
Bagley, Oregon and California R. R. Co. <i>v.</i>	392	California, State of, Owens <i>v.</i> (on review).....	12
Baker Fraction Placer.....	112	California, State of, <i>v.</i> Reeves (on review).....	377, 448
Baker <i>et al.</i> <i>v.</i> Rambo.....	475	Canady, Northern Pacific R. R. Co. <i>et al.</i> <i>v.</i>	436
Bakkene <i>et al.</i> , Heinrichs <i>v.</i>	234, 582	Castello <i>v.</i> Bonnie.....	162, 481
Barbour <i>v.</i> Wilson <i>et al.</i>	12, 462	Catron <i>et al.</i> <i>v.</i> Lewishon.....	20
Barnes, Newman <i>v.</i>	257, 585	Cawood <i>v.</i> Dumas (on review)....	551
Bartlett Bay Packing Co.....	337	Central Pacific R. R. Co., Halling <i>v.</i> (on review).....	9
Beach, Wood, <i>v.</i> (on review)....	200	Central and Union Pacific R. R. Companies, Bramwell <i>v.</i>	326, 462
Bell <i>et al.</i> , Florida Central and Peninsular R. R. Co. <i>v.</i> (on review).....	106	Childs <i>v.</i> Floyd (on review).....	350
Benesh <i>v.</i> Kalashek (on review)....	147	Chisholm, Guerten <i>v.</i>	479
Bergerud, St. Paul, Minneapolis and Manitoba Ry. Co. <i>et al.</i> <i>v.</i>	408	Christian, Penwell <i>v.</i>	10
Bickford, Hershey <i>et al.</i> <i>v.</i>	522	Church, John Houston M.....	130
Black Queen Lode <i>v.</i> Excelsior No. 1 Lode (on review).....	9	Cleaves <i>v.</i> Smith (on review)....	297
Blue Water Land and Irrigation Co.....	275	Clifford, Joseph.....	199
Bonnett <i>v.</i> Jones.....	547	Connell's Heirs, Stone <i>et al.</i> <i>v.</i>	166, 448
Bonnie, Castelló <i>v.</i>	162, 481	Cooper <i>et al.</i> , United States <i>v.</i> (on review).....	333
Bonner, John R. L.....	251	Copp, Henry N.....	123
Boomer, James.....	574	Corlis <i>v.</i> Northern Pacific R. R. Co.....	265
Boswell <i>et al.</i> <i>v.</i> Watkins (on review).....	12	Craig, State of Minnesota <i>v.</i>	305
Bowsman, Alexander.....	404	Crowley <i>v.</i> Ritchie <i>et al.</i> (on review).....	346
Brady <i>et al.</i> <i>v.</i> Williams.....	533	Cullom <i>v.</i> Helmer <i>et al.</i> (on review).....	148
		Curnutt <i>v.</i> Jones (on review)....	158

	Page.		Page.
Daily v. Marquette, Houghton and Ontonagen R. R. <i>et al.</i> (on review)	310	Gamble v. Northern Pacific R. R. Co	351
Davis, Spaulding v	358	Gaunt v. Rutledge <i>et al.</i>	55
Dawson <i>et al.</i> v. Higgins (on review)	165	Giesmar, Louis	555
Dayton, United States v	54	Gillen, Parcher v	485
Denny <i>et al.</i> , Hosmer v	319, 519	Giroux v. Scheurman	546
Dhalin, Peter	193	Glover <i>et al.</i> v. Swarts	480
Dodge, White v	240	Grandin <i>et al.</i> v. La Bar	301, 381
Dolles v. Hamberg Consolidated Mines Co	267, 539	Grayson, George W	194
Douglas, Shook v. (on review) ...	331	Green River Coal Association, McWilliams <i>et al.</i> v	127
Downman v. Moss (on review) ...	297	Green, Morgan v	297
Drake <i>et al.</i> v. Wilt	2	Greenhoot <i>et al.</i> , Hamilton v. (on review)	180
Drew, Northern Pacific R. R. Co. v ..	380	Grinnell v. Southern Pacific R. R. Co. (on review)	489
Drewicke v. State of Minnesota ..	148, 384	Grothjan, Louise C	414
Dumas, Cawood v. (on review) ..	551	Goldstein v. Juneau Townsite ...	417
Duncan <i>et al.</i> v. The Dalles Military Wagon Road Co. (on review)	339	Gonzales, Silva v	189
Dunlap v. Shingle Springs and Placerville R. R. Co	67, 391	Gowdy <i>et al.</i> v. Kismet Gold Mining Co. (on review)	319
Duran de Chavez v. Saabedra ...	193	Guerten v. Chisholm	479
Durrell <i>et al.</i> v. Windom	508	Gulf and Ship Island R. R. Co ...	565
Dyer v. Oregon and California R. R. Co	569	Gurnee, Clinton (on review) ...	151
Dysart, Francis J	282	Guthrie City, Hance <i>et al.</i> v	196, 467
Eastern Oregon Land Co., King v ..	579	Guthrie City v. Nichols <i>et al.</i> (on review)	343
Ellis, Parsons <i>et al.</i> v	69, 504	Hall, William <i>et al.</i>	495
English v. Leavenworth, Lawrence and Galveston R. R. Co ..	343	Hall v. Lake (on review)	2
Epley, Hodgson v	293	Halling v. Central Pacific R. R. Co. (on review)	9
Evans, Henry C	412	Hamberg Consolidated Mines Co., Dolles v	267, 539
Excelsior No. 1 Lode, Black Queen Lode v. (on review)	9	Hamilton v. Greenhoot <i>et al.</i> (on review)	180
Fairfield, Melloy v. (on review) ..	259	Hance <i>et al.</i> v. City of Guthrie ...	196, 467
Fay, Joel (on review)	358	Hardman v. The Dalles Military Wagon Road Co	94
Ferguson, Powell v	173	Harper, Joseph H	249
Fields v. Kenedy	165	Harrington <i>et al.</i> v. Hegarty	384
Fish v. Northern Pacific R. R. Co. (on review)	15	Hart, W. H. H	280
Florida, State of	237	Haskins, Perry <i>et al.</i> v. (on review)	50, 436
Florida Central and Peninsular R. R. Co. v. Bell <i>et al.</i> (on review)	106	Heiskell v. McDowell	63, 403
Florida, State of, Spencer v	185	Helmer <i>et al.</i> , Cullom v. (on review)	148
Floyd, Childs v. (on review)	350	Heinrichs v. Bakkene <i>et al.</i>	234, 582
Fluent, Francis H	175	Hershey v. Bickford <i>et al.</i>	522
Fort Alexander Fishing Station ..	335	Higgins, Dawson <i>et al.</i> v. (on review)	165
Fort Cummings	14	Hillebrand v. Smith (on review) ..	456
Fyffe v. Mooers (on review)	15	Hilliard v. Lutz (on review)	400
		Hodgson v. Epley	293

TABLE OF CASES REPORTED.

IX

	Page.		Page.
Hopkins v. Wagner <i>et al.</i> (on review)	400	*Lancer, Weedon v.	248, 444
Hosmer v. Denny <i>et al.</i>	319, 519	Langsford, James H.	9
Howard v. Northern Pacific R. Co.	6	Larson, Frank	452
Huffman v. Milburn <i>et al.</i> (on review)	6	Lawrence, Frederick W.	450
Hughart <i>et al.</i> , Mee v.	455	Leavenworth, Lawrence and Galveston R. R. Co., English v.	343
Humiston v. Northern Pacific R. Co. <i>et al.</i>	543	Leshner v. St. Paul Catholic Mission (on review)	7
Hunt v. Maxwell	180	Lewishon, Catron <i>et al.</i> v.	20
Idaho, State of, Kent v.	147	Linnemann, White v.	378
Illinois, Jefferson County	184	Long v. Isaksen	353
Iowa Railroad Land Company ..	79	Louise Mining Company (on review)	317
Isaksen, Long v.	353	Lowenstein v. Orne	285, 495
J. C. Baker Fraction Placer	112	Lutz, Hilliard v. (on review)	400
Jefferson County, Illinois	184	Lynde and Hough Company	442
Jensen, Mads	586	Machomich, Keyes v.	106
Jones, Bonnett v.	547	Makemson v. Snider's Heirs (on review)	189
Jones, Curnutt v. (on review) ...	158	Malone, North Perry Townsite <i>et al.</i> v.	87, 204
Johnson, Charles A., <i>et al.</i>	283	Maloney, Tipton v.	186
Johnson, McEvers v.	472	Marker, Emory H., <i>et al.</i>	407
Johnson <i>et al.</i> v. Smith <i>et al.</i> (on review)	317	Markuson v. State of Minnesota ..	591
Juneau Townsite, Goldstein v. ...	417	Marquette, Houghton and Ontonagon R. R. Co. <i>et al.</i> , Daily v. (on review)	310
Kalashek, Benesh v. (on review) ..	147	Martin, Jared, <i>et al.</i>	582
Kanawyer, Southern Pacific R. Co. v.	500	Maxwell, Hnnt v.	180
Keagy v. Wilcox	444	McCollom Fishing and Trading Co.	7
Keithly v. Richardson	158, 569	McCord, W. E.	137
Kellogg, Moore v.	468	McDowell, Heiskell v.	63, 403
Kendall, F. P.	245	McEvers v. Johnson	472
Kendrich <i>et al.</i> v. Perdido Land Co.	288, 529	McGowan <i>et al.</i> v. Alps Consolidated Mining Co.	113
Kenedy, Fields v.	165	McGrade v. Murray	140
Kent v. State of Idaho	147	McPeck, Sullivan v. (on review) ..	411
Keyes v. Machomich	106	McWilliams <i>et al.</i> v. Green River Coal Association	127
King v. Eastern Oregon Land Co.	579	Meagher v. Caldwell	256
Kismet Gold Mining Co., Gowdy <i>et al.</i> (on review)	319	Mee v. Hughart <i>et al.</i>	455
Knight, Osborn <i>et al.</i> v. (on review)	216	Melloy v. Fairfield (on review) ..	259
Koontz, Reeves <i>et al.</i> v.	562	Merritt, Willis v.	122
La Bar, Grandin <i>et al.</i> v.	301, 381	Milburn <i>et al.</i> , Huffnan v. (on review)	6
Lake, Hall v. (on review)	2	Miller v. State of Nebraska	348
Lamb v. Adams	548	Minnesota, State of, v. Craig	305
Lamb, Northern Pacific R. R. Co. v.	1	Minnesota, State of, Drewicke v.	148
Lambeck, St. Paul, Minneapolis and Manitoba Ry. Co. v. (on review)	552	Minnesota, State of, Markuson v.	591
		Montana, State of, v. Buley	116
		Montana, State of, v. Silver Star Mining Co.	313

* For "restrictive," in the second line on p. 249, read *retroactive*.

	Page.		Page.
Montgomery <i>et al.</i> , Wilson Creek Consolidated Mining and Milling Co. <i>v.</i>	476	Northern Pacific R. R. Co. <i>v.</i> Wallace	381
Morgan <i>v.</i> Green	297	Northern Pacific R. R. Co., Walters <i>v.</i>	492
Mooers, Fyffe <i>v.</i> (on review)	15	Northern Pacific R. R. Co. <i>v.</i> Walters <i>et al.</i>	331
Moore <i>v.</i> Kellogg	468	Northern Pacific R. R. Co., Wasmund <i>v.</i>	445
Moores <i>v.</i> Sommer (on review)	514	Northern Pacific R. R. Co. <i>v.</i> Treadwell	115
Moss, Dowman <i>v.</i> (on review)	297	Northern Pacific R. R. Co., Wilson <i>v.</i>	247
Moulton, Stillman B.	304	Olson <i>et al.</i> , Power <i>v.</i>	387
Murray <i>v.</i> Skaggs <i>et al.</i>	478	Oregon, State of	178, 460
Nebraska, State of, Miller <i>v.</i>	348	Oregon and California R. R. Co. <i>v.</i> Bagley	392
Needham <i>v.</i> Northern Pacific R. R. Co.	433	Oregon and California R. R. Co., Dyer <i>v.</i>	569
Newman <i>v.</i> Barnes	257	Orne, Lowenstein <i>v.</i>	285, 495
Nichols <i>et al.</i> , City of Guthrie <i>v.</i> (on review)	343	Osborn <i>et al.</i> <i>v.</i> Knight (on review)	216
Niles, Reith <i>v.</i>	415	Otoe and Missouri lands	143
Nilson <i>v.</i> Anderson	138	Quimette <i>v.</i> O'Connor (on review)	243
North Perry Townsite <i>et al.</i> <i>v.</i> Malone	87, 204	Owen <i>et al.</i> , Northern Pacific R. R. Co. <i>v.</i>	324
Northern Pacific R. R. Co.	70, 204, 428	Owens <i>v.</i> State of California (on review)	12
Northern Pacific R. R. Co., Adams <i>et al.</i> <i>v.</i>	529	Parcher <i>v.</i> Gillen	485
Northern Pacific R. R. Co., Ashelman <i>v.</i>	513	Parsons <i>et al.</i> <i>v.</i> Ellis	69, 504
Northern Pacific R. R. Co., Briskey <i>v.</i>	435	Penwell <i>v.</i> Christian	10
Northern Pacific R. R. Co. <i>et al.</i> <i>v.</i> Canady	436	Perdido Land Co., Kendrick <i>et al.</i> <i>v.</i>	288, 529
Northern Pacific R. R. Co., Corlis <i>v.</i>	265	Perry <i>et al.</i> <i>v.</i> Haskins	50, 436
Northern Pacific R. R. Co. <i>v.</i> Drew	380	Petre <i>et al.</i> , Welch <i>v.</i> (on review)	360
Northern Pacific R. R. Co., Fish <i>v.</i> (on review)	15	Phillips, John W.	410
Northern Pacific R. R. Co., Gamble <i>v.</i>	351	Power <i>v.</i> Olson <i>et al.</i>	387
Northern Pacific R. R. Co., Howard <i>v.</i>	6	Powell <i>v.</i> Ferguson	173
Northern Pacific R. R. Co. <i>et al.</i> , Humiston <i>v.</i>	543	Putman, Elijah C.	152
Northern Pacific R. R. Co. <i>v.</i> Lamb	1	Rambo, Baker <i>et al.</i> <i>v.</i>	475
Northern Pacific R. R. Co., Needham <i>v.</i>	433	Randolph, Simon	329, 516
Northern Pacific R. R. Co. <i>v.</i> Owen <i>et al.</i>	324	Reeves, State of California <i>v.</i> (on review)	377, 448
Northern Pacific R. R. Co., Spillock <i>v.</i> (on review)	588	Reith <i>v.</i> Niles	415
Northern Pacific R. R. Co. <i>v.</i> St. Paul, Minneapolis and Manitoba Ry. Co.	454	Reeves <i>et al.</i> <i>v.</i> Koontz	562
Northern Pacific R. R. Co., Romaine <i>v.</i> (on review)	313	Rhodes <i>et al.</i> <i>v.</i> Treas (on review)	186
		Richardson, Florence A.	578
		Richardson, Keithly <i>v.</i>	158
		Ritchie <i>et al.</i> , Crowley <i>v.</i> (on review)	346
		Roach, Sheldou <i>v.</i> (on review) ..	352
		Roberts, Sumner <i>v.</i>	201, 460
		Romaine <i>v.</i> Northern Pacific R. R. Co. (on review)	313
		Rutledge <i>et al.</i> , Gaunt <i>v.</i>	55

TABLE OF CASES REPORTED.

XI

	Page.		Page.
Saabedra, Duran de Chavez <i>v.</i> ...	193	St. Paul, Minneapolis and Mani-	
Scheurman, Giroux <i>v.</i>	546	toba Ry. <i>et al.</i> , <i>v.</i> Bergerud ...	408
Seaver, Carlton, <i>et al.</i>	108	St. Paul, Minneapolis and Mani-	
Shea <i>v.</i> Williams	119	toba Ry. Co. <i>v.</i> Lambeck (on	
Sheldon <i>v.</i> Roach (on review)...	352	review)	552
Shingle Springs and Placerville		St. Paul, Minneapolis and Mani-	
R. R. Co., Dunlap <i>v.</i>	67, 391	toba Ry. Co., Northern Pacific	
Shook <i>v.</i> Douglas (on review)...	331	R. R. Co. <i>v.</i>	454
Silva <i>v.</i> Gonzales	189	Stransky <i>v.</i> Shaut (on review)..	558
Simpson, Jabez B., <i>et al.</i> (on re-		Sullivan <i>v.</i> McPeck (on review)..	411
view)	14	Sumner <i>v.</i> Roberts	201, 460
Skaggs <i>et al.</i> , Murray <i>v.</i>	478	Swarts, Glover <i>et al.</i> <i>v.</i>	480
Spaulding <i>v.</i> Davis	358		
Spencer <i>v.</i> State of Florida	185	Taylor, Smith <i>et al.</i> <i>v.</i>	440
Spirlock <i>v.</i> Northern Pacific R. R.		Taylor, Walker <i>v.</i>	110, 345
Co. (on review)	588	Tennessee Coal, Iron and R. R.	
Smith <i>v.</i> Anderson <i>et al.</i>	580	Co. <i>et al.</i>	28
Smith, Cleaves <i>v.</i> (on review)...	297	The Dalles Military Wagon Road	
Smith, Hillebrand <i>v.</i> (on review)..	456	Co., Duncan <i>et al.</i> <i>v.</i> (on review)	339
Smith <i>et al.</i> , Johnson <i>et al.</i> <i>v.</i> ...	317	The Dalles Military Wagon Road	
Smith <i>et al.</i> <i>v.</i> Taylor	440	Co., Hardman <i>v.</i>	94
Smith, Wheeler <i>et al.</i> <i>v.</i>	395	Thompson, Wares <i>et al.</i> <i>v.</i>	341
Snider's Heirs, Makemson <i>v.</i> (on		Tipton <i>v.</i> Maloney	186
review)	189	Tobin <i>et al.</i> <i>v.</i> Tripp	58
Snowden, West Reno City <i>et al.</i> <i>v.</i>	74	Treadwell, Northern Pacific R. R.	
Sommer, Moores <i>v.</i> (on review)..	514	Co. <i>v.</i>	115
Southern Pacific R. R. Co., Grin-		Treas, Rhodes <i>et al.</i> <i>v.</i> (on review)	186
nell <i>v.</i> (on review)	489	Tustin <i>v.</i> Adams (on review)...	188
Southern Pacific R. R. Co. <i>v.</i> Ka-			
nawyer	500	Union Oil Company	222
State of California	423	Union Pacific R. R. Co. (on re-	
State of California (on review)..	230	view)	161
State of California, Owens <i>v.</i> (on		United States <i>v.</i> Cooper <i>et al.</i> (on	
review)	12	review)	333
State of California <i>v.</i> Reeves (on		United States <i>v.</i> Dayton	54
review)	377, 448		
State of Florida	237	Wagner <i>et al.</i> , Hopkins <i>v.</i> (on re-	
State of Florida, Spencer <i>v.</i>	185	view)	400
State of Idaho, Kent <i>v.</i>	147	Walker <i>v.</i> Taylor	110, 345
State of Illinois, Jefferson County		Wallace, Northern Pacific R. R.	
State of Minnesota <i>v.</i> Craig	184	Co. <i>v.</i>	381
State of Minnesota, Drewicke <i>v.</i>	305	Walters <i>v.</i> Northern Pacific R. R.	
148, 384		Co	492
State of Minnesota, Markuson <i>v.</i>	591	Walters <i>et al.</i> , Northern Pacific	
State of Montana <i>v.</i> Buley	116	R. R. Co. <i>v.</i>	331
State of Montana <i>v.</i> Silver Star		Wasmund <i>v.</i> Northern Pacific	
Mining Co	313	R. R. Co	445
State of Nebraska, Miller <i>v.</i>	348	Wares <i>et al.</i> <i>v.</i> Thompson	341
State of Oregon	178, 460	Watkins, Boswell <i>et al.</i> <i>v.</i> (on re-	
Stich, Henry E	457	view)	12
Stocks <i>et al.</i> , Aspinall <i>et al.</i> <i>v.</i> ...	502	*Weedin <i>v.</i> Lancer	248, 444
Stone <i>et al.</i> <i>v.</i> Connell's Heirs...	166, 448	Welch <i>v.</i> Butler (on review)	8
St. Paul Catholic Mission, Leshner		Welch <i>v.</i> Petre <i>et al.</i> (on review)..	360
<i>v.</i> (on review)	7	West Reno City <i>et al.</i> <i>v.</i> Snowden.	74
St. Paul, Minneapolis and Mani-		Wheeler <i>et al.</i> <i>v.</i> Smith	395
toba Ry. Co	539	White, Anna E	467

* For "restrictive," in the second line on p. 249, read *retroactive*.

	Page.		Page.
White, Martha E.....	52	Wilson <i>et al.</i> , Barbour <i>v.</i>	12, 462
White <i>v.</i> Dodge.....	240	Wilson <i>v.</i> Northern Pacific R. R.	
White <i>v.</i> Linnemann.....	378	Co.....	247, 580
Wilcox, Keagy <i>v.</i>	444	Wilson Creek Consolidated Min-	
Williams, Maria H.....	483	ing and Milling Co. <i>v.</i> Mont-	
Williams, Aspen Consolidated		gomery <i>et al.</i>	476
Mining Co. <i>v.</i>	34, 256	Wilt, Drake <i>et al.</i> <i>v.</i>	2
Williams, Brady <i>et al.</i> <i>v.</i>	533	Windom, Durrell <i>et al.</i> <i>v.</i>	508
Williams, Shea <i>v.</i>	119	Wood <i>v.</i> Beach (on review).....	200
Willis <i>v.</i> Merritt.....	122	Wyatt, Simeon D.....	61
Wilson, Esther L.....	200		

TABLE OF CASES CITED.

[The abbreviation "L. D." refers to this publication; "L. and R.," to the records in the division of Lands and Railroads; "B. L. P.," refers to Brainerd's Legal Precedents; "1 C. L. L.," to Copp's Public Land Laws, Ed. 1875; "2 C. L. L.," to Copp's Public Land Laws, Ed. 1882; "C. L. O.," to Copp's Land Owner; "C. M. D.," to Copp's Mining Decisions; "C. M. L.," to Copp's Mineral Lands; "Lester," to Lester's Land Laws and Decisions; "Rep.," to the Reporter; "S. M. D.," to Sickles's Mining Laws and Decisions; and "C. Cls.," to Court of Claims.]

	Page.		Page.
Adamson v. Blackmore; 16 L. D., 111.....	379	California, State of; 15 L. D., 10.....	424
Aldrich, C. W.; 13 L. D., 572.....	94	California v. Martin; 5 L. D., 99.....	232
Alice Placer Mine; 4 L. D., 314.....	174	California v. Reeves; 23 L. D., 377.....	445
Allen v. Leet; 6 L. D., 669.....	531	California v. United States; 3 L. D., 521..	232
Andrus et al. v. Balch; 22 L. D., 238.....	109	Cameron, John; 7 L. D., 436.....	575
Ard v. Missouri, Kansas and Texas R. R. Co.; 14 L. D., 369.....	162	Carson v. Finity; 10 L. D., 532.....	120
Ard v. Brandon; 156 U. S., 537.....	332, 532	Castello v. Bonnie; 20 L. D., 311.....	164
Arnett, Mary G.; 20 L. D., 131.....	68	Castle v. Womble; 19 L. D., 455.....	423
Aspen Consolidated Mining Co. v. Atkinson; 22 L. D., 8.....	37	Castner, John K. et al.; 17 L. D., 565.....	398
Aspen Consolidated Mining Co. v. Williams; 23 L. D., 48.....	422	Cedar Rapids and Missouri R. R. Co. v. Herring; 110 U. S., 27.....	81
Austin, Newton F.; 18 L. D., 4.....	484	Central Pacific R. R. Co. v. California; 2 C. L. L., 1052.....	232
Austin v. Luey; 21 L. D., 507.....	133	Chambers v. Harrington; 111 U. S., 350....	223
Anway v. Phinney; 19 L. D., 513.....	413	Chapman v. Wagon Road Co.; 13 L. D., 61	501
		Chicago, St. Paul, Minneapolis and Omaha R. R. Co.; 11 L. D., 607.....	183, 221
Baker v. Stewart; 40 Kansas, 442.....	298	Chick et al. v. Willetts; 2 Kansas, 384.....	254
Balch v. Andrus; 22 L. D., 238.....	216, 220	Clarke et al. v. Erwin; 16 L. D., 122.....	324
Bardon v. Northern Pacific R. R. Co.; 145 U. S., 535.....	16, 540	Cleveland et al. v. North et al.; 16 L. D., 484	464
Barnes v. Poirier; 27 U. S., App. 500.....	156	Cochens, Nicholas; 11 L. D., 627.....	510
Bate Refrigerating Co. v. Salzberger; 157 U. S. 1.....	156	Conlin v. Kelley; 12 L. D., 1.....	324
Beane v. Kalashek; 22 L. D., 530.....	581	Corlis v. Northern Pacific R. R. Co.; 22 L. D., 265.....	447
Belk v. Meagher; 104 U. S., 279.....	99	Cooper Mfg. Co. v. Ferguson; 113 U. S., 727.....	322
Bisbing, Mary E.; 13 L. D., 45.....	484	Cormack, Amanda; 18 L. D., 352.....	484
Boyle v. The Northern Pacific R. R. Co.; 23 L. D., 134.....	332	Cornelius v. Kessel; 128 U. S., 456.....	194
Bradford v. Aleshire; 18 L. D., 78.....	551	Crane, George W.; 16 L. D., 170.....	575
Brangan et al. v. Dulaney; 2 L. D., 744.....	115	Craven, Albert G.; 14 L. D., 101 and 140....	250, 557
Brant v. Virginia Coal and Iron Co.; 93 U. S., 326.....	160	Criswell v. Waddingham; 16 L. D., 66.....	511
Bright v. Elkhorn Mining Co.; 8 L. D., 122	70	Crowley v. Ritchie et al.; 22 L. D., 276....	408
Brown v. Naylor; 14 L. D., 141.....	560	Curnutt v. Jones; 21 L. D., 40.....	65
Buena Vista Co. v. R. R. Co.; 112 U. S., 165	146	Darland v. Northern Pacific R. R. Co.; 12 L. D., 195.....	471
Bullard v. Sullivan; 11 L. D., 22.....	53	Davis v. California; 13 L. D., 129.....	232
Burdett; 2 C. L. O., 55.....	356	Davis's Administrator v. Weibbold; 139 U. S., 524-525.....	477
Burns, Frank; 10 L. D., 365.....	321	Dayton, Lyman C.; 10 L. D., 159.....	531
Bush, Zachariah T.; 22 L. D., 182.....	264	Deery v. Craig; 5 Wallace, 795.....	160
Buttz v. Northern Pacific R. R. Co.; 119 U. S., 72.....	501	Deffebach v. Hawke; 115 U. S., 392.....	194, 477
Cagle v. Mendenhall; 20 L. D., 447.....	533	Dermody, Michael; 11 L. D., 504.....	433
Caldwell v. Missouri, Kansas and Texas R. R. et al.; 8 L. D., 570.....	162	Dillivan v. Snyder; 5 L. D., 184.....	53
California and Oregon Land Company; 22 L. D., 170.....	580	Dobbs Placer Mine; 1 L. D., 565.....	531
		Downey v. Rogers; 2 L. D., 707.....	23, 228
		Douglass v. Dickson; 31 Kansas, 310.....	548
		Drake et al. v. Button; 14 L. D., 18.....	512

	Page.		Page.
Drew v. Comisky; 22 L. D., 174.....	164, 482	Harper v. Grand Junction; 15 L. D., 124..	465
Driscoll v. Morrison; 7 L. D., 274.....	531	Hastie; 8 L. D.....	34
Dunlap v. Shingle Springs and Placerville R. R.; 23 L. D., 67.....	458	Hastings and Dakota R. R. Co. v. Whit- ney; 132 U. S., 357.....	16
East Tenn., etc., R. R. Co. v. Frasier; 139 U. S., 288.....	212	Hausen v. Ueland; 10 L. D., 273.....	531
Eddy v. England; 6 L. D., 530.....	559	Hayden v. Jamison; 14 L. D., 537.....	324
Ellis, Joseph; 21 L. D., 377.....	136, 457	Heath v. Wallace; 138 U. S., 573.....	232
Emert, Adolph; 14 L. D., 101.....	557	Heilman v. Syverson; 15 L. D., 184.....	121, 379
English v. Leavenworth, Lawrence and Galveston R. R. Co.; 23 L. D., 343.....	461	Heptner v. McCartney; 11 L. D., 400.....	560
Ewart v. Carey's Heirs; 20 L. D., 214....	298	Hessong v. Burgan; 9 L. D., 353.....	144
Falconer v. Hunt <i>et al.</i> ; 6 L. D., 512.....	34	Hobbs v. Goulette <i>et al.</i> ; 18 L. D., 409.....	565
Farrell <i>et al.</i> v. Hoge <i>et al.</i> ; 18 L. D., 81....	223	Holcomb, Jedediah F.; 22 L. D., 604.....	452, 577
Farrell v. McDonell; 13 L. D., 105.....	559	Holm v. St. Paul, Minneapolis and Mani- toba Ry. Co.; 16 L. D., 251.....	542
Featherspil, John C.; 4 L. D., 570.....	177	Holt, Charles; 16 L. D., 294.....	497
Fleming v. Bowe; 13 L. D., 78.....	146, 178	Holton v. Rutledge; 20 L. D., 227.....	109, 183
Florida Central and Peninsular R. R. Co. v. Heirs of Lewis Bell, deceased; 22 L. D., 451.....	68	Hopeley <i>et al.</i> v. McNeil <i>et al.</i> ; 20 L. D., 87....	70
Fertilizing Co. v. Hyde Park; 97 U. S., 659..	212	Hopkins v. Wagner <i>et al.</i> ; 21 L. D., 485....	400
Fieker v. Murphy; 2 L. D., 135.....	356	Hooper, W. H.; 1 L. D., 560.....	228, 356
Fish v. Northern Pacific R. R. Co.; 21 L. D., 165.....	16	Houston v. Coyler; 2 L. D., 58.....	287
Fish v. Northern Pacific R. R. Co., on review; 23 L. D., 15.....	86, 453, 541	Hudson v. Francis; 15 L. D., 173.....	121
Forsyth v. Wisconsin Central R. R. Co.; U. S. Vol., 159.....	346	Hunt v. Maxwell; 23 L. D., 180.....	511
Foot v. McMillan; 22 L. D., 280.....	318	Hurt v. Griffin; 17 L. D., 162.....	11
Frisbie v. Whitney; 9 Wall., 189.....	144	Iowa R. R. Land Co.; 9 L. D., 370.....	84
Fritzsche, Edward F.; 3 L. D., 208.....	287	Iron Silver Co. v. Cheseman; 116 U. S., 529..	399
Fyffe v. Mooers; 21 L. D., 167.....	561	Jackson v. McKeever; 3 L. D., 516.....	5
Gardiner, Robert J.; 19 L. D., 83.....	575	Jackson v. Roby; 104 U. S., 440.....	223
Gibbons v. United States; 9 Wall., 269.....	283	Jackson v. Stults; 15 L. D., 413.....	236
Gibson v. Van Gilder; 9 L. D., 626.....	565	Jefferson Davenport; 16 L. D., 526.....	240
Gill v. Webster; 110 Penn. St., 313.....	227	Jenkins <i>et al.</i> v. Dreyfus; 19 L. D., 272....	511
Gillen v. Beebe; 16 L. D., 306.....	485	Johnson v. Towsley; 13 Wall., 72.....	17
Goodale v. Olney; 12 L. D., 324.....	476	Johnson v. Williams; 37 Kansas, 179.....	255
Goodale v. Olney; 13 L. D., 498.....	379	Jones; 9 L. D., 97.....	34
Goodnight, Kisiah; 16 L. D., 319.....	497	Jordan v. Idaho Aluminium M. and M. Co.; 20 L. D., 500.....	329
Good Return Co.; 4 L. D., 221.....	223	Julien v. Hunter; 18 L. D., 151.....	107
Gowdy, W. H., <i>et al.</i> v. The Kismet Min- ing Co.; 22 L. D., 624.....	10, 505	Kansas Pacific R. R. Co. v. Dunmeyer; 113 U. S., 629.....	16, 162
Grandin <i>et al.</i> v. La Bar; 23 L. D., 301.....	511	Kansas City, Lawrence and Southern Kansas R. R. Co. v. The Attorney-Gen- eral; 118 U. S., 682.....	87
Grant v. Rutledge; 23 L. D., 49.....	287	Kaweah Cooperative Colony <i>et al.</i> ; 12 L. D., 326 at 330.....	240
Green, John W.; 19 L. D., 465.....	497	Kelso v. Janeway <i>et al.</i> ; 22 L. D., 242.....	547
Greenough v. Wells; 19 L. D., 172.....	55	Kelly, Lydia; 8 L. D., 322.....	138
Gregg <i>et al.</i> v. Lakey; 17 L. D., 60.....	497	Kendrich <i>et al.</i> v. The Perdidio Land Co..	288
Guerten v. Anderson; 295 L. and R., 169....	479	Ketcham, H. B.; 18 L. D., 93.....	177
Guthrie v. Paine; 13 L. D., 562.....	93	Kilmer v. Wilson; 49 Barbour.....	255
Guyselman v. Schaffer <i>et al.</i> ; 3 L. D., 517....	5	Kimberland v. Northern Pacific R. R. Co.; 8 L. D., 318.....	436
Gwillim v. Donnellan; 115 U. S., 45.....	99	Kiser v. Keech; 7 L. D., 25.....	120
Hall v. Fox; 9 L. D., 153.....	560	Knaggs, Annie; 9 L. D., 49.....	575
Hall v. Russell; 101 U. S., 503.....	168	Knight v. U. S. Land Association; 142 U. S., 178.....	40, 435
Hall v. Stone; 16 L. D., 199.....	318, 476	Koons v. Elsnor; 2 L. D., 65.....	287
Hamilton v. Anderson; 19 L. D., 168.....	130	La Bar v. Northern Pacific R. R. Co.; 17 L. D., 406.....	325, 553
Hansbrough, Henry C.; 5 L. D., 155.....	480	Lachapelle v. Herbert; 18 L. D., 494.....	3
Hanscom v. Sines <i>et al.</i> ; 15 L. D., 27.....	236	La Grande land district, Oreg.; 19 L. D., 449.....	415
Hardin v. Jordan; 140 U. S., 380.....	321, 432	Laird, Maggie; 13 L. D., 502.....	379
Harnick v. Butts <i>et al.</i> ; 20 L. D., 516.....	499	Lake Superior, etc. Co. v. Cunningham; 155 U. S., 354.....	311
Harnick v. Sheppard <i>et al.</i> ; 20 L. D., 516....	499		
Harper, Joseph H.; 23 L. D., 249.....	557		

TABLE OF CASES CITED.

XV

	Page.		Page.
Langford v. Butler; 20 L. D., 76.....	359	Northern Pacific R. R. Co. v. Urquhart; 8 L. D., 365.....	6
Lawrence, Frederick; 23 L. D., 450.....	577	Norton v. Thorson <i>et al.</i> ; 10 L. D., 261.....	58
Lee v. Johnson; 116 U. S., 48.....	146	Noyes v. Mantle; 127 U. S., 343.....	49, 100, 476
Lerne v. Martin; 5 L. D., 259.....	524		
Malone v. Union Pacific R. R. Co.; 7 L. D., 13.....	18, 220	Offutt v. Northern Pacific R. R. Co.; 9 L. D., 407.....	438
Maloy, Albert, v. Plogue, Frederick.....	260	Olney v. Shyrook; 9 L. D., 633.....	565
Mann, Jane; 18 L. D., 116.....	53	Ontonagon and Brule River R. R. Co.; 13 L. D., 463.....	427
Marsh v. Hughes; 22 L. D., 581.....	560	Oregon and California R. R. Co. v. Kuebel; 22 L. D., 308.....	571
Mather <i>et al.</i> v. Hackley Heirs; 19 L. D., 48.....	238	Organ, Kate G.; 20 L. D., 406.....	575
Matthiessen and Ward v. Williams; 6 L. D., 95.....	488	Osborn, A. R., <i>et al.</i> ; 22 L. D., 459.....	217
Maxwell v. Brierly; 9 C. L. O., 50.....	228	O'Toole v. Spicer; 20 L. D., 392.....	203, 401
McDonald <i>et al.</i> v. Hartman <i>et al.</i> ; 19 L. D., 547.....	547	Owens v. Gauger; 18 L. D., 6.....	379
McDonald <i>et al.</i> v. Montana Wood Co.; 35 Fed. Rep., 668.....	224	Parant, Edward; 20 L. D., 53.....	537
McGregor <i>et al.</i> v. Quinn; 18 L. D., 368.....	12, 462	Paulson v. Owen; 15 L. D., 114.....	464
McInnes <i>et al.</i> v. Cotter; 21 L. D., 97.....	318	Peacock v. Shearer's Heirs; 20 L. D., 213.....	32
McIntosh; 8 L. D., 614.....	34	Pearsall v. Great Northern R. R.; 161 U. S., 664.....	212
McLean v. Union Pacific R. R. Co.; 22 L. D., 227.....	94	Pensacola and Louisville R. R. Co.; 19 L. D., 386.....	68
Mendenhall, C. B.; 11 L. D., 414.....	411	Perry <i>et al.</i> v. Hastings; 23 L. D., 50.....	202
Meyers v. Massey; 22 L. D., 159.....	581	Pierce v. Musser-Sauntry Co.; 19 L. D., 136.....	311, 509
Millican v. R. R. Co.; 7 L. D., 85.....	18	Pike's Peak Lode; 14 L. D., 47.....	315
Mills v. Daly; 17 L. D., 345.....	408	Piru Oil Co.; 16 L. D., 117.....	229, 419
Mitchell v. Salen; 16 L. D., 403.....	524	Platt <i>et al.</i> v. Graham; 7 L. D., 229.....	359
Mitchell v. Smale; 140 U. S., 371.....	432		
Montana v. Bayliss; 22 L. D., 629.....	315	Quinn, William T.; 19 L. D., 295.....	12
Morrill v. Northern Pacific R. R. Co.; 22 L. D., 636.....	382, 436		
Morrow <i>et al.</i> v. State of Oregon <i>et al.</i> ; 17 L. D., 571.....	179	Rabuck v. Cass; 5 L. D., 398.....	298
Moulton, Stillman B.; 23 L. D., 304.....	467	Railroad Company v. Griffey; 143 U. S., 32.....	553
Murray, James H.; 6 L. D., 124.....	5	Rathburn v. Warren; 10 L. D., 111.....	3
		Raven v. Gillespie; 6 L. D., 240.....	107
Neal v. Cooley; 18 L. D., 3.....	560	Reed v. Casner; 9 L. D., 170.....	581
Nebraska v. The Town of Butte; 21 L. D., 220.....	426	Reese, Hugh; 10 L. D., 541.....	575
Negus, James D., <i>et al.</i> ; 11 L. D., 32.....	111	Reynolds v. Iron Silver Mining Co.; 116 U. S., 687.....	99
Neilson v. Northern Pacific R. R. Co.; 9 L. D., 402.....	542	Rice v. Lenzshek; 13 L. D., 154.....	476
Nemitz, Rudolph; 7 L. D., 80.....	471	Richmond Mining Co. v. Rose <i>et al.</i> , 114 U. S., 576.....	25
Nettie Lode v. Texas Lode; 14 L. D., 180.....	23	Robbins v. Sackett; 23 Kansas, 301.....	255
Newhall v. Sanger; 92 U. S., 761.....	16	Roeschlaub v. Union Pacific Ry. Co.; 6 L. D., 750.....	471
Nicholson, John W.; 9 L. D., 54.....	547	Rogers, Samuel E.; 4 L. D., 284.....	228
Nix v. Allen; 112 U. S., 129.....	542	Rogers v. Jepson; 4 L. D., 60.....	229
Northern Pacific R. R. Co.; 21 L. D., 412.....	204	Root v. Shields; 1 Wool, 340.....	465
Northern Pacific R. R. Co. v. Barnes; 51 N. W. Rep., 386.....	501	Rucker <i>et al.</i> v. E. Knisley; 14 L. D., 113.....	130
Northern Pacific R. R. Co. v. Cole; 17 L. D., 8.....	434	Ryan v. Carter; 93 U. S., 78.....	322
Northern Pacific R. R. Co. v. Crosswhite; 20 L. D., 526.....	438	Robertson v. Ball <i>et al.</i> ; 10 L. D., 41.....	264
Northern Pacific R. R. Co. v. Halvorson; 10 L. D., 15.....	471		
Northern Pacific R. R. Co. v. Harris; 12 L. D., 351.....	542	Salt Bluff Placer; 7 L. D., 549.....	229
Northern Pacific R. R. Co. v. Miller; 7 L. D., 100.....	434, 501	Saunders v. Baldwin; 9 L. D., 391.....	526
Northern Pacific R. R. Co. v. North; 22 L. D., 93.....	511	Sawyer v. Northern Pacific R. R. Co.; 12 L. D., 450.....	490
Northern Pacific R. R. Co. v. Stovenour; 10 L. D., 645.....	18	Schuyllkill Navigation Co. v. Moore; 2 Wh., 477.....	226
		Scott v. King; 9 L. D., 299.....	560
		Sears v. Almy; 6 L. D., 1.....	547
		Sethman v. Clise; 17 L. D., 307.....	109, 183
		Shafer v. Butler; 22 L. D., 386.....	27
		Shea v. Williams; 23 L. D., 119.....	379
		Sheldon v. Warren; 9 L. D., 668.....	107
		Shepherd v. Bird <i>et al.</i> ; 17 L. D., 82.....	357

	Page		Page
Sherer, George H.; 15 L. D., 563.....	250	Tubus v. Wilhoit; 138 U. S., 134.....	231
Shinn v. Shinn; 42 Kansas, 7.....	298	Tucker et al. v. Florida R. R. and Navigation Co.; 19 L. D., 414.....	227
Shire et al. v. Chicago, St. Paul, Minneapolis and Omaha R. R. Co.; 10 L. D., 85.....	162	Union Colony v. Fulmele et al.; 16 L. D., 272.....	512
Shortt v. Kirkpatrick; 101 Penn. St., 36 ..	226	Union Logging Co. v. Noble; 147 U. S., 165.....	433
Shugren v. Dillman; 19 L. D., 453.....	3	Union Pacific R. R. Co. et al. v. McKinley; 14 L. D., 237.....	221
Simms et al. v. Busso; 14 L. D., 429.....	55	Union Pacific Ry. Co. et al. v. McKinley; 14 L. D., 237.....	511
Simmons v. Wagner; 101 U. S., 260.....	194	United States v. Bank of Metropolis; 15 Pet., 377.....	433
Simonian, Armenag; 13 L. D., 696	379	United States v. Copeland et al.; 5 L. D., 170.....	177
Simser v. Southern Minnesota Ry. Co.; 12 L. D., 386	471	United States v. Cooper et al.; 20 L. D., 403.....	333
Sisemore, William R.; 18 L. D., 44.....	145	United States v. Des Moines Navigation and R. R. Co.; 142 U. S., 510.....	162
Sioux City and Pacific R. R. Co. v. Wrich; 22 L. D., 515	435	United States v. Freeman; 3 Howard, 556.....	322
Skinvilk v. Longstreet et al.; 22 L. D., 32.....	511	United States v. Healy; 160 U. S., 136, 157, 451, 575.....	144
Smith v. Fitts; 13 L. D., 670	264	United States v. Johnson; 15 L. D., 442.....	144
Smelting Co. v. Kemp; 104 U. S., 636.....	223	United States v. McLaughlin; 127 U. S., 428.....	469
Smith v. Malone; 18 L. D., 482.....	346	United States v. Northern Pacific R. R. Co.; 152 U. S., 294.....	73, 266, 447
Smith v. Townsend; 148 U. S., 490	386, 516, 527	United States v. Newman et al.; 15 L. D., 224.....	177
South Oklahoma v. Couch et al.; 16 L. D., 132	286	United States v. Schurz; 102 U. S., 278, 401.....	465
South Star Lode; 20 L. D., 204.....	99	United States v. Wright; 1 McL. C. C., 509.....	481
Southern Pacific R. R. Co. v. Araiza; 57 Fed. Rep., 98.....	501	Utley v. Fee; 33 Kansas, 681.....	255
Southern Pacific R. R. Co. v. Brady; 5 L. D., 407 and 658.....	501	Veatch v. Park; 16 L. D., 490.....	172
Southern Pacific R. R. Co. v. Orton; 6 Sawyer, 157.....	501	Walker, John L.; 10 L. D., 354.....	154, 464
Southwestern Mining Co.; 14 L. D., 596 ..	229	Walker, Hattie E., 15 L. D., 377.....	53
Sparks, Alpha L.; 20 L. D., 75.....	250, 557	Wallace v. Woodruff; 19 L. D., 309.....	58, 287
Spaulding v. Northern Pacific R. R. Co.; 21 L. D., 57.....	71	Wardell, Edwin M.; 15 L. D., 375.....	379
Spencer v. McDougal; 159 U. S., 62.....	501	Waterloo Mining Co. v. Doe; 56 Fed. Rep., 685.....	223
Spitz v. Rodey; 17 L. D., 503.....	524	Webb v. Loughrey et al., on review; 10 L. D., 302.....	560
State of California; 14 L. D., 253.....	179	Webster v. Luther; 163 U. S., 331.....	152, 456, 464
Stayton v. Carroll; 7 L. D., 198.....	560	Weed v. Sampsel; 19 L. D., 461.....	241
Stebbins v. Croke; 14 L. D., 498	220	Weeks v. Bridgman; 159 U. S., 541.....	434
Stephen et al. v. Morris; 21 L. D., 557.....	183	Westenhaver v. Dodds; 13 L. D., 196.....	559
St. Louis, Iron Mountain and Southern R. R. Co.; 13 L. D., 559.....	86	Wheeler et al. v. Smith; 5 Wash., 704.....	396
St. Paul, Minneapolis and Manitoba Ry. Co. v. Bergerud; 23 L. D., 408.....	541	White Extension West Lode; 22 L. D., 677.....	269
St. Paul, Minneapolis and Manitoba R. R. Co. v. Phelps; 137 U. S., 528.....	586	Whitney v. Taylor; 158 U. S., 85.....	16, 453, 541
St. Paul and Pacific R. R. Co. v. Northern Pacific R. R. Co.; 139 U. S., 1.....	409, 455, 540	Willamette Valley and C. M. Wagon Road Co. v. Hagan; 20 L. D., 259.....	501
St. Paul and Pacific R. R. Co. v. Larson; 3 L. D., 305.....	19, 220	Wilson, Madella O.; 17 L. D., 153.....	537
St. Paul and Sioux City R. R. Co.; 6 L. D., 47.....	407	Winona and St. Peter R. R. Co.; 9 L. D., 649.....	86
Stone v. United States; 2 Wall., 525.....	433	Wisconsin v. Wolf; 8 L. D., 555.....	150
Strutz v. Crabb; 19 L. D., 123.....	11	Wisconsin Central R. R. Co. v. Forsythe; 159 U. S., 46.....	59, 550
Sullivan v. Iron Silver Mining Co.; 143 U. S., 431.....	99	Wiseman; 21 L. D., 12.....	34
Sumner v. Roberts; 23 L. D., 201	401	Witter v. Ostroski; 11 L. D., 260.....	565
Sutton et al. v. Abrams; 7 L. D., 136.....	487	Wood v. Beach; 156 U. S., 548.....	501
Sutton v. State of Minnesota; 7 L. D., 562.....	426	Woodward, Ozra M.; 2 L. D., 688.....	557
Swanson v. Galbraith; 21 L. D., 109.....	494	Wolcott v. Des Moines Co.; 72 U. S., 681.....	162
Swineford et al. v. Piper; 19 L. D., 9.....	512, 221	Woolsey v. Chapman; 101 U. S., 755.....	162
Tauer v. Heirs of Walter A. Mann; 4 L. D., 433.....	53	Wright v. Roseberry; 121 U. S., 488.....	233
Taylor v. Jordon; 18 L. D., 471.....	55	Yellow Dog Improvement Co.; 18 L. D., 77.....	497
Telford v. Keystone Lumber Co.; 19 L. D., 141.....	311		
Tilton, Daniel G.; 8 L. D., 368.....	575		

TABLE OF OVERRULED AND MODIFIED CASES.

[From Vol. 1 to 23, inclusive.]

- Aldrich v. Anderson (2 L. D., 71); overruled, 15 L. D., 201.
- Anderson v. Tannehill *et al.* (10 L. D., 388); overruled, 13 L. D., 586.
- Bailey, John W., *et al.* (3 L. D., 386); modified, 5 L. D., 513.
- Baker v. Hurst (7 L. D., 457); overruled, 8 L. D., 110.
- Barlow, S. L. M. (5 L. D., 695); modified, 6 L. D., 648.
- Bartch v. Kennedy (3 L. D., 437); modified, 6 L. D., 217.
- Bivins v. Shelley (2 L. D., 282); modified, 4 L. D., 583.
- Blenkner v. Sloggy (2 L. D., 287); modified, 6 L. D., 217.
- Bosch, Gottlieb (8 L. D., 45); overruled, 13 L. D., 42.
- Box v. Ulstein (3 L. D., 143); modified, 6 L. D., 217.
- Brady v. Southern Pacific R. R. Co. (5 L. D., 407 and 658); overruled, 20 L. D., 259.
- Bradstreet *et al.* v. Rehm (21 L. D., 30); reversed on review, *id.*, 544.
- Bundy v. Livingston (1 L. D., 152); overruled, 6 L. D., 284.
- Burkholder v. Skagen (4 L. D., 166); overruled, 9 L. D., 153.
- Buttery v. Sprout (2 L. D., 293); overruled, 5 L. D., 591.
- Cagle v. Mendenhall (20 L. D., 447); overruled, 23 L. D., 533.
- California, State of (15 L. D., 10); overruled, 23 L. D., 423.
- California, State of (14 L. D., 253); vacated on review, 23 L. D., 230.
- Call v. Swain (3 L. D., 46); overruled, 18 L. D., 373.
- Castello v. Bonnie (20 L. D., 311); overruled, 22 L. D., 174.
- Central Pacific R. R. Co. v. Orr (2 L. D., 525); overruled, 11 L. D., 445.
- Christofferson, Peter (3 L. D., 329); modified, 6 L. D., 284, 624.
- Colorado, State of (7 L. D., 490); overruled, 9 L. D., 408.
- Cornell v. Chilton (1 L. D., 153); overruled, 6 L. D., 483.
- Crowston v. Seal (5 L. D., 213); overruled, 18 L. D., 586.
- Dakota Central R. R. Co. v. Downey (8 L. D., 115); modified, 20 L. D., 131.
- Devoe, Lizzie A. (5 L. D., 4); modified, 5 L. D., 429.
- Dudymott v. Kansas Pacific R. R. Co. (5 C. L. O., 69); overruled, 1 L. D., 345.
- * Elliott v. Ryan (7 L. D., 322); overruled, 8 L. D., 110.
- Emblem v. Weed (15 L. D., 28); overruled, 17 L. D., 220.
- Epley v. Trick (8 L. D., 110); overruled, 9 L. D., 359.
- Ewing v. Rickard (1 L. D., 146); overruled, 6 L. D., 483.
- Fish, Mary (10 L. D., 606); modified, 13 L. D., 511.
- Fitch v. Sioux City and Pacific R. R. Co. (216 L. and R., 184); overruled, 17 L. D., 43.
- Fleming v. Bowe (13 L. D., 78); overruled, 23 L. D., 175.
- Florida Rwy. and Navigation Co. v. Miller (3 L. D., 324); modified (6 L. D., 716); overruled, 9 L. D., 237.
- Florida, State of (17 L. D., 355); reversed on review, 19 L. D., 76.
- Forgeot, Margaret (7 L. D., 280); overruled, 10 L. D., 629.
- Freeman v. Texas Pacific R. R. Co. (2 L. D., 550); overruled, 7 L. D., 13.
- Gallihier, Maria (8 C. L. O., 57); overruled, 1 L. D., 57.
- Garrett, Joshua (2 C. L. O., 1005); overruled, 5 L. D., 158.
- Gates v. California and Oregon R. R. Co. (5 C. L. O., 150); overruled, 1 L. D., 336.
- Gohrman v. Ford (8 C. L. O., 6); overruled, 4 L. D., 580.
- Grinnell v. Southern Pacific R. R. Co. (22 L. D., 438); vacated on review, 23 L. D., 489.
- Gulf and Ship Island R. R. Co. (16 L. D., 236); modified on review, 19 L. D., 534.
- Hardin, James A. (10 L. D., 313); recalled and revoked, 14 L. D., 233.
- Harrison, Luther (4 L. D., 179); overruled, 17 L. D., 216.
- Heilman v. Syverson (15 L. D., 184); overruled, 23 L. D., 119.
- Hickey, M. A. and Edward (3 L. D., 83); modified, 5 L. D., 256.
- Holland, G. W. (6 L. D., 29); overruled, 6 L. D., 639, and 12 L. D., 436.
- Hooper, Henry (6 L. D., 624); modified, 9 L. D., 86, 284.
- Huls, Clara (9 L. D., 401); modified, 21 L. D., 377.
- Hyde *et al.* v. Warren *et al.* (14 L. D., 576); see 19 L. D., 64.
- Jones, James A. (3 L. D., 176); overruled, 8 L. D., 448.
- Jones v. Kennett (6 L. D., 688); overruled, 14 L. D., 429.
- Kackman, Peter (1 L. D., 86); overruled, 16 L. D., 464.
- Kemper v. St. Paul and Pacific R. R. Co. (2 C. L. L., 805); overruled, 18 L. D., 101.
- Kiser v. Keech (7 L. D., 25); overruled, 23 L. D., 119.
- Kniskern v. Hastings and Dakota Rwy. Co. (6 C. L. O., 50); overruled, 1 L. D., 362.
- Laselle v. Missouri, Kansas and Texas Rwy. Co. (3 C. L. O., 10); overruled, 14 L. D., 278.
- Laughlin v. Martin (18 L. D., 112); modified, 21 L. D., 40.
- Leonard, Sarah (1 L. D., 41); overruled, 16 L. D., 464.

* The cases marked with a star are now authority. See *Hessong v. Burgan*, 9 L. D., 153.

XVIII TABLE OF OVERRULED AND MODIFIED CASES.

Lindberg, Anna C. (3 L. D., 95); modified, 4 L. D., 299.
 Linderman v. Wait (6 L. D., 689); overruled, 13 L. D., 459.
 Lockwood, Francis A. (20 L. D., 361); modified, 21 L. D., 200.
 Louisiana, State of (8 L. D., 126); modified on review, 9 L. D., 157.
 Lynch, Patrick (7 L. D., 33); overruled, 13 L. D., 713.
 Maughan, George W. (1 L. D., 25); overruled, 7 L. D., 94.
 McKernan v. Bailey (16 L. D., 368); overruled, 17 L. D., 494.
 McNamara *et al.* v. State of California (17 L. D., 296); overruled, 22 L. D., 666.
 Mather *et al.* v. Hackley's Heirs (15 L. D., 487); vacated on review, 19 L. D., 48.
 Meyer, Peter (6 L. D., 639); modified, 12 L. D., 436.
 Morgan v. Craig (10 C. L. O., 234); overruled, 5 L. D., 303.
 Northern Pacific R. R. Co. (20 L. D., 191); modified, 22 L. D., 224.
 Northern Pacific R. R. Co. v. Bowman (7 L. D., 238); modified, 18 L. D., 224.
 Northern Pacific R. R. Co. v. Burns (6 L. D., 21); overruled, 20 L. D., 191.
 Northern Pacific R. R. Co. v. Miller (7 L. D., 100); overruled, 16 L. D., 229.
 Northern Pacific R. R. Co. v. Yantis (8 L. D., 58); overruled, 12 L. D., 127.
 Nyman v. St. Paul, Minneapolis and Manitoba Rwy. Co. (5 L. D., 396); overruled, 6 L. D., 750.
 Oregon Central Military Wagon Road Co. v. Hart (17 L. D., 430); overruled, 18 L. D., 543.
 Papina v. Alderson (1 B. L. P., 91); modified, 5 L. D., 256.
 Patterson, Charles E. (3 L. D., 260); modified, 6 L. D., 284, 624.
 Pecos Irrigation and Improvement Co. (15 L. D., 470); overruled, see 18 L. D., 168 and 268.
 Phelps, W. L. (8 C. L. O., 139); overruled, 2 L. D., 854.
 Phillips, Alonzo (2 L. D., 321); overruled, 15 L. D., 424.
 Pike's Peak Lode (14 L. D., 47); overruled, 20 L. D., 204.
 Popple, James (12 L. D., 433); overruled, 13 L. D., 588.
 Powell, D. C. (6 L. D., 302); modified, 15 L. D., 477.
 Rancho, Alisal (1 L. D., 173); overruled, 5 L. D., 320.
 Rankin, John M. (20 L. D., 272); reversed on review, 21 L. D., 404.
 * Reed v. Buffington (7 L. D., 154); overruled, 8 L. D., 110.
 Rico Townsite (1 L. D., 556); modified, 5 L. D., 256.
 Robinson, Stella G. (12 L. D., 443); overruled, 13 L. D., 1.
 Rogers, Horace B. (10 L. D., 29); overruled, 14 L. D., 321.
 Rogers v. Atlantic and Pacific R. R. Co. (6 L. D., 565); overruled, 8 L. D., 165.
 * Rogers v. Lukens (6 L. D., 111); overruled, 8 L. D., 110.

St. Paul, Minneapolis and Manitoba Rwy. Co. (8 L. D., 255); modified, 13 L. D., 354.
 Sayles, Henry P. (2 L. D., 88); modified, 6 L. D., 797.
 Serrano v. Southern Pacific R. R. Co. (6 C. L. O., 93); overruled, 1 L. D., 380.
 Shanley v. Moran (1 L. D., 162); overruled, 15 L. D., 424.
 Shineberger, Joseph (8 L. D., 231); overruled, 9 L. D., 202.
 Sipchen v. Ross (1 L. D., 634); modified, 4 L. D., 152.
 Southern Pacific R. R. Co. (15 L. D., 460); reversed on review, 18 L. D., 275.
 Spencer, James (6 L. D., 217); modified, 6 L. D., 772, and 8 L. D., 467.
 State of California v. Pierce (3 C. L. O., 118); modified, 2 L. D., 854.
 State of California v. Smith (5 L. D., 543); overruled, 18 L. D., 343.
 Stricker, Lizzie (15 L. D., 74); overruled, 18 L. D., 283.
 Sweeten v. Stevenson (3 L. D., 249); overruled, 3 L. D., 248.
 Taft v. Chapin (14 L. D., 593); overruled, 17 L. D., 414.
 Talkington's Heirs v. Hempfing (2 L. D., 46); overruled, 14 L. D., 200.
 Tate, Sarah J. (10 L. D., 469); overruled, 21 L. D., 211.
 Taylor v. Yates *et al.* (8 L. D., 279); reversed on review, 10 L. D., 242.
 Traugh v. Ernst (2 L. D., 212); overruled, 3 L. D., 218.
 Tripp v. Stewart (7 C. L. O., 39); modified, 6 L. D., 795.
 Tupper v. Schwarz (2 L. D., 623); overruled, 6 L. D., 623.
 Turner v. Lang (1 C. L. O., 51); modified, 5 L. D., 256.
 Turner v. Cartwright (17 L. D., 414); modified, 21 L. D., 40.
 United States v. Bush (13 L. D., 529); overruled, 18 L. D., 441.
 Vine, James (14 L. D., 527); modified, 14 L. D., 622.
 Walker v. Prosser (17 L. D., 85); reversed on review, 18 L. D., 425.
 Waterhouse, William W. (9 L. D., 131); overruled, 18 L. D., 586.
 Watson, Thomas E. (4 L. D., 169); modified, 6 L. D., 71.
 Weber, Peter (7 L. D., 476); overruled on review, 9 L. D., 150.
 Wickstrom v. Calkins (20 L. D., 459); modified, 21 L. D., 553.
 Wickstrom v. Calkins (20 L. D., 459); overruled, 22 L. D., 392.
 Wilkins, Benjamin C. (2 L. D., 120); modified, 6 L. D., 797.
 Willamette Valley and Cascade Mountain Wagon Road Co. v. Chapman (13 L. D., 61); overruled, 20 L. D., 259.
 Willingbeck, Christian P. (3 L. D., 383); modified, 5 L. D., 408.

* The cases marked with a star are now authority. See Hessong v. Borgan, 9 L. D., 153.

TABLE OF CIRCULARS AND INSTRUCTIONS.

	Page.		Page.
May 14, 1895.—Accounts; unearned fees.	572	November 27, 1896.—Right of way.....	458
August 29, 1896.—Instructions under the act of August 4, 1892.....	322	November 27, 1896.—State selections.....	459
October 16, 1896.—Survey; restoration of lost corners.....	361	December 23, 1896.—Right of way.....	519
		December 26, 1896.—Accounts; unearned fees.....	573

CIRCULARS AND INSTRUCTIONS CITED AND CONSTRUED.

	Page		Page.
May 17, 1877.—Soldiers' additional homestead; 2 C. L. L., 479.....	495	January 13, 1892.—Price of desert land; 14 L. D., 74.....	451
November 7, 1879.—Adjustment of railroad grants.....	18	March 21, 1892.—Right of way; 14 L. D., 338.....	459
January 30, 1883.—Mineral lands; 9 C. L. O., 210.....	357	October 12, 1892.—Building stone, act of August 4, 1892; 15 L. D., 360.....	324
February 13, 1883.—Soldiers' additional homestead; 1 L. D., 654.....	498	February 20, 1894.—Right of way; 18 L. D., 168.....	459
August 4, 1885.—Railroad-indemnity selections; 4 L. D., 90.....	490	June 30, 1894.—Survey manual, tide-water streams.....	394
June 27, 1887.—Desert-land entry; 5 L. D., 708.....	451	June 30, 1894.—Survey manual, mineral land.....	426
September 15, 1887.—Price of desert land; 6 L. D., 145.....	451	July 9, 1894.—State selections, mineral lands; 19 L. D., 21.....	459
February 13, 1889.—Railroad lands; 8 L. D., 348.....	313, 407	November 30, 1894.—Town-site entry; 19 L. D., 334.....	385
April 20, 1891.—Desert entry of unsurveyed land; 12 L. D., 376.....	411	October 30, 1895.—Extension of time for payment; gen. circular, page 25.....	305
April 22, 1891.—School lands; act of February 28, 1891.....	316, 426	October 30, 1895.—Repayment; gen. cir., page 97.....	415
December 10, 1891.—Mining circular, par. 29.....	506	August 29, 1896.—Building stone; 23 L. D., 322.....	330

ACTS OF CONGRESS CITED AND CONSTRUED.

	Page.		Page.
May 23, 1828 (4 Stat., 248), private land claim.....	137	August 18, 1856 (11 Stat., 87), aban'd mil. res.....	237
May 26, 1830 (4 Stat., 405), private land claim.....	137	March 3, 1857 (11 Stat., 195), Minn. R. R. grant.....	540
July 2, 1836 (6 Stat., 676), private land claim.....	130	March 3, 1857 (11 Stat., 251), swamp land.....	184
September 27, 1850 (9 Stat., 496), donation.....	166	March 12, 1860 (12 Stat., 3) swamp land.....	150,
September 27, 1850 (9 Stat., 496), sec. 4.....	392		178, 305, 461
September 28, 1850 (9 Stat., 519), swamp land.....	305, 461	April 11, 1860 (12 Stat., 836), Porterfield scrip.....	321
February 14, 1853 (10 Stat., 158), donation.....	167	March 2, 1861 (12 Stat., 239), Territory of Dakota.....	348
March 2, 1853 (10 Stat., 172), sec. 20, Wash. school lands.....	397	May 20, 1862 (12 Stat., 392), homestead.....	542
March 3, 1853 (10 Stat., 244), Cal. school lands.....	424	July 1, 1862 (12 Stat., 489), Union Pac.....	161
July 22, 1854 (10 Stat., 308), sec. 8, private claim.....	193	July 2, 1862 (12 Stat., 503), agricultural college grant.....	461
August 3, 1854 (10 Stat., 346), certification of granted lands.....	343, 460	July 12, 1862 (12 Stat., 624), Minn. R. R. grant.....	540
September 30, 1854 (10 Stat., 1110), art. 2, Indian treaty.....	151	March 3, 1863 (12 Stat., 772), R. R. grant.....	343
March 2, 1855 (10 Stat., 634), swamp land.....	184	April 19, 1864 (13 Stat., 47), State of Nebraska.....	348
May 15, 1856 (11 Stat., 9), Iowa R. R. grant.....	79	May 5, 1864 (13 Stat., 64), L. S. and M. R. R. grant.....	206, 429
June 3, 1856 (11 Stat., 17), Mobile and Girard grant.....	288	May 5, 1864 (13 Stat., 66), Wis. R. R. grant.....	58,
June 3, 1856 (11 Stat., 20), Wis. R. R. grant.....	58,		217, 413
	217, 413	June 2, 1864 (13 Stat., 95), Iowa R. R. grant.....	79
		June 25, 1864 (13 Stat., 184), donation.....	167

	Page.		Page.
July 2, 1864 (13 Stat., 356), Union Pac....	161	May 17, 1884 (23 Stat., 24), Alaska.....	419
March 3, 1865 (13 Stat., 526), Minn. R. R. grant.....	540	sec. 8, Alaska..	8, 196
May 1, 1866 (14 Stat., 355), Nor. Pac.....	206	July 5, 1884 (23 Stat., 103), aban'd mil. res.	14, 237, 569
June 21, 1866 (14 Stat., 67), homestead....	458	sec. 5, aban'd mil. res.....	516
July 23, 1866 (14 Stat., 218), swamp land...	231	March 3, 1885 (23 Stat., 371), Indian lands.	145
July 23, 1866 (14 Stat., 218) sec. 6, Cal. school lands.....	424	August 2, 1886 (24 Stat., 214), Indian lands.....	145
July 25, 1866 (14 Stat., 239), Oregon and Cal. R. R. grant.....	73, 392, 571	March 3, 1887 (24 Stat., 556), railroad lands.	579
July 27, 1866 (14 Stat., 292), Atlantic and Southern Pac.....	468, 500	sec. 2.....	407
February 25, 1867 (14 Stat., 409), wagon road grant.....	339	sec. 3.....	327
April 10, 1869 (16 Stat., 57) Northern Pac. grant.....	71	sec. 4.....	108, 288, 310
May 6, 1870 (16 Stat., 121) common R. R. terminal.....	326	sec. 5.....	180, 216, 301, 387, 508, 543
May 31, 1870 (16 Stat., 378) Northern Pac. grant.....	70, 265, 445,	May 14, 1888 (25 Stat., 622), Ark. private entry.....	582
April 28, 1870 (16 Stat., 98), Nebraska boundary.....	348	October 2, 1888 (25 Stat., 526), arid lands..	276, 483
March 3, 1871 (16 Stat., 579), Southern Pac.	468	February 22, 1889 (25 Stat., 676), sec. 10 and 18, school land.....	315, 397, 426
March 3, 1871 (16 Stat., 588), St. P., M. and M. grant.....	408, 540	March 1, 1889 (25 Stat., 757), sec. 2, Okl. lands.....	386
June 5, 1872 (17 Stat., 226), Bitter Root lands.....	358	March 2, 1889 (25 Stat., 854), sec. 2, second entry.....	65
June 8, 1872 (17 Stat., 333), additional homestead.....	154	sec. 3, leave of absence.....	404
June 8, 1872 (17 Stat., 340), Indian lands ..	151	March 2, 1889 (25 Stat., 980), sec. 13, Okl. lands.....	385, 527
June 22, 1874 (18 Stat., 194), R. R. indem- nity.....	387, 565	March 2, 1889 (25 Stat., 1008) R. R. for- feiture.....	312
March 3, 1875 (18 Stat., 99) Lassen county desert lands.....	61	May 2, 1890 (26 Stat., 81), sec. 20, Okl. homestead.....	251, 547
March 3, 1875 (18 Stat., 482) right of way..	67, 458, 519	May 14, 1890 (26 Stat., 109), sec. 4, Okl. town lot.....	196
April 21, 1876 (19 Stat., 35), sec. 1, R. R. withdrawals.....	6, 115, 339, 435, 436	June 20, 1890 (26 Stat., 169), reservoir lands	485
August 15, 1876 (19 Stat., 208), Otoe and Missouria lands.....	144	July 3, 1890 (26 Stat., 215), sec. 11, State of Idaho.....	147
March 3, 1877 (19 Stat., 377), desert entry ..	61, 293, 450, 574	August 30, 1890 (26 Stat., 371), arid lands.	276
June 3, 1878 (20 Stat., 89), timber and stone	322, 330, 413, 517	September 29, 1890 (26 Stat., 496), forfeiture R. R. grants.....	70, 317, 346, 413, 423
June 14, 1878 (20 Stat., 89), sec. 2, timber culture.....	298	September 29, 1890 (26 Stat., 496), sec. 3....	26, 415
March 3, 1879 (20 Stat., 471), Otoe and Mis- souria lands.....	144	September 29, 1890 (26 Stat., 496), sec. 7, in- demnity.....	565
March 3, 1879 (20 Stat., 472), additional homestead.....	383	September 29, 1890 (26 Stat., 496), sec. 8, Mo- bile and Girard lands.....	288
May 14, 1880 (21 Stat., 140), sec. 2, contest- ant.....	183, 264, 524	September 30, 1890 (26 Stat., 684), exten- sion of time for payment.....	304, 467
sec. 3, home- stead settle- ment.....	188	February 28, 1891 (26 Stat., 796), school land.....	315, 423
June 16, 1880 (21 Stat., 287), sec. 2, repay- ment.....	63, 138, 250, 282, 414, 555	March 3, 1891 (26 Stat., 854), sec. 14, pri- vate claim.....	193
May 28, 1880 (21 Stat., 143), Osage land....	144	March 3, 1891 (26 Stat., 1095):	
January 13, 1881 (21 Stat., 315), railroad lands.....	468	sec. 1, timber culture.....	9, 264
March 3, 1881 (21 Stat., 380), Otoe and Mis- souria lands.....	144	sec. 2, desert entry.....	293, 450, 574
March 3, 1881 (21 Stat., 505), mining claim.	257	sec. 4, preemption.....	192, 462
March 3, 1883 (22 Stat., 487), Alabama lands.....	251	sec. 5, homestead.....	462, 547
		sec. 6, homestead.....	305
		sec. 7, confirmation ..	144, 162, 175, 331, 456, 481
		secs. 11 and 16, Alaska.....	417
		secs. 12, 13, and 14, Alaska.....	7, 245, 280, 283, 335, 337, 442
		sec. 17, reservoir sites.....	484
		secs. 18-21, right of way.....	275, 458, 519
		June 25, 1892 (27 Stat., 59), forfeited rail- road lands.....	416

	Page.		Page.
August 4, 1892 (27 Stat., 348), building stone.....	322, 329, 413, 516	July 26, 1894 (28 Stat., 123), time for proof and payment extended.....	248, 293, 304, 467
August 5, 1892 (27 Stat., 390), railroad lands.....	586	August 4, 1894 (28 Stat., 226), extension of time on desert entries.....	293
January 31, 1893 (27 Stat., 427), forfeited railroad lands.....	416	August 18, 1894 (28 Stat., 397), sold. additional homestead.....	123, 502
February 15, 1893 (27 Stat., 456), repayment.....	282	August 23, 1894 (28 Stat., 491), abandoned military reservation.....	14, 237, 567
March 3, 1893 (27 Stat., 568), Otoe and Missouri land.....	144	December 29, 1894 (28 Stat., 509), second homestead entry.....	404
March 3, 1893 (27 Stat., 572), Stateselection.....	147	January 21, 1895 (28 Stat., 635), right of way.....	519
March 3, 1893 (27 Stat., 593), solds. additional certificate.....	495	February 15, 1895 (28 Stat., 664), abandoned military reservation.....	237
March 3, 1893 (27 Stat., 640), Cherokee outlet.....	386, 535	January 23, 1896 (29 Stat., 4), R. R. lands.....	26
December 12, 1893 (28 Stat., 15), forfeited railroad lands.....	416	March 2, 1896 (29 Stat., 42), railroad lands.....	445, 569
July 6, 1894 (28 Stat., 122), donation claims.....	569	April 7, 1896 (29 Stat., 90), Ark. private cash entry.....	582
July 16, 1894 (28 Stat., 109), Utah school lands.....	569	May 14, 1896 (29 Stat., 120), right of way.....	519
July 26, 1894 (28 Stat., 122), donation.....	166	May 21, 1896 (29 Stat., 127), right of way for pipe line.....	521

REVISED STATUTES CITED AND CONSTRUED.

	Page.		Page.
Section 2258.....	465	Section 2326.....	23, 70, 113, 258, 395
Section 2274.....	190	Section 2333.....	99, 477
Section 2275.....	315, 423	Section 2347.....	112, 119, 128
Section 2276.....	315, 423	Section 2348.....	110, 127
Section 2288.....	189	Section 2351.....	111
Section 2289.....	462, 547	Section 2357.....	451, 574
Section 2290.....	462	Section 2362.....	138
Section 2291.....	155, 159, 304, 458, 568	Section 2389.....	76, 562
Section 2294.....	140	Section 2372.....	389
Section 2301.....	305	Section 2387.....	76, 419, 562
Section 2306.....	123, 152, 465, 498	Section 2388.....	76, 562
Section 2318.....	323, 399, 477	Section 2448.....	136, 457
Section 2319.....	330, 399, 477	Section 2449.....	461
Section 2320.....	227, 357, 399, 476	Section 2455.....	590
Section 2322.....	357	Section 2488.....	230
Section 2323.....	223	Section 2490.....	308
Section 2324.....	223, 269	Section 2631.....	480
Section 2325.....	70, 173, 398		

RULES OF PRACTICE CITED AND CONSTRUED.

	Page.		Page.
Rule 1.....	314	Rule 70.....	412
Rule 2.....	314	Rule 78.....	401
Rule 3.....	314	Rule 82.....	412
Rule 7.....	142	Rule 86.....	413
Rule 35.....	140	Rule 95.....	530
Rule 48.....	562	Rule 114.....	244, 406
Rule 53.....	414, 444		

DECISIONS

RELATING TO

THE PUBLIC LANDS.

RAILROAD GRANT—LANDS EXCEPTED—TIMBER CULTURE CLAIM.

NORTHERN PACIFIC R. R. CO. *v.* LAMB.

Rights under the timber culture law are initiated by application to enter, and prior improvement of the land covered thereby will not operate to exclude the same from indemnity selection.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
July 1, 1896. (A. E.)

This is an appeal from your office decision of May 18, 1895, rejecting the application of Maggie A. Lamb, widow of John K. Lamb, to make timber culture entry of the SE. $\frac{1}{4}$ Sec. 21, T. 11 N., R. 39 E., Walla Walla, Washington.

This action by your office was taken because the Northern Pacific Railroad Company had made selection of the land on January 5, 1884, as indemnity for lost lands within the granted limits.

At a hearing ordered to determine the status of the land at the date of the selection, it was shown by the applicant that the deceased, John K. Lamb, began to improve and cultivate the land in the year 1880, and continued to cultivate and improve the same until his death in November, 1888.

On December 29, 1888, Maggie A. Lamb, his widow, presented an application to make timber culture entry of the land, alleging the above facts of improvement.

After due notice a hearing was had, and the local office recommended that the railroad selection be canceled, and the applicant be permitted to make entry.

In the decision appealed from, your office held that the claims asserted for this land at the date of selection were not such as would defeat the right of the railroad company under its indemnity selection.

For this reason the application of Maggie A. Lamb was held for rejection.

While the testimony introduced by Mrs. Lamb shows that the improvement and cultivation of the land were continuous from 1880

until 1888, it does not show that deceased claimant ever lived upon the land or was qualified to enter the same under the settlement laws.

As rights under the timber culture law are not initiated until application to make entry, improvement prior to that time would not confer a right sufficient to defeat selection by the railroad company.

Your office decision is therefore affirmed.

HALL v. LAKE.

Motion for review of departmental decision of March 11, 1896, 22 L. D., 296, denied by Acting Secretary Reynolds, July 1, 1896.

CONTEST—SOLDIERS' HOMESTEAD—AMENDMENT.

DRAKE ET AL. v. WILT.

A contest against a soldier's homestead declaratory statement is invalid, and a subsequent amendment thereof does not confer any priority as against an intervening contest begun after the homesteader has made entry under his declaratory statement.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(W. A. L.) July 1, 1896. (P. J. R.)

On May 2, 1894, Isaac Wilt filed his soldier's declaratory statement for the NW. $\frac{1}{4}$ of Sec. 12, T. 26 N., R. 14 W., Alva land district, Oklahoma.

On May 3, 1894, J. H. Drake filed an affidavit of contest against said declaratory statement, alleging that Wilt was then the owner of one hundred and sixty acres of land in the State of Nebraska.

On May 11, 1894, Wilt filed a motion to dismiss said contest.

On October 1, 1894, the day set for the hearing of Wilt's motion, Drake filed an affidavit to amend his affidavit of contest and asked fifteen days in which to prepare and file an amendment, which is as follows:

That the contestant is informed by the register of deeds in Douglas county, Nebraska, that Isaac Wilt was the owner of the SE. $\frac{1}{4}$ of section 3, Tp. 16, R. 11, in that county, and that on May 5, 1894, three days after the filing of his declaratory statement herein, the contestee caused two deeds to be recorded in the office of said register of deeds, one by himself and wife to H. Misfelt, and the other from Misfelt to his wife, conveying said land to his wife, and wants time in which to obtain the date of the acknowledgment of the deeds, the name of the officer before whom they were acknowledged, and a copy of the deeds.

On October 1, 1894, the motion of Wilt to dismiss was overruled.

On October 2, 1894, Wilt made homestead entry No. 6073 of the land in dispute, based on his soldier's declaratory statement.

On October 3, 1894, the application of Drake to amend was allowed.

On October 9, 1894, George S. Hamilton filed affidavit of contest

against Wilt's homestead entry, alleging the disqualification of Wilt; and on the next day Hamilton filed an application to intervene in the contest of Drake for the purpose of showing the insufficiency of the same, and asking that the application of Drake to amend be refused.

On October 17, 1894, Drake filed his amended affidavit of contest.

On October 20, Hamilton filed a motion to dismiss Drake's contest.

November 26, 1894, was set for hearing argument upon Hamilton's motion to dismiss Drake's contest.

On December 14, 1894, the local officers overruled Hamilton's motion to dismiss, and held that he was a stranger to the record and could not be heard.

From this decision Hamilton appealed, and on March 14, 1895, your office held that the order of the local officers was purely interlocutory in its nature, and from it no appeal would lie either by Hamilton or Wilt, and that Hamilton cannot be heard to move the dismissal of Drake's contest.

On May 9, 1895, Hamilton appealed; and on June 27, 1895, your office denied his right to appeal from the decision of March 14, 1895.

On April 15, 1895, Drake filed a supplemental affidavit of contest, alleging that Wilt had wholly abandoned the land covered by his entry, and that said abandonment had existed for more than six months since filing his soldier's declaratory statement; and that he has changed his residence therefrom and has failed to cultivate and improve the land, and that this cause of action had not accrued at the date he filed the contest against said tract, on the 3rd day of May, 1894.

On May 23, 1895, Hamilton filed a motion asking that he be substituted as the first contestant in the cause. June 10, 1895, was set for hearing of the supplemental affidavit of contest filed by Drake, but no hearing was had on that date because of Hamilton's motion filed on May 23, 1895.

On July 8, 1895, counsel for George S. Hamilton filed a petition for a writ of certiorari, requiring your office to forward his appeal and the record to the Department, in the case of *J. H. Drake v. Isaac Wilt*. Said petition shows substantially the foregoing history of the case at bar.

On September 28, 1895, the case was carefully considered by the Department, when it was held that

The contest of Drake against the soldier's declaratory statement of Wilt was clearly void (*Lachapelle v. Herbert*, 18 L. D., 494), and raises the question whether Drake was entitled to amend his void contest, subsequently to the intervention of the contest of Hamilton initiated against Wilt's homestead entry.

It was also held that the decision of the local officers was not—purely interlocutory, but on the contrary, that it was the determination of a substantial right, to-wit: Hamilton's claim to the prior right to contest Wilt's entry, and is appealable. *Shugren v. Dillman* (19 L. D., 453); *Rathburn v. Warren* (10 L. D., 111).

Your office was thereupon directed to certify to the Department the

record in the case and suspend all further action until the matter is passed upon as presented by the record.

The following is a copy of Hamilton's affidavit of contest, viz:

Personally appeared before me, the undersigned F. P. Alexander, register of the United States land office at Alva, O. T., George S. Hamilton, of Stafford county of Kansas, who upon his oath says: that to the best of his knowledge and belief Isaac Wilt who made homestead entry No. 6073 at the district land office at Alva, O. T., on the 2d day of October, 1894, based upon H. D. S. No. 466 made at the same land office on the 2d day of May, 1894, for the NW. $\frac{1}{4}$ section 12, township 26, north of range 14 west of Indian meridian, is and was at the time said H. D. S. No. 466 and said homestead entry No. 6073 were made, disqualified from making homestead entry and perfecting title thereunder, for the reason that the said Isaac Wilt is and was at the time of filing said H. D. S. No. 466 and making said H. E. No. 6073 the owner of 160 acres of land in fee simple in the county of Douglass and State of Nebraska, contrary to the provisions of section 20 of the act of Congress approved May 2nd, 1890.

And that he the said entryman has entirely abandoned the said land and has expressed himself to the effect that he had no intention or expectation of ever residing upon, cultivating or improving the said land.

And this the said contestant is ready to prove at such time and place as may be named by the register and receiver for a hearing in said case; and he therefore asks to be allowed to prove said allegations, and that homestead entry No. 6073 may be declared canceled and forfeited to the United States, he the said contestee, paying the expenses of such hearing.

GEORGE S. HAMILTON.

Subscribed in my presence and sworn to before me this 9th day of October, 1894.

F. P. ALEXANDER, *Register*.

Also appeared at the same time and place John B. Kelsey and Alice H. Kelsey who being first by me duly sworn on oath say that they are acquainted with the tract of land described in the within affidavit of George S. Hamilton, and know from the personal statements of the homestead entryman Isaac Wilt to them the said affiants that the statements made in the said affidavit are true.

JOHN B. KELSEY.

ALICE H. KELSEY.

Subscribed in my presence and sworn to before me this 9th day of October, 1894.

F. P. ALEXANDER, *Register*.

In his appeal he alleged the following specifications of error, viz:

First. That the appeal of Hamilton was interlocutory in its nature, the same having been an appeal from an order of the local land office refusing him the right to intervene, upon a properly verified showing of his interest in the subject-matter, declaring him a stranger to the record and denying him the right to be heard to a motion to dismiss the previous contest.

Second. That no appeal will lie from an order of the local office which places a contestant in the position of a second contestant, even though it be shown that the alleged first contest is on its face a nullity and void.

Third. That Hamilton could not be heard to move the dismissal of Drake's contest and that the decision of the local office to that effect was correct.

Fourth. In effect; that intervenor Hamilton did not show such an interest in the subject-matter as would entitle him to intervene and to be heard in support of his motion to dismiss Drake's contest.

Fifth. In effect; that the application of Drake to be allowed to amend to a certain specified extent, gave him the right to amend to a greater extent and to set up new matter, to the injury of a second contestant.

Sixth. In effect; that such amendment even if properly allowed cured the original defect or gave the Department jurisdiction over the subject-matter of the particular case.

Seventh. In effect; that the original contest of Drake could be amended after the filing of the contest of Hamilton and the intervention of his adverse right.

Eighth. In effect; that the amended affidavit of contest of Drake sets up good grounds of contest.

Ninth. In effect; that either the original affidavit of contest of Drake or the amendment thereof, is sufficiently corroborated to confer jurisdiction upon the Department in the absence of the issuance of notice.

Tenth. In effect; that jurisdiction of the Drake contest has ever vested in the Department, in the absence of the issuance of notice.

Eleventh. That the affidavit of contest of a second contestant must remain on file, unacted upon, until the final determination of the prior contest.

It is contended by appellant that the refusal to allow him to intervene, and to dismiss the previous contest of Drake was, as to him as intervenor, final, and his acquiescence, without appeal, in this order, would have concluded him.

In the case of *Jackson v. McKeever* (3 L. D., 516) it was held (syllabus): "An appeal will lie from an order refusing to grant a hearing if it amounts to a denial of right."

This rule was followed in the case of *Guyselman v. Schaffer et al.*, decided by Secretary Teller June 7, 1883 (Ib., 517).

The Department held in the case of *James H. Murray* (6 L. D., 124):

Though an appeal will not lie from a decision of the Commissioner ordering a hearing, the refusal to order a hearing is, when it amounts to the denial of a right, appealable.

At the time Drake initiated his contest Wilt had not made his homestead entry for the tract described in his soldier's declaratory statement; nor had he made his entry for said land on the date Drake asked for leave to amend his affidavit of contest.

It has been repeatedly held by the Department that there is nothing in a soldier's declaratory statement which is contestable. It is a mere notification that at a future time the person filing it intends to claim the land described. It does not segregate the land. Any qualified homesteader may make entry over it and force the soldier to a hearing.

Hamilton's was the first valid contest initiated after Wilt made his homestead entry; and the amended affidavit filed by Drake October 17, 1894, cannot be considered by any rule of the Department as being entitled to a priority of record over that filed October 9, 1894, and must be considered as a new contest and second to the contest of Hamilton.

After full consideration of the whole record in the case at bar, and the law governing the same, the Department finds that the contest initiated by Drake May 3, 1894, was void *ab initio*; and as Hamilton's contest was the first valid contest filed against Wilt's homestead entry No. 6073, the decision of your office is hereby reversed, and Hamilton may be permitted to prove the truth of the allegations made by him against said homestead entry.

HUFFMAN v. MILBURN ET AL.

Motion for review of departmental decision of March 24, 1896, 22 L. D., 346, denied by Acting Secretary Reynolds, July 1, 1896.

RAILROAD GRANT—WITHDRAWAL—SETTLEMENT RIGHT.

HOWARD v. NORTHERN PACIFIC R. R. CO.

The withdrawal on general route for the branch line of this road did not operate to reserve lands for the benefit of the main line.

A settlement right, acquired prior to the receipt of notice at the local office of the withdrawal on definite location, is within the protective provisions of section 1, act of April 21, 1876.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
July 1, 1896. (E. M. R.)

This case involves the SW. $\frac{1}{4}$ of Sec. 33, T. 28 N., R. 42 E., Spokane land district, Washington.

The record shows that on November 26, 1890, Rowland R. R. Hazard made homestead application to enter this tract, accompanied by affidavits showing settlement on the land March 6, 1884, which showing was borne out by evidence submitted at a hearing between the parties.

This tract is within the forty miles limit of the main line of the Northern Pacific railroad company, as definitely located August 30, 1881, and was withdrawn on map of general route August 15, 1873, for the branch line.

The local officers rejected this application to enter because settlement was made subsequently to the definite location of the road. Upon appeal your office decision of May 9, 1895, was rendered, and though it was then shown that the order of withdrawal on the definite location was not received at the local office until June 8, 1884, the decision of the local officers was affirmed, it being held that this tract of land had been in a state of reservation by reason of the withdrawal for the benefit of the branch line August 15, 1873, and on account of such reservation settlement could not inure to the detriment of the title of the railroad company.

Among the various questions suggested for determination by the facts as set out, the only one necessary to be decided in this case is the effect of the withdrawal on account of the branch line in 1873, upon the grant in behalf of the main line.

In the case of Northern Pacific railroad company v. Urquhart (8 L. D., 365), it was held, syllabus:—

A withdrawal on general route made for a branch line of this road, will not operate to reserve lands for the benefit of the main line.

The settlement and occupancy of a qualified pre-emptor, existing at the date of definite location, are sufficient to except the land covered thereby from the operation of the grant.

This case appears to be in all essential respects similar to the one at bar, and under the act of April 21, 1876 (19 Stat., 35), the settlement of the appellant being prior to the reception of notice at the local office of the withdrawal upon definite location, his right under said settlement is protected and he will be allowed to make entry.

Judgment reversed.

LESHER *v.* ST. PAUL CATHOLIC MISSION.

Motion for review of departmental decision of March 26, 1896, 22 L. D., 365, denied by Acting Secretary Reynolds, July 1, 1896.

ALASKA—ACT OF MARCH 3, 1891.

McCOLLOM FISHING AND TRADING CO.

The right of purchase conferred by the act of March 3, 1891, upon individuals or corporations engaged in trade or manufactures in Alaska, is limited to land actually occupied for such purposes, not to exceed in any case one hundred and sixty acres.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
July 1, 1896. (W. M. B.)

This is an appeal by the McCollom Fishing and Trading Company from your office decision of May 8, 1895, wherein was suspended survey No. 56, made by Clinton Gurnee, Jr., U. S. deputy surveyor, under provisions of sections 12 and 13, act of March 3, 1891 (26 Stat., 1095), of a tract of land containing 145.60 acres, used for trading purposes and situate on Pirate Cove and Unga Straits, Popoff Island, district of Alaska; said survey being suspended for the reason that more land is embraced therein and claimed by the company than is actually occupied or used by the claimants for their business.

In your said office decision you say:

It is suggested that if the survey was amended by beginning at the south end of course No. 3; thence along the line of ordinary high water mark to the south end of course No. 11; thence southwesterly to the point of beginning, final action by this office would be greatly facilitated. Such a survey would include about 20 acres, besides all the land occupied by the claimants for their business.

Claimants in appealing from your office decision file assignments or error as follows:

1. That the survey contains no more land than allowed by the statute of March 3, 1891.
2. That the field notes of the survey are made pursuant to the monuments and boundaries of the company's claim.
3. That the claimant is entitled to 160 acres; that in analogy with the federal and state laws said company should be allowed the lands in any form, so as within the quantity, and conforming to company limits and are adjoining; that such area is necessary to include the improvements of the company and allow shipping grounds and water privileges on the shores of the bay.

There are two courses marked upon the plat hereto appended as No. 3, and so designated in the field notes, but the one referred to as No. 3 in your office letter of May 8, 1895, must necessarily mean *meander* course No. 3, which being the case, an emendation of the survey in accordance with suggestion contained in your office letter, under the state of facts recited, would give appellants all the land to which, it would appear, they are entitled under the law.

There is no force in the contention that the survey and field notes thereof, are made pursuant to the "monuments and boundaries" of the company's claim, for the act of March 3, 1891, did not confer upon individuals or corporations engaged in trade or manufactures in the District of Alaska the absolute and unconditional right to purchase one hundred and sixty acres of land for such purposes, but only gave the right to purchase so much land as might be actually occupied for said purposes, "not to exceed," in any case, one hundred and sixty acres.

This survey does not only fail to comply with the statute with respect to marking off a tract of land, embracing such particular portion as is actually occupied by the claimants, "as near as practicable in a square form," but it is notable for the remarkable irregularity of the form of the tract claimed, which takes in not only the entire water front on Pirate's Cove, but covers also an extended line along the coast of Unga Straits, which would give to said claimants, in case the survey was approved in its present form, an undue control over and power to prevent vessels from landing and trading along the coast of that portion of Popoff Island.

The contention that the said company is entitled, from "analogy with the federal and state laws," to one hundred and sixty acres of land in any form, so it is adjoining, is without force, since it is provided in section 8 of the Act of May 17, 1884 (23 Stat., 26), that "nothing contained in this act shall be construed to put in force in said district (Alaska) the general land laws of the United States."

The sale and disposal of the public lands, other than mineral, in the District of Alaska, are regulated entirely by the statutes herein cited, and not, as is seen, by the general land laws affecting the public domain.

For the reasons herein given your office decision suspending survey No. 56 in its existing form is hereby affirmed.

WELCH v. BUTLER.

Motion for review of departmental decision of November 2, 1895, 21 L. D., 369, denied by Acting Secretary Reynolds, July 1, 1896.

BLACK QUEEN LODGE *v.* EXCELSIOR No. 1 LODGE.

Motion for review of departmental decision of March 24, 1896, 22 L. D., 343, denied by Acting Secretary Reynolds, July 1, 1896.

TIMBER CULTURE ENTRY—COMMUTATION.

JAMES H. LANGSFORD.

A timber culture entryman is not entitled to commute his entry under the act of March 3, 1891, if he is not a bona fide resident of the State in which the land is situated.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
July 1, 1896. (J. L.)

This case involves the NW. $\frac{1}{4}$ of section 18, T. 12 S., R. 17 W., Wakeeny land district, Kansas.

On March 26, 1888, James H. Langsford made timber culture entry No. 12,475 of said tract.

On October 29, 1894, he made final proof and payment for said tract and was awarded by the local officers final receipt and certificate No. 12,780, under the 5th proviso in section 1 of the act of March 3, 1891 (26 Statutes, 1095). His final proof failed to show that he was an actual *bona fide* resident of the State of Kansas, as required by said proviso. His own affidavit showed that he had been absent from Kansas for two years.

On April 30, 1895, your office suspended and held for cancellation Langsford's final certificate for an affidavit showing that he was a *bona fide* resident of Kansas at the time of commuting his said entry; and instructed the local officers to notify him that unless evidence of such residence be furnished within sixty days after notice, or an appeal be taken, "his final certificate which is hereby held for cancellation, will be canceled without further notice from this office."

Langsford was duly notified, and within sixty days filed his appeal to this Department.

Your office decision is clearly right, and it is hereby affirmed. (See Circular of October 30, 1895, pages 35 and 204.)

HALLING *v.* CENTRAL PACIFIC R. R. Co.

Motion for review of departmental decision of March 27, 1896, 22 L. D., 408, denied by Acting Secretary Reynolds, July 1, 1896.

OKLAHOMA LANDS—SETTLEMENT RIGHT.

PENWELL v. CHRISTIAN.

The conditions attendant upon the opening of Oklahoma to settlement require the recognition of extremely slight initial acts of settlement in determining priorities between adverse claimants, if such primary acts are followed by residence within such time as clearly shows good faith.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
July 1, 1896. (R. F. H.)

D. H. Penwell appeals from your office decision of July 6, 1895, dismissing his contest against homestead entry No. 117 of Rial Christian, made September 18, 1893, for lots 3 and 4 and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 31, T. 27 N., R. 1 E., Perry land district, Oklahoma Territory.

The facts are sufficiently stated in your said office decision.

The question presented is whether the prior act of settlement made by contestant, taken in connection with his subsequent acts, are such as to constitute his rights as a homestead claimant superior to those of the entryman. The evidence shows that the contestant was first upon the land, in the race on September 16, 1893, but that his primary acts of settlement were slight, and consisted in sticking a stake three or four feet long in the ground near the south line, with a red handkerchief attached to the stake, and on the next day he dug a hole near his stake about two feet deep and three or four feet across. Prior to his digging this hole the entryman had dug a small hole near the northwest corner of the tract, about a spade deep and two feet across, making a mound of the dirt, so that the only act of the contestant done prior to the entryman consisted in setting said stake with his handkerchief attached, and the question is whether this act is such an assertion of title as will defeat the entry of Christian. Ordinarily it would not be deemed sufficient, in the absence of actual notice to the entryman, but in cases of this nature, where the good faith of both parties is established and neither party is guilty of laches, I am of the opinion that the only sound rule that can be adopted is to award the land to the person who was first upon the land and performed any act that evinces an intention to assert title.

In the race for lands in Oklahoma Territory, the sticking of a stake with a flag or card attached was the recognized method of asserting possession, and too many cases have been adjudicated in accordance with the rule above stated to justify a departure therefrom.

In the acquisition of homesteads in Oklahoma under the proclamation of the President and under the rules and regulations which anticipated the rush or race that would inevitably occur in the efforts of claimants to secure their homesteads, and which rules and regulations sought to secure to all equal opportunity and fairness in competing for prior possession or settlement, and where the rights of contestants for

a certain tract are in other respects equal, the maxim of *qui prior est tempore, potior est jure* applies, and he who was first in point of time in reaching the tract, and performed some act which signified an intention to claim it as his own, and followed such primary act by residence within such reasonable time as clearly shows his good faith, should be held to have the better title. No safer rule can in my opinion be applied in such a case than that he has the better title who was first in point of time. This rule was recognized in the case of *Hurt v. Giffin* (17 L. D., 162), wherein it was held that priority of right might properly be accorded to one who first reaches the tract and puts up a stake with the announcement of his claim thereon, and such initial act of settlement is duly followed by residence in good faith.

That case also recognized the peculiar and special conditions under which the homestead claims were initiated in Oklahoma, and as the government created the condition, justice and a due administration of the law requires the recognition of the conditions in the adjudication of cases arising out of them.

As was said in *Hurt v. Giffin* (17 L. D., 166-7)—

It is a notorious fact, that in the great race for homes in the Territory, he who first reached a tract and staked it, was regarded as the prior settler, and as eager as men were to secure homes, this kind of settlement was generally respected by the honest people who rushed into the Territory, for as a matter of fact, to stake a claim, or dig a hole, or put up a wagon sheet or tent, was about all that the great majority of the settlers could accomplish in the afternoon of the 22d of April, 1889, circumstanced as they were, and very many settlements have been held valid in Oklahoma, that were no better indicated, fixed and determined than was the settlement of *Hurt*. This settlement has been diligently followed up, until it has ripened into a good home, good faith being manifest at all times.

Had it not been for *Giffin's* interference, he would have had his filing on the land, and every act would have related back to the moment he went upon the land and staked it, intending to make it his home.

In the case of *Strutz v. Crabb* (19 L. D., 122), citing the case of *Hurt v. Giffin* (17 L. D., 162), it was held that digging a small hole was not an act to constitute sufficient notice to the public of an intention to claim the land. None of the cases cited in support of the proposition announced in *Strutz v. Crabb* were Oklahoma cases, nor growing out of conditions similar to those existing under the opening of the Oklahoma lands, nor was the case of *Strutz v. Crabb* an Oklahoma case, but involved a homestead entry in South Dakota, and to apply the holding in that case to cases involving the question of priority of settlement in Oklahoma in homestead cases would defeat the rules and regulations as well as the spirit of the law, which was designed to award the land to the first qualified settler who settled upon the land and complied with the law.

I am of the opinion that the case of *Strutz v. Crabb* is not authority in determining the question as to what constitutes an act of settlement in homestead entries in Oklahoma under the law and the President's

proclamation opening the lands in that Territory to settlement and entry.

I am further of the opinion that the act of Penwell on September 16th, followed as it was by residence on the 5th and 6th of October, 1893, and continuous residence and cultivation, should be held to entitle him to rights superior to those of Christian, and your said office decision is accordingly reversed.

OWENS *v.* STATE OF CALIFORNIA.

Motion for review of departmental decision of March 26, 1896, 22 L. D., 369, denied by Acting Secretary Reynolds, July 1, 1896.

BOSWELL ET AL. *v.* WATKINS.

Motion for review of departmental decision of March 11, 1896, 22 L. D., 297, denied by Acting Secretary Reynolds, July 1, 1896.

PRACTICE—INTERVENER—RIGHT OF APPEAL.

BARBOUR *v.* WILSON ET AL.

The right to intervene, and be heard on appeal, may be properly accorded a protestant who shows an interest in the subject matter of a contest.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
July 1, 1896. (A. B. P.)

This is an application by George H. Barbour asking that the record and proceedings in the case of Arthur P. Heywood *v.* William Wilson and the Castle Land Company, involving the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ (lots 5 and 6), Sec. 24, T. 8 N., R. 8 E., Helena, Montana, be certified to this Department for consideration and action.

It appears that the case referred to is the sequel of the case of McGregor *et al.* *v.* Quinn, decided by this Department April 5, 1894 (18 L. D., 368), wherein Sioux half-breed scrip location made by one William T. Quinn, covering the land in question was canceled—motion for review having been denied October 10, 1894 (19 L. D., 295).

It further appears that prior to the date of said decision of April 5, 1894, the Castle Land Company became the transferee of the land in question by deed of conveyance executed by one Messena Bullard, its attorney, to whom the land had been conveyed by Quinn the day after his said scrip location was made.

In support of the present application it is alleged, in substance, that the said Castle Land Company had, prior to the said decision in McGregor *et al.* *v.* Quinn, sold and conveyed to applicant and various and

sundry other parties by deeds of general warranty a large number of town lots from said land, the title whereto necessarily failed upon the cancellation of said scrip location made by said Quinn, and that thereupon a number of suits had been brought in the courts against the said company by its said lot grantees, seeking to recover the purchase money paid by them; that immediately after the said adverse decision upon the company's said motion for review in *McGregor et al. v. Quinn*, it set about to procure title to the land by some other means, and in its endeavor so to do it had procured the entry of said land for its own benefit through the aid of one William Moses, a professional scrip dealer and entry maker of Denver, Colorado, under soldier's additional homestead application filed October 30, 1894, by one William Wilson who had been brought from the State of Illinois for the purpose; that as soon as Wilson's entry was made he conveyed the land to said Moses, whereupon Moses at once conveyed the same to the company, and as soon as the company had obtained its deed from Moses it proceeded to set up its newly acquired title as a defence in all the suits brought against it by its said lot grantees, as aforesaid, of whom this applicant was one; that thereupon a contest was instituted by Arthur P. Heywood against said Wilson entry, based upon the facts aforesaid, alleging the same to have been fraudulently made; that a hearing was had upon the contest, whereat the entry was defended by the Castle Land Company, Wilson not appearing. It is the record in that case which is now asked to be certified here.

As grounds for the writ of certiorari it is alleged, in substance, that the Heywood contest was carried on partly at the expense of applicant and other lot grantees similarly situated; that the local officers found for the defendant company, and the company thereupon induced Heywood to waive his right of appeal, which he did; that an application to intervene, accompanied by an appeal from the decision of the local officers, was filed by this applicant, but the same was denied by your office, the decision of the local officers held to be final in view of Heywood's waiver of his right of appeal, and the Wilson entry confirmed. An appeal from your said office decision was thereupon filed by H. F. Collett and this applicant, as interveners and parties in interest, but your office held that they had no such interest as entitled them to the right of appeal, or to intervene and be heard, and declined to recognize their said appeal. Certiorari is now asked by Barbour on the ground of his alleged standing as a party in interest, and also, as a friend of the government.

Barbour and Collett appear from the facts alleged to be lot purchasers from the said company and to have furnished part of the money to carry on the Heywood contest, being interested in the subject matter thereof because the title to their lots was necessarily involved in the controversy. I think they have shown such an interest as entitles them to be heard and that their application to intervene and appeal, in

view of the circumstances, should have been allowed. Clearly it is to their interest to see that the company furnishes them a good title, and in view thereof it is their right to protest against the title which the company is endeavoring to procure, if it is in fact defective as they allege. The validity of that title was directly in issue in the Heywood contest, and it is now averred that Heywood was induced by the company not to appeal, thus leaving those who had aided him in carrying on the contest, because of their interest in the same, without remedy, unless they are allowed to intervene and be heard. The applicants to intervene stand in the position of protestants in interest. They are interested in the title which it is proposed to acquire from the government, and in my judgment that interest is such as entitles them to be heard before the title passes out of the government. If tainted with fraud the title would not be good, and might be assailed and overthrown even after patent.

Moreover, the application presents such a case, in my opinion, as calls for the exercise of the supervisory authority vested in the Secretary of the Interior in matters involving the disposition of the public lands.

You are therefore directed to certify the record and proceedings in the case to this Department for consideration and such action as may be found necessary and proper.

JABEZ B. SIMPSON ET AL.

Motion for review of departmental decision of February 4, 1896, 22 L. D., 97, denied by Acting Secretary Reynolds, July 1, 1896.

ABANDONED MILITARY RESERVATION—PRICE OF LANDS.

FORT CUMMINGS.

Lands within an abandoned military reservation subject to disposition under the act of August 23, 1894, belonging to the single minimum class, must be sold at \$1.25 per acre, though appraised at a less figure.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
July 1, 1896. (A. M.)

Under cover of your letter of the 1st instant you submitted the report of the appraisers appointed to appraise the lands in the abandoned military reservation of Fort Cummings, New Mexico, under the provisions of the act of July 5, 1884, 23 Stat. 103.

The area of the reservation is 23,150 acres, and, with the exception of a few subdivisions valued at \$1.25 per acre, the lands have been valued by the appraisers at ten cents and twenty-five cents per acre in about equal proportions. The general appraiser reports that the

appraisers look on the lands as valueless, because there is no water with which to irrigate them, that so far as known the lands contain no minerals and that there is but one person living on the entire reservation. These conditions account for the low valuation.

By reason of the area and date of transfer of the reservation the lands thus appraised are subject to disposal under the act of August 23, 1894, 28 Stat., 491. This act opens the lands to settlement under the public land laws, and requires parties making homestead entries thereof to pay for the lands "not less than the value heretofore or hereafter determined on by appraisal nor less than the price of the land at the time of the entry."

Under the circumstances of the case you have expressed the opinion that, as the lands are of the single minimum class, valued at \$1.25 per acre, they cannot be disposed of at a less figure, notwithstanding the lesser valuation placed thereon by the appraisers, in view of the wording in the act, viz: "nor less than the price of the land at the time of the entry." In accordance with this view you have recommended that the price be fixed at \$1.25 per acre and have prepared and submitted instructions to the local officers at Las Cruces, New Mexico, for the disposal of the lands, with the necessary exception of certain named tracts, on that basis.

I concur in your view respecting the price that must govern the disposal of the lands and it is hereby fixed at \$1.25 per acre.

The instructions refer to those of the 25th ultimo to the same officers respecting the disposal of the lands in the Fort Craig abandoned military reservation as a guide in the disposal of the lands in this reservation. They thus follow the ruling laid down in departmental decision of April 9, 1895, 20 L. D., 303, and have been approved.

TYFFE *v.* MOOERS.

Motion for review of departmental decision of September 23, 1895, 21 L. D., 167, denied by Acting Secretary Reynolds, July 1, 1896.

RAILROAD GRANT—LANDS EXCEPTED—PRE-EMPTION FILING.

FISH *v.* NORTHERN PACIFIC R. R. CO. (ON REVIEW).

An uncanceled pre-emption filing of record at the date when a railroad grant becomes effective excepts the land covered thereby from the operation of the grant, even though at such time the statutory life of the filing has expired.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1896. (F. W. C.)

With your office letter of November 23, 1895, was forwarded a motion filed on behalf of the Northern Pacific R. R. Company, for the review

of departmental decision of September 23, 1895 (21 L. D., 165), in the case of George Fish against said company, in which it was held (syllabus) that—

An uncanceled pre-emption filing of record at the date when a railroad grant becomes effective excepts the land covered thereby from the operation of the grant, even though at such time the statutory life of the filing has expired.

This land is within the primary limits of the grant for the road extending from Portland, Oregon, to Tacoma, Washington, as shown by the map of definite location filed May 14, 1874. It is also within the primary limits of the grant for the Cascade branch of said road, as shown by the map of definite location filed March 26, 1884.

One Edward Davis filed a pre-emption declaratory statement covering this land on January 13, 1870, in which settlement was alleged December 21, 1869.

Said filing was never consummated to cash entry, but was of record uncanceled at the date of the filing of the map of definite location on account of both lines named, and was, under the authority of the decision of the Supreme Court in the case of *Whitney v. Taylor* (158 U. S., 85), held to be sufficient to except the land covered thereby from the operation of the grant for said company.

The motion questions the correctness of the application of the decision of the court in the case named, to the facts in this case, urging that the filing in question was an expired filing, that is, the pre-emptor had failed to make payment within the statutory period, which expired before the filing of said maps of definite location, while in the case before the court, the filing by Jones had not expired at the date of the filing of the map of definite location. Further, that the construction placed upon the decision of the court reversed the uniform decisions of this Department for the past thirty years upon mere *dicta*.

We will first look to the decision of the court. In said decision the court first reviews its previous decisions holding lands to be excepted from railroad grants on account of certain claims, viz: (1) In the case of *Kansas and Pacific Ry. Co. v. Dunmeyer* (113 U. S., 629), an abandoned homestead entry of record at the date of definite location; (2) *Hastings and Dakota R. R. Co. v. Whitney* (132 U. S., 357), a homestead entry based upon an illegal affidavit; (3) *Bardon v. Northern Pacific R. R. Co.* (145 U. S., 535), an illegal pre-emption entry of record at the date of the passage of the act making the grant, and (4) *Newhall v. Sanger* (92 U. S., 761), a claim under an invalid Mexican grant undetermined at the date of definite location, and thus proceeds:

Although these cases are none of them exactly like the one before us, yet the principle to be deduced from them is that when *on the records of the local land office* there is an existing claim on the part of an individual under the homestead or pre-emption law, which has been recognized by the officers of the government and *has not been canceled or set aside*, the tract in respect to which that claim is existing is excepted from the operation of a railroad land grant containing the ordinary excepting clauses, and this notwithstanding such claim may not be enforceable by the

claimant, and is subject to cancellation by the government at its own suggestion, or upon the application of other parties. It was not the intention of Congress to open a controversy between the claimant and the railroad company as to validity of the former's claim. It was enough that the claim existed, and the question of its validity was a matter to be settled between the government and the claimant, in respect to which the railroad company was not permitted to be heard. The reasoning of these cases is applicable here. Jones had filed a claim in respect to this land, declaring that he had settled and improved it, and intended to purchase it under the provisions of the pre-emption law. Whether he had in fact settled, or improved it was a question in which the government was, at least up to the time of the filing of the map of definite location, the only party adversely interested. And if it was content to let that claim rest as one thereafter to be prosecuted to consummation, that was the end of the matter, and the railroad company was not permitted by the filing of its map of definite location to become a party to any such controversy. The land being subject to such claim was, as said by Mr. Justice Miller, in *Railway Company v. Dunmeyer*, *supra*, "excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds."

The above will be seen to refer generally to pre-emption claims and if the decision ended here, I do not doubt that all would agree that an expired filing while of record was as effectual against a railroad grant as one unexpired.

The court, however, then proceeds to analyze the grounds on which the company seek to evade the effect of the filing by one Jones, which is made the basis for holding the lands there in question to have been excepted from its grant, viz:

First, Jones never acquired any right of pre-emption because he never in fact settled upon and improved the tract; second, the land was unsurveyed at the time of the alleged settlement, and the filing was not made 'within the three months after the return of the plats of surveys to the land office,' (10 Stat., 246), and was therefore an unauthorized act; third, that whether the filing was made in time or not, as it was not followed by payment and final proof within the time prescribed, all rights acquired by it lapsed, the filing became in the nomenclature of the land office an 'expired filing,' and the land was discharged of all claim by reason thereof.

Upon the first proposition, the court holds that the acceptance of the declaratory statement by the local officers is *prima facie* evidence of the *bona fide* character of the claim, and that the filing of the statement was, in the strictest sense of the term, the assertion of a pre-emption claim, and when noted upon the records it was officially recognized as such.

It was in this connection that the court states:—

Indeed, this declaratory statement bears substantially the same relation to a purchase under the pre-emption law that the original entry in a homestead case does to the final acquisition of title. The purpose of each is to place on record an assertion of an intent to obtain title under the respective statutes. "This statement was filed with the register and receiver, and was obviously intended to enable them to reserve the tract from sale, for the time allowed the settler to perfect his entry and pay for the land." *Johnson v. Towsley*, 13 Wall., 72, 89. By neither the declaratory statement in a pre-emption case nor the original entry to a homestead case is any vested right acquired as against the government. For each fees must be paid by the applicant, and each practically amounts to nothing more than a declaration of intention. It is true one must be verified and the other need not be, but this does not

create any essential difference in the character of the proceeding; and when the declaratory statement is accepted by the local land officers and the fact noted on the land books, the effect is precisely the same as that which follows from the acceptance of the verified application in a homestead case and its entry on the land books.

In some of the briefs filed on behalf of the grant claimants interested in the decision of the question now under consideration, it is urged that by referring to the decisions of the Department named, the court recognizes and approves of the holdings made therein as to the effect of pre-emption filings, and, as the decision in the case of *R. R. Co. v. Stovenour* (10 L. D., 645), holds that "expired filings" do not defeat the grant, it was not the intention of the court to overrule such holding.

In this connection I desire to call attention to the decision in the case of *Millican v. R. R. Co.* (7 L. D., 85), referred to in said decision of the court.

In that case the land was included within the limits of the withdrawal on general route of 1879 and fell within the primary limits on definite location as shown upon the map filed May 24, 1884.

The land involved was filed for by one Wilson May 2, 1879, prior to the filing of the map of general route. The same person made a second filing on March 3, 1883.

Millican applied to enter the land in 1886, alleging it to have been excepted from the grant by reason of the claim of Edward Wilson. Hearing was duly ordered, and upon the testimony adduced it was found that—

The evidence shows that Wilson built a house upon said land about May, 1879, resided therein and improved his claim for about one year, when according to the testimony of one witness, "he seems to have neglected it;" that upon making said second filing, he returned to said land, cultivated and improved it, and built another house and dug another well; that said second filing is invalid, but the claim under the first filing still of record is good, "except as against another settler," and served to except said land from the operation of the grant to said company.

From the foregoing, it is apparent that the claim of the company was properly rejected, for, at the date of the withdrawal on general route, and also when the line of the road was definitely located, *there was a preemption filing of record*, which had attached to the land in controversy, and the company can not question the validity of said filings. *William H. Malone v. Union Pacific Railway Company* (7 L. D., 13).

It might be here stated that under the early rulings of this Department in the administration of railroad land grants, the exception in favor of preemption claims, found in all the land grants, was construed, in effect, to be a mere saving clause in favor of the individual claimant, and not as excepting the land covered thereby from the operation of the grants, that is, unless the filing was consummated into cash entry it was held not to effect the grant.

In departmental circular approved November 7, 1879, containing regulations concerning railroads, the rulings respecting pre-emption claims are summed up as follows:

2. A pre-emption claim which may have existed to a tract of land at the time of the attachment of a railroad grant, if subsequently abandoned and not consum-

mated, even though in all respects legal and *bona fide*, will not operate to defeat the grant, it being held that upon the failure of such claim the land covered thereby inures to the grant as of the date when such grant became effective.

Under this ruling, therefore, no hearings can be ordered for the purpose of ascertaining the facts respecting the settlement, occupation, improvement of the land, etc., by such pre-emption claimant, for even if such facts were established, still, under the decision, the land inures to the grant.

Under this ruling the great majority of railroad conflicts have been disposed of and the lands shown by the records to be covered by filings, whether expired or unexpired, so long as they were not perfected, have been patented on account of the grants.

This ruling prevailed until the decision of this Department in the case of *Malone v. Union Pacific Ry. Company* (7 L. D., 13), where, for the first time, the *record* of a filing not perfected, was held to be sufficient to defeat the grant in favor of another claimant.

This decision was rendered July 9, 1888. It is true that in the case of *Railroad Co. v. Larson* (3, L. D., 305), and a few other cases, it was held that a pre-emption filing capable of being perfected, defeated an indemnity withdrawal or excepted lands from certain grants, but these cases were not based upon the record of the filing, but upon testimony showing that the pre-emptor had continued to reside upon and claim the land, and was, even to this extent, in conflict with the circular of 1879, before quoted.

I admit that the Stovenour decision, made in 1890, intimated that the claim under the filing expired at the time within which proof was required to be made by law, and ceased to be effective as against the grant unless the party continued in possession, and that this decision has been since followed.

This has been but a few years, and the decision in the Millican case was cited in the Stovenour decision and has never been reversed.

Just here I might say that the decision in the Stovenour case is, to my mind, unsupportable except upon the theory that the filing, uncanceled, defeats the grant.

If the filing expires, or ceases to exist, as against the grant, at the time set under the pre-emption law within which to make proof, then the mere fact that the party continues to reside thereon does not affect the grant, for the right of pre-emption in him is gone with his expired filing, and he can no more initiate a new claim to the land formerly filed for by continuing to reside thereon, than he could to a different tract than that first filed for.

The law allows but one filing. If his claim under his filing is made to depend upon the showing of continued residence, by so holding, we permit the company to question his compliance with law in the matter of residence, which it has been specifically and repeatedly ruled by the courts cannot be done.

The second objection urged by the company to the filing by Jones, was that he failed to file within three months from date of settlement,

but this the court held was a question that could not be raised by the company.

The third objection was that he had failed to make proof within the time required by law.

The court does not pass upon the sufficiency of this objection, but answers it by quoting from the decision of this Department to show that the time has not expired at the date of the attachment of rights under the grant.

In view of this fact it is urged that so far as the principles announced in said decision may embrace expired filings, that they are *dicta*.

Dicta are judicial opinions expressed by the judge on points that do not necessarily arise in the case. If it may be conceded that they are *dicta*, it can not be denied that they are amply supported in the argument of the court, by authority; that they are held as opinions by the unanimous bench. If the opinions expressed are *dicta*, such *dicta* are strong enough to be followed with safety.

I regard the conclusions set out above as more than the mere *dicta* of the court. I rather regard them as adjudications in one view of the case presented. But inasmuch as the final decision in the particular case was rested on a ground which did not involve the direct reasoning submitted, the opinion of the court may technically be called *dicta*; nevertheless, such *dicta* would be usually recognized by all courts as authority.

From a review of the matter, I adhere to the previous decision made, and hold that the land covered by Davis' filing was excepted from the company's grant.

The motion is accordingly denied.

MINING CLAIM—ADVERSE CLAIM—JUDICIAL PROCEEDINGS.

CATRON ET AL. *v.* LEWISHON.

In determining whether an adverse judicial proceeding has been instituted within the statutory period, the Department will not undertake to review an order of a court of competent jurisdiction recognizing the initiation of such proceedings within said period, while the suit so begun is pending within said court.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 7, 1896. (C. J. W.)

It appears by the record before me that Leonard Lewishon filed his application for patent for the Mountain View, Colusa and Grayhorse lode claims and Grayhorse Mill Site, surveys No. 952, A. B. C. and D., in the Santa Fe, New Mexico, land district; that during the period of publication, on April 23, 1895, T. B. Catron *et al.*, claiming the San Pedro placer claim, filed their protest and adverse claim against said entry; that on October 21, 1895, the attorney for Lewishon presented

his affidavit to the local office, alleging that no suit in support of said adverse claim had been brought in any court of competent jurisdiction within thirty days after filing said adverse claim; that he had examined the records of the district court having jurisdiction of the land in controversy on the 23d day of May, and found that no action had been instituted; that a certificate that no suit or action of any character was then pending was prepared for the clerk's signature on the evening of that day with the promise of said clerk that it would be signed the following day; that during the forenoon of May 24, the clerk informed him, that the presiding judge of said district court had directed said clerk to file a declaration in ejectment of said Thomas B. Catron *et al.*, as of the 21st of May, 1895, and that the judge had made and caused to be entered on the record of said court an order, which reads as follows (omitting caption):

It being made to appear to the court that plaintiffs left with the clerk of this court declaration in the above case on the evening of May 21, 1895, and that it was not filed by the clerk for the reason that the plaintiffs did not pay the advance fee as required by law, and that such fee has been paid at this date, it is ordered that the clerk file said declaration as of the date of May 21, 1895. And it is so ordered.

(Signed by Associate Justice.)

May 24, 1895.

It is also stated in said affidavit that the clerk of said court informed this affiant—

that on the evening of May 21, 1895, after he had closed his office, Charles A. Speiss met said clerk upon the street and handed him a declaration in said case and requested him to file the same; that said clerk informed him that he would not file the same until the advance fee required by law was paid. Thereupon Speiss said he would come the next day and pay the same, and the clerk again told him that it would not be filed unless said advance fees were paid; that said Speiss did not come the next day as he said he would, and the fee for filing the same was not paid said clerk until the 24th day of May A. D., 1895, and but for the order heretofore mentioned the clerk would have filed said declaration of that date.

On the 21st day of October, 1895, the clerk of the district court made a certificate, in which he certifies:

That there is now no suit or action of any character pending in said court involving the right of possession to any portion

of the ground in controversy,

and that there has been no litigation before said court affecting the title to the said group or any one of the said claims or any part thereof for over two years last past other than what has been finally decided in favor of the present claimant, Leonard Lewishon, or his assignees, except No. 3579, T. B. Catron *et al.*, v. Leonard Lewishon, which was not actually filed until May 24, 1895, and would have been marked filed as of that date, except for the order of the court, a copy of which is hereto annexed, the fees required by law not having been paid until that date.

The applicants for patent applied to purchase said land, and the local officers, on December 2, 1895, held:

We being of the opinion that said suit was not filed within the thirty days allowed, as we did not consider the papers were filed until the filing fee was paid as

stated in the clerk's certificate, did, on October 22, 1895, dismiss said adverse claim and notify T. B. Catron, attorney for the adverse claimants, of such dismissal, for the reason that he did not commence suit within the time allowed by law.

The local officers transmitted all the papers in the case to your office, together with the appeal of Catron *et al.* Your office by letter of January 17, 1896, reversed the action of the local officers on the following ground:

Whether the suit upon said adverse claim was commenced within the statutory period is the question to be determined, and the decision of that question involves the validity of the order of the court to the clerk thereof, which order is recited above. I am of the opinion that the power to annul and vacate said judicial order is vested by law in the courts of the Territory of New Mexico and not in this office, and until said order shall have been regularly vacated, I am bound to respect it.

Thereupon, the mineral applicants prosecute this appeal, assigning several grounds of error, but on the following the case may be disposed of:

1st. That under the laws of New Mexico suit was not brought within thirty days from the time notice was given said adverse claimants.

2d. The district court of Santa Fe had not acquired jurisdiction of said cause at the time of making said *nunc pro tunc* order of the judge entered in said case, and said order is wholly void.

3d. Said *nunc pro tunc* order was made *ex parte*, and said applicant has not by any summons or other process (up to this time) been brought into said court to plead or answer said complaint, and thereby be given an opportunity by said court to set aside and vacate said illegal order made in violation of the express statutes of this Territory.

(In connection with this specification of errors is presented the certificate of the clerk of said court, under date of February 12, 1896, wherein it is shown, "that there is no return in my office showing the service of any summons or other process upon the above named defendant, Leonard Lewishon, requiring him to appear or plead to the declaration in the above entitled suit.)

The contention of counsel for appellants is, that under the laws of the Territory of New Mexico suit cannot be commenced until the advance fee required by law shall have been paid; that said advance fee was not paid within thirty days as limited by the United States statute in which suit can be brought in support of an adverse claim, and that the court did not have jurisdiction of the cause at the time the order was issued.

By the Compiled Laws of New Mexico (1884), section 1867, it is provided:

The filing in the clerk's office of the petition, declaration, bill or affidavit, upon the filing of which process is authorized by law to be issued, with intent that process shall issue immediately thereupon, which intent shall be presumed unless the contrary appear, shall be deemed a commencement of the action.

Also by section 1907, it is provided:

All suits at law in the district courts shall be commenced by filing a declaration in office of the clerk of said court, etc.

By section 1262 of said statute, and also by Laws of New Mexico (1889), Chap. 69, p. 146 *et seq.*, and Laws of New Mexico (1893), p. 126 *et seq.*, it is made the duty of the clerk of the district court to collect part fees in advance.

The Commissioner of the General Land Office reversed the ruling of the local officers on the ground that the power to annul the judicial order of May 24th, rested in the courts of the Territory of New Mexico and not in his office.

The Department, it would seem, has the power to determine for itself the question of fact in each case as to whether or not action has been commenced within the statutory period, as is indicated in the cases of *Downey v. Rogers* (2 L. D., 707), and *Nettie Lode v. Texas Lode* (14 L. D., 180).

No certified transcript of the record showing the declaration and the entry of filing upon it is in evidence, though this would be the best evidence, yet it is virtually conceded that such declaration has been filed and that the official notation of the date of filing entered thereon is May 21, 1893, which would be within the statutory period. What is asked of the Department in the first instance, is that this official entry upon the declaration showing the date of filing shall be held to be false.

In the cases cited, wherein it was held by the Department that judicial proceedings based on an adverse claim filed out of time, and such proceedings not begun within the prescribed period, do not preclude the allowance of a mineral entry, the fact of filing out of time appeared as a record fact, and required only a computation of the number of days to make such fact appear. These cases are not necessarily authority for doing what this Department is asked to do in this case. It is not so much construction of section 2326, Revised Statutes, or any other United States statute applicable to the case, which is now sought, as it is a construction of a statute of the Territorial legislature in reference to the collection of fees in advance, which applies to all suits brought in the Territorial courts.

The decision invoked is that the judge of the district court has committed error in construing a territorial statute in relation to what constitutes filing or the commencement of a suit in New Mexico under its laws. It is, in effect, a collateral attack upon the judgment of a court of competent jurisdiction.

It has been shown that under the laws of New Mexico, suit is commenced by filing a declaration in the office of the clerk. By another law of the Territory, it is made the duty of the clerk of the district court to collect fees in advance. It may be said then that a suit is commenced when a declaration is filed in the office of the clerk, and that it becomes the duty of the clerk to collect fees in advance.

It appears from the facts as stated, that when the declaration was presented to the clerk, the party was notified that it would not be filed until the fees were paid; that the party promised to pay the fees and

the clerk retained the papers until the fees should be paid. There is no doubt that the handing to the clerk at his office, a paper which is required to be filed in his office, is filed, whether the fact be entered upon the paper by the clerk or not. The entry is a clerical duty imposed by law upon the clerk, with the performance of which duty the party submitting the paper is in no way concerned. It seemed that the clerk treated the paper as filed, subject to the payment of the fees before it would be so entered, for he accepted it and became its custodian. The fact then is that it was handed to him on the 21st, in time, and was treated by him as filed, except on account of non-payment of fees, and if the non-payment of fees be not under the law of New Mexico a condition precedent to the filing, then both in fact and in law, the paper was filed on the 21st.

It may be a condition precedent to filing, but it does not appear to be from the statutes cited; nor do they authorize the conclusion that it is; but rather, that a certain part of the fees are due in advance and it is made the duty of the clerk to collect it. The statute is in reference to the duty of the clerk, and contains no provision declaring the filing nugatory by the non-payment of fees. If it had been intended that the filing should not be legal until the fees were paid, a very few words would have sufficed to make this point clear. If the statute had declared that it was the duty of the plaintiff to pay the fees when he filed his declaration, it would not have made the filing void, but the attorney who filed it would simply have failed to discharge his duty and, presumably, there would have been adequate means of reaching such breaches of duty.

Whether the handing of the paper to the clerk, under the circumstances detailed, amounted to a filing in office in the meaning of the law, need not be now considered, but the judge who made the order directly to be considered, seems to have been of the opinion that it was. That he entertained that opinion is evidenced by the fact that when the clerk failed or refused to file the paper as of the date of May 21st, by which it is to be understood that he failed and refused to endorse the same as filed on the 21st, the judge by an order of his court required him to do so. This order is referred to in some of the pleadings as a *nunc pro tunc* order, but it does not purport to belong to this class of orders and cannot properly be so styled. It does not recite anything which indicates that it is an order which should have been passed on the 21st, but rather that it is an appropriate order as of the 24th, the date it bears. The order would appear to have been made on the complaint of some one, who presumably made it appear to the court that the clerk had received a declaration on the 21st; that it was not filed by the clerk for the reason that the plaintiff did not pay the advance fee required by law, and that it appearing to the court that such fee had been paid by the date of the order, the clerk was ordered to file the declaration as of the date May 21st.

Upon the statement of facts presented, the court was evidently of the opinion that there had been a legal filing of this declaration with the clerk of his court on the 21st; that for an unsatisfactory reason the clerk refused to endorse that filing, and the court then directed it to be done, subsequently to such filing. This may have been an improvident judgment or order of the court, but it is to be presumed that if this is so, and was so shown to the court, the court would on such showing revoke it. It is an interlocutory order which does not purport to dispose of the case; belongs to the class of orders which the court might lawfully make, and to a class from which there is no appeal, under the general rule, until the case, on its merits, is passed upon.

There can be no doubt that the question of the legality of this filing received judicial consideration and was passed upon by the court and held to be legal. The case to all intents and purposes is in court and before a tribunal having jurisdiction of the subject-matter. It is insisted that the order itself admits the fact that the fees might be lawfully demanded in advance and that they were not paid until the 24th, the day after the expiration of the thirty days; and therefore that it proves the want of jurisdiction of the court, and itself falls because of want of jurisdiction.

This conclusion rests upon the hypothesis that the penalty for a failure to pay the lawful fees at the time of filing his paper by a suitor, can be nothing else than to make the filing nugatory and void, and that this results by necessary implication because the statute provides no specific penalty. This evidently is exactly what the judge who passed the order disbelieved, and therefore held that the law provided no such penalty.

Section 2326 Revised Statutes, prescribes the duty of the adverse claimant to commence proceedings within a court of proper jurisdiction, within thirty days, to determine the question of the right of possession. Should he fail to do so, by this statute it is prescribed that such failure shall be a waiver of his adverse claim. But the statute goes further, and prescribes that upon payment of fees and of five dollars per acre for a claim, and the filing of the copy of the judgment roll with the register of the land office, that he is entitled to a patent. Evidently the idea of this statute is, that the court shall determine who is entitled, and while such determination is made upon the contingency of the filing of his proceeding in the court, it is nevertheless the clear intent of this statute that contest of claims of this character shall be determined by a court of competent jurisdiction.

In *Richmond Mining Co. v. Rose et al.*, 114 U. S., 576, it was urged that the court acquired no jurisdiction because fees required by the statute were not paid at the time of the filing, to which the supreme court, on page 583, replies as follows:

What constitutes the commencement of an action in a State court, being matter of State law, the decision of that court on this point is not a federal question, and is not therefore reviewable here.

These propositions also answer the objection of non-payment of fees to the State, which is purely a matter of State concern, and if it could in any manner avail the defendant it must have been by motion at the time, and before demurring or answering to the merits.

The right of this Department, where it is clearly shown by dates that the proceedings were not begun within the given period of thirty days, to proceed with its own ruling on the assumption that there was a waiver of the adverse claim, seems to be settled.

The point of trouble in this case, however, is that it is insisted that the filing was not in time, notwithstanding the fact that the court, by solemn order, when attention was called to the alleged illegal filing, sanctioned it, and assumed jurisdiction, and the effect of holding the order void would be to make a departmental ruling in relation to a proper construction of the statutes of New Mexico, so as to deny to the courts of that State jurisdiction in a matter which they had directly assumed on consideration of the express jurisdictional question.

Whether rightfully or wrongfully, there is a case pending in the district court in New Mexico, to determine the question of right of possession. If there is no jurisdiction the point can be clearly made and decided by the court; if it should not be prosecuted with reasonable diligence to final judgment, we have authority that the Department may then step in and declare that the adverse claim is waived; but where the very question at issue is involved in a pending case and the court has assumed jurisdiction, and an opportunity is afforded the parties to have a judicial decision not only of the question of jurisdiction but of the merits of the case as well, it seems to me that it is now premature for the Department to declare that the court entertaining the case had no jurisdiction.

Your office decision is therefore approved.

RAILROAD LANDS—ACT OF JANUARY 23, 1896.

BROWN v. ANDERSON ET AL. (ON REVIEW).

Under the provisions of the amendatory act of January 23, 1896, an applicant for the right of purchase, accorded by section 3, act of September 29, 1890, to settlers who have gone upon railroad lands with a view to purchasing the same from the company, is not required to show actual residence, if he has enclosed and cultivated the land applied for.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 7, 1896. (C. W. P.)

This is a motion, on the part of Henderson Brown, for review of the decision of the Department of September 23, 1895, in the above entitled case.

The land involved is the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 5, township 14 S., range 7 E., San Francisco land district, California.

There is a full statement of the case in 21 Land Decisions, p. 193, and it need not be here repeated.

The assignments of error set out in the motion for review need not now be considered, in view of the act of Congress approved January 23, 1896, amending the act of forfeiture, in which it is provided:

That section three of an Act entitled "An act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes," approved September twenty-ninth, eighteen hundred and ninety, and the several acts amendatory thereof, be, and the same is, amended so as to extend the time within which persons entitled to purchase lands forfeited by said act shall be permitted to purchase the same, in the quantities and upon the terms provided in said section, at any time prior to January first, eighteen hundred and ninety-seven: *Provided*, That actual residence upon the lands by persons claiming the right to purchase the same shall not be required where such lands have been fenced, cultivated, or otherwise improved by such claimants, and such persons shall be permitted to purchase two or more tracts of such lands by legal subdivisions, whether contiguous or not, but not exceeding three hundred and twenty acres in the aggregate.

In the decision of the Department in the case of *Shafer v. Butler*, on review (22 L. D., 386), it is held that, under the laws, as amended, residence is not necessary to be shown in support of an application to purchase under the third section of the act of forfeiture, and as it was shown in that case that the land had been improved to great value by the parties through whom Shafer obtained possession of the land; and that Shafer settled upon the land with the intention of purchasing the same of the railroad company, and continued the improvement and cultivation of the same, and was in peaceable possession thereof at the time Butler made his homestead entry, it was held that Shafer was entitled to purchase the land under the third section of the act, as amended.

In the case at bar, it is alleged by Henderson Brown in his application to purchase:

That in 1881 the deponent went into possession of the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ Sec. 5, T. 14 S., R. 7 E., M. D. M., and has held possession thereof ever since; that at the time of going into possession of the land deponent purchased the land from parties then in possession who had purchased from six others, and who had applied to purchase said lands from the Southern Pacific Railroad Company as early as 1872. That deponent purchased said lands for a valuable consideration and with the intention of purchasing them from said Southern Pacific Railroad Company as soon as the land should be subject to sale. That deponent has been ready and anxious to purchase at all times since 1881; that deponent has two houses upon said land and has it enclosed with other and adjoining land and has used it for pasture purpose since 1881;

and it appears from the evidence that he went into possession of the land on July 1, 1878, by purchase from John H. Carlisle; that in 1879 he, with other neighbors, put a fence around it; that he used the land for grazing purposes generally, but at different times had cultivated

about seventy-five acres of it; that he had been in continuous possession of the land since date of his purchase; that when he went into possession of the land his intention was to purchase it from the railroad company, and he knew said lands were claimed by said company; that John H. Carlisle had made no application to purchase the land from said railroad company, at date of his purchase of same; that he had applied to purchase no other land under the provisions of said act of September 29, 1890; that he had about twenty-two hundred (2200) acres of land fenced, the possessory right of which he had purchased, including sections 5 and 11 and portions of sections 1, 3 and 9; that he made application to purchase a portion of section 1 from the Southern Pacific Railroad Company prior to September 29, 1890, and made application to purchase from said company the N. $\frac{1}{2}$ and the SW. $\frac{1}{4}$ of Sec. 11, twenty-five years prior to hearing; that there were a three room house, a dairy house and a corral on the land when he purchased it from Carlisle; and that he was in possession of the same at the time E. A. Brown and A. S. J. Anderson were allowed to make their homestead entries.

These facts entitle Henderson Brown to purchase the land under the third section of the act of September 29, 1890 (26 Stat., 96), as amended by the act of January 23, 1896.

The decision of the Department of September 23, 1895, is therefore revoked, and upon the completion of said purchase, the homestead entries of E. A. Brown and A. S. J. Anderson will be canceled.

PRACTICE—REVIEW—RELINQUISHMENT—TRANSFeree.

TENNESSEE COAL, IRON AND RAILROAD COMPANY ET AL.

Affidavits should not be submitted with a motion for review for the purpose of supplying facts that should have formed a part of the case as presented in the first instance.

A transferee whose title is acquired after cancellation of an entry is charged with notice of such action.

The rule that a relinquishment executed after final proof, and after sale of the land, is invalid, can not be invoked on behalf of one who fails to show, under oath, any interest in the land, or that the entryman in fact had complied with the law.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1896. (P. J. C.)

A motion for review of departmental decision of March 6, 1896, has been filed by the Tennessee Coal, Iron and Railroad Company and Joseph Moses.

It appears by the record that John D. Maddox on August 11, 1881, made homestead entry of the SE. $\frac{1}{4}$, Sec. 25, Tp. 17 S., R. 7 W., Montgomery, Alabama, land district, alleging settlement November 15, 1875;

that on November 22, 1881, he made final entry of the same, and receiver's receipt issued therefor. In the published notice of final proof the following names are given as witnesses: Andrew J. Bespey, Andrew J. Vines, Lot V. Vines, and Dorcas Maddox. Andrew J. Vines appeared as a witness, and in answer to the question, "Are you interested in this claim?" says, "No,—and I further swear that the witness Dorcas Maddox is in no way related to or connected with claimant." This witness signed his proof with "his mark," and it is attested by E. K. Fulton. The other witness is described in the body of the proof as "Lot or Latty V. Vines." In answer to the question quoted above, he says: "No, and I further swear that I am the identical Lot V. Vines advertised as a witness for claimant, and further that claimant is of no kin to the witness Dorcas Maddox." His signature, Latty V. Vines, is also by "his mark," but it is not attested. These are the only witnesses whose testimony is in the record.

On August 30, 1882, your office directed the local officers to order hearings in a number of cases including this, the general allegations to be,—want of good faith in making the entry; non-compliance with the law in respect to residence, improvement and cultivation and that the land was not subject to entry by reason of being mineral in character. They were also instructed to confer with a special agent in regard to the hearings. Notice of contest was served, fixing the date of hearing December 13, 1882. The hearing was continued from time to time, until February 9, 1883. Subsequently an affidavit and relinquishment of Maddox was filed. In this affidavit he states that he never resided on, or occupied the land as a homestead; that he entered it under instruction from E. K. Fulton; that he made final proof, but never had the final receipt in his possession, but that it was "in the possession of one Latta Vines, from whom he can not get it." He swears "that he makes this relinquishment of his own free will and accord without the influence of any person or persons, and without the advice of any person or persons whatever." This affidavit, which contains a formal relinquishment, was sworn to February 1, 1883.

Another formal relinquishment was executed by Maddox February 16, 1883.

The record, as made in the local office, shows this: "Feby. 20, '83. Received relinquishment of John D. Maddox." On August 20, 1890, Joseph Moses made homestead entry of the tract, alleging settlement December 18, 1878. Your office by letter of October 17, 1890, on the report of a special agent, of September 18, 1890, held Maddox's entry for cancellation, by a letter addressed to the local officers. In reply thereto, the register states that their records show that on February 16, 1883,

said Maddox executed a relinquishment to the United States, and the same was filed February 20th, 1883, and the same was noted on the records and placed with other papers in the case. We now enclose the relinquishment, and ask if it will be necessary to carry out the instructions contained in your letter "P" October 17, 1890.

By letter of December 10, following, your office advised the local officers that the relinquishment had been received, and on that day Maddox's entry had been canceled on your office records, and that no further action was necessary under your office letter of October 17, 1890.

On August 22, 1894, Moses made a relinquishment of his homestead entry, and on August 24, following, an attorney forwarded the petition of the Tennessee Coal, Iron and Railroad Company and Joseph Moses, dated August 22, 1894, praying for a re-instatement of Maddox's homestead entry for the reasons:

1st. That the claimant John D. Maddox, sold the surface of this land to L. V. Vines on December 11th, 1881, who transferred the same to Joseph Moses on December 11th, 1888.

2d. That claimant John D. Maddox, sold the mineral right from this land to E. K. Fulton on November 26th, 1881, and on December 2d, 1881, E. K. Fulton transferred the same to Thomas Peters.

On July 26, 1882, Thomas Peters transferred the same to the Birmingham Coal, Coke & Iron Company.

The Birmingham Coal, Coke & Iron Company, after a consolidation with the Platt Coal & Coke Company, transferred the same to the Tennessee Coal, Iron & Railroad Company, which company still own all the mineral rights on said land and have continuously paid the State and county taxes assessed on the same.

3d. That at the time, viz., February 16th, 1883, John D. Maddox signed a relinquishment to said land, he did so under duress and under threats made by Special Agent Mabson, as is shown by the sworn affidavit, signed by him, on the 8th day of August, 1891, also the affidavits of William Vines, Jr., and John C. Vines, which affidavits are hereto attached and made a part of this petition.

4th. That at the time, viz., February 16th, 1883, that John D. Maddox signed said relinquishment, he, Maddox, had no right, claim, title, or interest in said land, or any portion of it, to relinquish, and such fact is shown by the records to be known by Special Agent Mabson at that time.

5th. That at the time and several years prior thereto, viz., February 16th, 1883, that John D. Maddox signed the said relinquishment, he in fact had no interest to relinquish, having transferred all of his interest to E. K. Fulton and L. V. Vines, viz., on November 26, 1881, and on December 11th, 1881.

6th. That your petitioners respectfully submit that Joseph Moses who is one of your petitioners, has this day relinquished his homestead entry on said land No. 24420, in order that this petition may be considered and granted, and each of your petitioners, respectfully ask that the homestead entry of John D. Maddox No. 11892, final proof No. 2343, reinstated and patent issue to and in the name of the said John D. Maddox.

"In addition to the statements contained in the attached petition," the Tennessee Company also submitted a statement, that it had no notice of the contest against the Maddox entry, or of the relinquishment filed by him, and "did not until a recent date learn that said land had been re-entered by Joseph Moses." Neither the "petition" nor "statement" is sworn to.

The affidavits referred to as accompanying the petition, three in number, were all sworn to in the month of August, 1891. Maddox states that he made his final proof before the clerk of the county court,

and got his final receipt on the 22d of November, 1881; that he sold the mineral rights in said lands to E. K. Fulton on the 26th of November, 1881; that he sold the

surface of said lands to L. V. Vines (who was one of the witnesses to his final proof) on the 1st of December, 1881. . . . That sometime after he got his final receipt . . . he got notice from the land office at Montgomery that his entry was contested;

that early in 1883 he got a message from a special agent in Birmingham informing him that he "was liable for criminal prosecution for fraud in making his entry"; but if he would "relinquish his entry he would not be prosecuted;" that by reason of this threat he became alarmed, went to Birmingham and made his relinquishment, not knowing that he had no right to relinquish after he had sold the land.

William Vines, jr., says he is a brother-in-law of Maddox; that Maddox told him about this message from the government agent; that he was very much alarmed, and at his request Vines accompanied him to Birmingham, when they met the agent, "who told them that Maddox was liable to criminal prosecution for fraud in making his entry" and that he could avoid the prosecution by relinquishing it, "though Mabson, (the special agent) was told and knew that Maddox has sold all his interest in the land."

John C. Vines, another brother-in-law, says he knows Maddox got the message, and "is informed and believes" that he went to Birmingham and relinquished his entry.

By letter of December 21, 1894, your office refused the application for re-instatement of the Maddox entry, and canceled the entry of Joseph Moses on his relinquishment. Your office decision is upon the grounds, that when Maddox's entry was canceled in local office on February 20, 1883, on his relinquishment, there was no notice on its records of any transfer, nor had the government any knowledge thereof; that the mortgagees, transferees or parties "had no appearance in the case which would entitle them to notice of the order of August 30, 1882, ordering a hearing;" that the petitioners do not submit any evidence that they are *bona fide* purchasers of the land or mineral rights therein; that the failure of Maddox to appear at the hearing and his subsequent relinquishment were a virtual acknowledgment of the truth of the charges, and the entry was thereby properly canceled; that the subsequent investigation of a special agent and action thereon by your office of October 17, 1890 and December 10, following has no bearing on the question at issue.

On appeal your office judgment was formally affirmed, and it was said:

In addition to the reasons assigned by you for refusing to re-instate said entry, it is to be observed that the applicants herein do not aver that Maddox's entry was improperly canceled on the merits of the case, or that he had complied with the homestead law.

The motion for review sets forth fourteen alleged errors. They are stated at great length in argumentative form, and not "concisely and specifically without argument" as required by the Rules of Practice. The motion will therefore be disregarded except as to such points of objection as the Department considers material in disposing of the case.

With the motion for review are filed two affidavits, one by G. F. McCormack, who says that he is the general manager of the Tennessee Company;

that said company has claimed to own, and has a deed to and has paid taxes for a number of years past on the mineral interest of the land (described,) as is shown in the abstract now on file. That the said company purchased the mineral interest in said land in good faith and for a valuable consideration; that said purchase was made for the use and benefit of the company, and that the said company had never sold said mineral interest or any part thereof.

The "abstract now on file" mentioned above is not found in the record.

The other is made by Maddox, in which he swears, "that he resided upon said land and had improvements on it of considerable value, before he made his entry, and that he made his entry in good faith and complied with the homestead laws of the United States." The balance of his affidavit is simply a reiteration of the one filed with the petition wherein he recites his reasons for giving his relinquishment, but in this affidavit he states that he made it under duress.

The evident intention in presenting those affidavits is to overcome the objection made in the decision of your office, affirmed by the Department, that the petitioners did not aver that they were *bona fide* purchasers of the mineral rights in the land, and the decision of the Department quoted above that there was no allegation that Maddox had complied with the homestead law. In other words, on this motion for review, parties are attempting by affidavits recently executed to overcome the objections raised in the departmental decision to the sufficiency of the showing then made, and upon which this proceeding was instituted. These matters are now for the first time presented to the Department. In discussing this loose method of practice the Department said in *Peacock v. Shearer's Heirs* (20 L. D., 213):

Such practice will not be permitted. Every fact alleged in the affidavits accompanying the motion was, or should have been, known to the plaintiff when he made his original motion for re-instatement, and should have then been presented. The Department will not tolerate the practice of parties waiting until it has announced its determination of a given proposition, and then in a motion for review permit them to present, as a specification of error, matters calculated to cover the objections of the Department to the original proceedings. Trials by piecemeal will not be sanctioned.

This language is particularly pertinent as applied to the case at bar. But aside from this, the sworn statement of Maddox in 1896, that he had complied with the homestead law, would not be accepted now to overcome his affidavit made in 1883, when his mind would naturally have been fresh on the subject, that he had not complied with the law.

The prominent features that stand out in bold relief in this case are not in themselves calculated to convince one of that degree of honesty and good faith, which are required in obtaining title to the public

domain. Here is a homestead entry made August 11, 1881: November 15, final proof is made, and final certificate issued November 22, following; November 26, four days thereafter, all mineral rights are transferred to Fulton, a witness to the mark of Andrew J. Vines, a final proof witness. On December 1, nine days after final proof, the surface rights is conveyed to Lot V. Vines, one of the final proof witnesses; on February 1, 1883, the entryman makes affidavit, "of his own free will and accord without the influence of any person or persons, and without the advice of any person or persons whatever," that he did not comply with the law in making his entry, and "that he entered said land under the instructions of one E. K. Fulton;" the petition for re-instatement is not made under oath, and it is to be observed that the Tennessee Company neither in its petition, or "statement" or in any other paper it has filed, gives the date at which it acquired any right to the land. It will also be noticed that the affidavits of Maddox and of the two Vines, his brothers-in-law, filed with the petition, were made in August, 1891; two on the 8th, the other on the 19th, and that they were not presented to your office until August 24, 1894. Thus three years elapsed between their execution and their presentation. It is a singular co-incidence that the statute of limitations for prosecutions for perjury under the United States statute expired practically simultaneously with the presentation of these affidavits. It might be pertinent to ask why this company held these affidavits for this period of time, and made no move toward re-instatement. It says, in its statement, as if for an excuse for not moving in the matter earlier, "that they (the company and Moses) only learned of said relinquishment at a recent date." Moses, when he made his homestead entry,—August 20, 1890,—must have had personal knowledge of the relinquishment, because he got the surface right by deed from Vines, December 11, 1888, under which he claims to have held possession of the land, and he must have known that the record was clear or he could not have made entry. And the company knew at least three years before moving of the condition of the record, if not, where was the necessity of procuring these affidavits?

But aside from all this, there is a statement in the record, made September 12, 1890 by "Wm. R. Barker for Tennessee Coal, Iron & Railroad Company" which shows that the Tennessee Company acquired its alleged right to the land December 31, 1888. It would seem to be idle to attempt to argue that this company was not charged with full knowledge of the condition of the record at that time. The Maddox entry had then been canceled on the record almost five years.

The petition could not be considered in the interest of Moses alone. His entry, so far as the records of the local office show, was a valid one when made and was validly existing when he made his relinquishment. It is difficult to harmonize his prior status in regard to the land with his relinquishment and petition in the present proceedings. But in whatever view it might be considered from a moral standpoint, his

petition for re-instatement of the Maddox entry could not be entertained, for the reason that he has not disclosed any interest in the land. Whatever right he acquired, if any, under his deed from Vines for the surface, was absorbed by his homestead entry, which he voluntarily relinquished.

It is urged that the doctrine announced in *Falconer v. Hunt et al.* (6 L. D., 512), wherein it is decided that, "a relinquishment executed after final proof, and after the entryman had parted with all interest in the land, is null and void," should govern here. But this rule cannot be applied to the case at bar, primarily for the reason that the petitioners do not show any interest in the land under oath, or that there was a compliance with the law on the part of the entryman. In all the cases following the doctrine of the *Falconer* case, it will be found that there was a *prima facie* showing made by affidavits of the interest of the petitioner, and his ability to prove a compliance with the law on the part of the entryman. (See *Hastie*, 8 L. D., *McIntosh Id.*, 614; *Jones*, 9 L. D., 97; *Paul v. Wiseman*, 21 L. D., 12).

The plea of duress cannot be accepted under the circumstances under which the affidavits of Maddox and Vines were presented, and for the further reason that it is presumed that the officers of the land department perform their duties in a lawful and regular manner, and in the absence of any better showing than that submitted here, it will not be assumed that the special agent by threats and intimidation procured the relinquishment.

The motion is denied.

MINERAL LANDS—AGRICULTURAL ENTRY—PROCEEDINGS ON PROTEST.

ASPEN CONSOLIDATED MINING CO. v. WILLIAMS.

A mineral claimant, who in his application temporarily excludes part of his claim in conflict with an adverse agricultural entry, does not thereby absolutely waive and renounce all claim to the land so excluded, but may thereafter assert his right thereto, by way of protest against the proof of the agricultural entryman. In proceedings under a protest against an agricultural entry, in which the mineral character of the land is alleged, the burden of proof is with the agricultural claimant, if the land is returned as mineral in the surveyor-general's report then in force.

The burden of proof rests with a protestant who attacks an agricultural entry on the ground of the "known" mineral character of the land at date of entry, irrespective of the fact that the land may have been returned as mineral after the allowance of the agricultural entry.

Under the supervisory authority of the Department, and in the interest of the government, evidence filed after the close of the hearing, and the appeal from the decision thereon, may be considered.

Land containing gold in sufficient quantities to justify men of ordinary prudence in the expenditure of money and labor in mining developments must be regarded as mineral in character.

The absence of active mining operations will not be held to negative an allegation as to the mineral character of the land, where such land is at the time involved in litigation.

A pre-emption entry, covering land that is mineral in character, and made with the knowledge of prior mineral locations thereon, and of the fact that the land was at such time regarded by many in the vicinity as valuable for the mineral therein, must be canceled as having been allowed for "known" mineral land.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1896. (A. B. P.)

The record in this case shows that on December 4, 1882, John R. Williams filed his pre-emption declaratory statement for the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 12, T. 10 S., R. 85 W., and the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 7, T. 10 S., R. 84 W., Leadville land district, Colorado, alleging settlement April 12, 1881.

On November 25, 1884, upon the application of Williams, your office allowed him to amend his filing so as to embrace the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said Sec. 7, T. 10 S., R. 84 W., subject, however, to any prior valid adverse claim.

On February 11, 1885, Williams submitted his proofs and was allowed to make cash entry for the land covered by his amended filing. It will be observed that his entry embraces only one of the forty-acre tracts covered by his filing as originally made. This he claims was due to the mistake of the party who made out his original papers for him.

It is proper to state in this connection that said township 10 S., range 84 W., was originally surveyed in December, 1881, and plat thereof filed in the Leadville office July 19, 1882, but the same was suspended by your office September 18, 1886.

Two additional or supplemental surveys were made under the direction of your office in 1889 and 1890, respectively, and plats filed, but both were suspended April 24, 1891. The latest and final subdivisinal survey of said township, and of the several sections therein, was made by Deputy Surveyor Edward S. Snell in 1891. This survey was approved by your office December 30, 1891, and plat filed in the local office at Glenwood Springs February 8, 1892. By this survey the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section 7 was found to contain less than forty acres, and the same has since been designated as lot 4.

The Aspen Consolidated Mining Company—a body corporate—is the owner of all title or rights that pertain to the Fowler, Fields and Lux placer mining claims, which appear to have been located and duly recorded by the original owners in May or June, 1883. These claims are situated along the Roaring Fork River, and include, to the extent of their length, the entire bed of the river except at a few places in its meanderings where there are sharp curves or bends. They conflict with the Williams entry to the extent of about twenty-eight acres. This conflict embraces a portion of the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ (now lot 4), Sec. 7, which was covered by Williams' original filing, and also a por-

tion of the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 7, not within his original, but within his amended filing.

On March 4, 1891, the said company filed in the local office at Glenwood Spring its protest against the issuance of patent to Williams, wherein, after setting forth the existence of said placer mining claims, and the conflict, substantially as just stated, it is alleged, in effect:

(1) That the land embraced by the said conflict is not agricultural but placer mining ground; and

(2) That Williams' filing and entry were not made in good faith to obtain the land for agricultural purposes but in fraud of the pre-emption law for speculative purposes.

On November 23, 1891, before said protest was acted upon by your office, the said company filed in the local office its application for patent embracing the entire area of said placer claims, and notice thereof appears to have been duly published and posted.

On January 23, 1892, your office ordered that a hearing be had for the purpose of determining whether the land embraced in said conflict was known to be mineral in character at the date of the entry by Williams.

The hearing did not take place, however, until March 20, 1893, and was not concluded until nearly a month later. In the meantime, to wit, August 18, 1892, the company filed its application to purchase the land embraced in said placer claims, expressly excluding, however, "temporarily . . . pending the determination of the titles" to the various tracts involved, under hearings already ordered and others applied for, the land within the Williams' conflict, and also all other conflicts disclosed by the survey and plat of said placer claims accompanying the said application, and also the original application for patent. The application as thus presented was allowed and entry was thereupon duly made of the area not in conflict.

Under date of August 23, 1893, the local office reported the result of the hearing and their finding upon the evidence, which, after a lengthy discussion of the case in various stated aspects, is, in effect, that the land in controversy was not at the date of Williams' entry, or prior thereto, of any value for placer mining purposes, but is valuable for agricultural purposes. And they thereupon recommended that the entry of Williams be approved and passed to patent, and that the protest of the plaintiff company be dismissed and its entry canceled for failure to establish the mineral character of any of the land embraced in the placer locations. This, though the issue related to the character of the land in the Williams conflict only. Other recommendations were made which are not material to the issue.

Upon appeal from said finding, your office, on May 21, 1894, affirmed the same upon the question as to the character of the land, and held further that the plaintiff company, by its said temporary exclusion of conflicts, as stated, must be considered as having waived and abandoned all right, title or claim to the excluded tracts.

At the hearing the burden of proof was placed upon the company against its protest, and that view was sustained by your office decision.

The case is now before the Department upon appeal by the company from said decision.

It is not deemed material that the several specifications of error—eight in all—contained in the appeal, should be here set forth in detail. It is sufficient to say that they, in substance, deny the correctness of said decision in the three following essential particulars:

- (1) In respect to the said temporary exclusion of conflicts.
- (2) In placing the burden of proof upon the company; and
- (3) In affirming the finding below upon the question of the character of the land.

These several assignments will be considered in the order stated.

I. It is proper to state in connection with the first question thus presented that on July 21, 1894, counsel for Williams filed a motion to dismiss the said appeal on the alleged ground that in view of the effect given by said decision to the company's application to purchase, it had become a protestant without interest, simply, and therefore was not entitled to the right of appeal. This motion your office overruled, August 25, 1894, upon the stated ground that, even though the exclusion of conflicts operated *ipso facto* as the relinquishment by the company of all right to the excluded tracts, yet such relinquishment could serve only to relegate the company to its possessory rights (if any it had) by virtue of the locations under which it claims; and therefore the interest it asserted was such as entitled it to the right of appeal. The motion has been renewed here upon the same grounds urged before your office.

This whole question was recently considered and passed upon by the Department in the case of the Aspen Consolidated Mining Company v. John Atkinson, decided January 4, 1896 (22 L. D., 8).

In that case it was held, in substance, that a mineral claimant, who in his application to purchase temporarily excludes part of his claim in conflict with an adverse agricultural entry, does not thereby absolutely waive and renounce all claim to the tract excluded, but may thereafter assert his right thereto by way of protest against the proofs of the agricultural entryman.

That case was similar to the present one in respect to the question now being considered, and applying here the rule there announced, it follows that your office erred in holding that the stated temporary exclusion by the company from its application to purchase operated as an abandonment or relinquishment of all right or claim to the land so excluded. In addition to this, the application to purchase on its face clearly shows that no such relinquishment or abandonment was intended or contemplated by the company, but that the purpose was to obtain title to that part of the land as to which there was no dispute, without waiving any rights the company had with respect to the

disputed tracts; and it would therefore work great injustice to the company to give to its application an effect wholly different from that intended, and yet rigidly hold it bound thereby with no right of amendment. It is unnecessary to discuss the question as to the correctness of the position taken by your office in allowing the appeal, inasmuch as the motion to dismiss must, in view of what has already been said, be disallowed.

II. The burden of proof.

It appears from the records of your office that in or about the year 1882 the land in said township 10 S., range 84 W., was returned by the surveyor general as "rocky and mountainous," and the soil in and around section 7, in said township, as "third rate." This return remained in force at the date of the Williams entry.

By a later survey, however, namely, that made by Deputy Surveyor Snell, as aforesaid, the lands in the valley of the Roaring Fork in and around Aspen were returned as mineral, and the lands embraced by, and in the immediate vicinity of, the placer claims now under consideration, were stated to be valuable for placer mining and rich in placer gold. This return also shows that it is based upon a personal inspection of the land by the deputy surveyor who made it. The plat of this later survey was not filed in the local office, as we have seen, until February 8, 1892, after a hearing in this case had been ordered. It is worthy of note, however, that at the date when the hearing was ordered, all former surveys of said township had been suspended, and there was, therefore, at that date, no effective return of the land in existence. The later mineral return was the only one in force at the date the hearing took place.

Of course, if the former non-mineral (hardly agricultural) return had been still in force at that date, there could be no question that the burden of proof was properly placed upon the company in this case. But such was not the fact. That return had not only been suspended, but the records of your office disclosed the later mineral return.

In the decision complained of it was held, in effect, that said later return of the land as mineral, made subsequent to the date of Williams' entry, could not affect the question of the burden of proof. This view is apparently based upon the idea that, inasmuch as the question whether the land was known to be mineral at the date of said entry is the main issue involved, the burden of proof should be determined by the returned character of the land as of that date. Whether based upon such premise or not, the conclusion does not appear to be a sound one.

It is undoubtedly true that the main issue involved is, whether the land in question was known to be mineral at the date of Williams' entry. This issue, however, is presented in a twofold aspect:

- (1) As to the character of the land; and
- (2) If mineral, was it known to be such at the date of said entry?

In its first aspect the issue on behalf of the protesting company would unquestionably be supported by any evidence tending to show the present mineral character of the land, for the simple reason that if mineral now, it has been so for ages, and was so at the date of Williams' entry.

The mineral return which accompanied the Snell survey, and which was the only return in force at the date of the hearing, constituted, therefore, a *prima facie* showing that the land was mineral in character, as well at the date of Williams' entry as at the date when the return was made; and in view thereof I am clearly of the opinion that it rested upon Williams to overcome by proofs the effect of that return, and the burden was therefore upon him to show its incorrectness. The authorities are numerous upon the proposition that the returned character of land establishes a *prima facie* showing which places the burden upon the party who claims the land to be of a different character. They need not be here cited.

The second aspect of the issue is entirely different from the first, and presents a different state of facts. Here the record of the entry made by Williams, and the proofs upon which the same is based, constitute a *prima facie* showing in his favor, which is not affected by the subsequent return of the land as mineral, and even though he should fail to establish the non-mineral character of the land, it would still rest with the protesting company to show that its mineral character was known at the date of his entry. If he is found to have successfully carried the burden placed upon him by the surveyor's return classifying the land as mineral, the controversy would be thereby ended in his favor without more saying. If, however, he is found to have failed in this, it will still remain to be determined whether the land was known to be mineral at the date of his entry, and upon this aspect of the main issue the burden is shifted from Williams to the company. I am therefore of the opinion that your office erred in placing the burden of proof, without qualification, upon the protesting company.

III. Was the land known to be mineral at the date of Williams' entry, February 11, 1885?

As already suggested, this is the main issue involved in this case. Its twofold nature has been explained, and in view thereof it is to be borne in mind that in considering the evidence upon the question of the character of the land the burden of proof rests upon the entryman Williams.

The testimony of a large number of witnesses was submitted at the trial below on behalf of each of the contending parties. The record, though already voluminous, has been considerably added to by the filing of additional evidence by each party against the objection of the other, since the appeal was taken. For the consideration of this additional evidence the supervisory authority vested in the Secretary of the Interior in such matters is invoked.

In view of the standing of the government as an interested party in all cases like the present one, and the consequent obligation resting upon the Secretary, as the head of the Land Department (*Knight v. U. S. Land Association*, 142 U. S., 178-181); and also in view of the magnitude of the interests involved in this case, it has been determined to consider all the evidence, whether submitted at the trial below or filed since the appeal.

It should be stated in this connection that the record is burdened with a great mass of evidence of which a very large part has no direct bearing upon any of the issues. Much of this irrelevant matter results from insinuations freely indulged in throughout the entire progress of the hearing, against the character of the opposing parties and witnesses, the only effect of which has been to engender a feeling of bitterness which is to be regretted. Such testimony, as a general rule, can serve no good purpose, and much valuable time and labor would be saved by a consistent endeavor in all cases, to confine the evidence to the questions at issue. The whole mass, however, has been gone over and examined with care, and neither time nor labor has been spared in the endeavor to arrive at the facts of the case.

For the entryman Williams the testimony of himself and fifteen others was submitted at the trial below. From his own evidence it appears that he is a miner by occupation, and that before going to Aspen he had drifted around in Montana and Wyoming, mining and prospecting for six or seven years; that he prospected around Leadville, Colorado, for three or four weeks immediately prior to going to Aspen, where he arrived in the spring of 1880, at which time the place was a small mining settlement of less than one hundred people, only about thirteen of whom had been there during the previous winter; that at that time it was not known in what formation the mineral was to be found and no mining was carried on, but the people "were mostly prospectors, prospecting for mines;" that he went upon his pre-emption claim in June, 1880, and remained there about three months, living in a tent; that he then left the land and went up to the head of Difficult Creek and up Castle Creek, Maroon, and about Ashcroft, and spent most of his time prospecting for mines; returned to the land in the fall and put a stake on it, but had not then made up his mind to take it, and did not do so until the spring of 1881, and about June of that year he brought his family on from Pennsylvania, and settled on his claim; that there was then a shaft being sunk on the J. C. Johnson mining claim about one thousand feet from the exterior boundaries of his pre-emption, and mineral was discovered therein about July 1, 1881; that he lived in Aspen during the winters of 1881-2 and 1882-3, and on the land during the summers and during the winter of 1884 following, and cultivated portions of the same in potatoes and various kinds of garden vegetables during those years, and in 1884 ran a dairy on it and did quite a large business that year in selling dairy products, and each year he sold produce from the ranch, as he called it.

He is acquainted with the placer claims in question—had heard of them in 1883 or 1884. Had placer-mined in the Black Hills of Dakota and in Montana and prospected in Colorado before going to Aspen; that he has prospected the Roaring Fork, but found nothing to justify the location of these claims, and had panned there before taking up his agricultural claim but got all told only about eight or nine colors, and they were found down near the mouth of the Maroon. He also panned the ground covered by these placers in 1892, with Hooper, Herrick and others for the purpose of preparing affidavits to be used by the Mollie Gibson Company against these placer people; that he panned six or seven days and got only four or five colors; that he had also very recently panned the ground in conflict here and failed to get a color. He says that no portion of the placer claims is valuable for placer mining purposes, and there is no gold in them; that his pre-emption claim is worth from two hundred to three hundred dollars per acre for agricultural purposes, but has no value for placer purposes at all; that he had made a living there, had a dairy there, had sold over two thousand dollars worth of potatoes in one year, and had made considerable money there. He estimates the entire product of his ranch for the years 1881 to 1885 at \$5,000. The altitude of his claim is between seven and eight thousand feet above sea level.

He further states that there were no improvements of any consequence upon the ground covered by the placer claims in 1883 when they were located; that the Aspen district is a mineral country, but there is no mineral around where the ranches are; that the J. C. Johnson mine, near his claim, is now a rich, paying mine, that the Cowenhoven Tunnel is situated on the easterly forty acres of his claim for the distance of about one thousand feet; that generally speaking the richest pay in placer mining is found at bed-rock, but the formation of the Roaring Fork is not favorable for the discovery of gold by placer mining, and says, "there is no gold there no matter what it looks like;" that he is interested around Aspen in the Schiller, the Oro, the Branch, the Mint, and the Tenderfoot mines; the Sunday, and the Alva Adams; the Cowenhoven Tunnel, and the Pride of Aspen; and in the Legal Tender, Mount Hope and Gavin—a group of mines—in the Independence District; that there are gold mines, both placer and lode, at Independence along the Roaring Fork, about eighteen miles above Aspen, embracing between two and three hundred acres, owned by himself and one R. J. Bolles, the latter being also one of the owners of the Mollie Gibson mine; that he was interested in those Independence mines from the time that Bolles became interested, and that may have been as early as 1886, and had shipped ore from them that ran one hundred dollars in gold to the ton; that there are paying mines in the vicinity of the easterly lines of his pre-emption claim, one of them being the Mollie Gibson, about five or six hundred feet distant, which is one of the most valuable mines in the world, but was in debt when he proved up in

1885; that the Smuggler, about two hundred feet distant, is a mine now but was not in 1835; that he visited the Smuggler shaft in 1880, and was aware of its workings when he took up his pre-emption, but never heard of the Mollie Gibson until 1884; that the Roaring Fork River is a winding stream such as would form riffles and bends calculated to catch gold carried from the veins above.

The other witnesses for Williams are, Lee Hayes, J. W. Atkinson, D. W. Brunton, T. O. Clark, J. E. McClure, J. W. Elliott, Peter Lux, J. D. Hooper, L. J. Herrick, J. J. Warnock, Daniel George, D. R. C. Brown, D. K. Hessong, Andrew M. MacFarlane and L. C. Welman. The testimony of nearly all of them is generally to the effect that the land embraced in the Williams entry and the placer claims is wholly valueless for placer mining purposes, but is good agricultural land, and they variously estimate its value for agricultural purposes at from \$100.00 to \$500.00 per acre, its close proximity to the markets being one of the principal elements considered in their estimates. The soil is shown to be a black sandy loam from six inches to four or five feet in depth, underlaid with large deposits of boulders, gravel and sand. Portions of the Williams entry are shown to have been cultivated to potatoes and various kinds of vegetables and to have produced well. Wheat and oats also to a limited extent appear to have been raised upon it. It is admitted, however, by nearly all the witnesses that though land may be agricultural, that fact is no evidence that it may not contain mineral.

Brunton was introduced as a mineral expert. He describes the Roaring Fork valley as having been formed by glacial action, and claims that by reason thereof it is not a place where placer deposits are likely to be found. Indeed, he avers that such deposits are almost unknown in valleys formed by such action. Other witnesses, however, and among them several practical miners, described the Roaring Fork as a valley in which the indications are all favorable to placer mining. It also appears that Brunton, together with Atkinson, Clark, McClure, Elliott, Lux and Hayes, about two weeks before giving their testimony, examined all the land embraced by the placer locations, spending parts of several days in the work. They claim to have thoroughly panned the ground, and although they found gold in small quantities at various places, they discovered none on the land in conflict, and none anywhere, they say, of sufficient consequence to justify the expenditure necessary to placer mining; and they state, most of them in positive terms, that the land is wholly valueless for placer purposes. Brunton appears to be interested in various mining enterprises and is the General Manager of the Cowenhoven Tunnel, but upon being asked whether he is interested in it, says he is not a stockholder, and simply gets a salary as manager.

Lux was one of the original owners of the placer claims but sold out early in the action.

Of the other witnesses, Hooper, Herrick, Hessong and Warnock appear to have examined the land in the placer locations with Williams in June, 1892, for the purpose of becoming witnesses for the Mollie Gibson Mining Company in a controversy between that company and the Aspen company. They admit having been employed by the Mollie Gibson company and that they were well paid for their services. They did some panning and discovered some colors of gold, but say, in substance that the land is far more valuable for agricultural than for placer mining purposes. Brown, MacFarlane and Welman testify from a general knowledge of the land that it is very valuable for agricultural purposes, but worth nothing for placer mining. Brown is especially severe in his denunciation of the placer claimants and shows considerable bitterness of feeling towards them. He declares that the ground in the placers, and in the Williams ranch, "for mineral purposes is of no value at all."

The remaining witness, George, was one of the original owners of the George placer, adjoining the Fowler, and subsequently became interested in the latter. He retained his interest until 1889, when sale was made through his co-owner Fowler to the Aspen Company. Notwithstanding his connection with these claims, he says they have no placer value.

From the testimony for the Aspen Company it appears that the Fowler, Fields and Lux placer mining claims were located, surveyed and marked upon the ground and notices duly recorded in May or June, 1883, at which time Aspen was still a small village. A number of persons were originally interested in the claims and in the Van Cleve and George placers, located about the same time, among whom was D. D. Fowler, who claims to have discovered mineral in the land as early as 1881. They were surveyed for patent in 1890-'91 by United States Deputy Mineral Surveyor John H. Marks, who says in his field notes that the survey "is identical with the respective locations" as originally made. The surveyor general's certificate filed in the company's application for patent shows that more than the requisite amount of annual assessment work had been done upon the several locations up to that date, and that such work inured to the benefit of all the claims.

Speaking of the development workings upon the claims, Deputy Mineral Surveyor Marks in his report says:

By these developments it was found that the auriferous ground or placer deposit was one continuous strata going deep under the bed of the river throughout the entire claim.

The witnesses who testified for the company on this point are, Carl Spangler, D. D. Fowler, William Mc. Wilson, J. W. Calvin, David Welch, Samuel Martin, Josiah Tippet, Theodore Krauss, Thomas F. Harkins and Louis Zahl. Their testimony is based upon personal examination and is generally to the effect that the altitude of the land

is too high for agricultural purposes, and that all the surface indications, as well as discoveries of gold made in prospecting the same, are favorable to placer mining and show that there are rich deposits of placer gold at bed-rock.

Fowler is an experienced placer miner. Says he has prospected the ground time and again all over the river bottom and in a hundred or more other places, and always found gold; that he first discovered the gold in 1881, but made no locations until 1883. Several attempts were made by the original locators to sink shafts to bed-rock, but quick-sand was encountered, and for lack of means to properly carry on the work they failed. He says he has no doubt of the existence of rich deposits of gold in these claims at bed-rock, and that what is needed is sufficient capital to properly develop and mine the same.

Spangler is the President of the Aspen Company. He went to Aspen in the spring of 1889 before the purchase by his company of these claims, and spent a week examining and prospecting them. He required Fowler to pan the ground at such places as he directed, some fifty or a hundred pans or perhaps more, and says they obtained a great many parts of gold, enough to satisfy him that gold existed in the ground in paying quantities. He had some of the samples taken by him tested, and upon finding them to be gold he made a report favorable to the purchase of the claims by his company.

Wilson, Calvin and Welch examined the claims together in March, 1893, and say they discovered gold in them sufficient to justify a prudent man in expending money to mine and develop the same to bed-rock; that they are located favorably for placer mining upon a large scale; that they panned the ground thoroughly, including six or eight places on the conflict with the Williams entry, and got colors there. At least two-thirds of the pans produced colors, the largest product being sixty or seventy-five colors to the pan. They also took a sack of dirt at haphazard from the claims which they securely kept, and a portion of it was afterwards panned in the local office during the progress of the hearing and disclosed, according to the testimony of Williams, twenty-three colors of shot gold. Other witnesses counted more than twenty-three colors.

These three men appear to be above reproach and thoroughly reliable. They are about the only witnesses, however, against whom some aspersions have not been cast in this case. Wilson is a practical miner. They say the sack of dirt was taken at a point selected by themselves and just as deposited by nature and was kept in that condition until panned in the local office. The question is raised as to whether this sack of dirt came from above or below the mouth of Castle Creek, which empties into the Roaring Fork below the land in controversy here. The evidence on this point is meagre, but shows that the dirt came from a point a short distance above the county bridge. This bridge is shown to span the Roaring Fork a short distance above the mouth of Castle Creek.

Harkins and Tippet, both practical placer miners, say the land is of drift or wash formation, composed of gravel and black sand, and is placer ground favorably situated for placer mining, with ample supply of water. Tippet further says that he found plenty of quartz there as good as he ever saw, and a great deal of black sand. He thinks the supply of gold for these placers has come from the head of Difficult Creek, where he says there are leads of iron quartz from which he has recently taken assays that netted over two ounces of gold. Other witnesses say that the principal sources of supply are the gold veins or lodes at Independence, about eighteen miles up the river, as to the existence of which there seems to be no controversy.

Martin saw the panning in the local office and testifies that he has found similar colors and larger ones on these placers; that he has panned the ground and has gotten as many as thirty-six colors of gold to the pan and has found lots of fine shot gold. Zahl is a jeweler, who tested the samples taken from the land by Spangler and says he found them to be gold. Krauss is a chemist and assayer, who being in Aspen on a visit in 1885 says he examined the claims for Fowler, and the result showed them to be valuable placer grounds; that he assayed some of the metal taken by himself from the placers by the panning process, and it figured out fifty cents worth of gold to the cubic yard.

A certified copy of the return by United States Deputy Surveyor Snell of townships nine and ten—the latter embracing the Williams entry and these placers—which accompanies the report of his said survey thereof (1891), was filed by the company. The following extracts bearing particularly upon this controversy are taken from that return:

In the valleys is found a rich deep alluvial loam susceptible of producing heavy crops of all vegetables and cereals with irrigation. Practically all of the valley lands have been located and filed upon by people contemplating tilling the soil or with a view to secure lands fabulously rich and valuable for mineral, both placer and other deposits Placer deposits were first discovered along the Roaring Fork in township ten in 1882, since which time mining interests have steadily advanced and numerous deposits of mineral both placer along the river, and veins in the mountains to the southwest, have been discovered and developed, till now these townships embrace a region of mining activity unparalleled in the State. Among the many developments and enterprises here, the project to wash the entire bed of the Roaring Fork River for a distance of several miles is especially worthy of note.

The river in its course through these placer grounds described in my notes, flows in a bed some eighty feet below the general level of the valley, and is within thirty feet of bed-rock as is shown by the extensive improvements on the placers, which however have been carried only to such an extent as to prove beyond a doubt the value of the mineral deposits embraced thereby I made a personal test of these strata in several places along the river, and was thereby convinced of the real worth of the lands for the purpose claimed. I was advised that it was the intent of the company controlling these claims to put in a complete system of dams, flumes and pipes for hydraulic mining in the near future. The history and record of placer mining along California Gulch near Leadville, to which this case is analogous, will surely justify such an expenditure of money.

It is further shown that after the examination made by Spangler as stated, the Aspen Company people sent an attorney from Washington at a cost of eight hundred dollars, including expenses, to investigate the title, and upon his report that the title appeared of record in good shape, the claims were purchased at a price of about \$14,000; that the Aspen Consolidated Mining Company was thereupon organized and the title conveyed to it; and the company has since expended about \$15,000 on these claims in trying to clear up the title and in other ways. It also appears that there exists in Aspen considerable bitterness of feeling against the company, presumably due to its efforts to perfect its title against various and sundry conflicts. Spangler states that he was unable on account of this feeling to obtain the attendance of witnesses he otherwise could have gotten. Zahl says that upon the occasion of one of his visits at Aspen to have assessment work done he was advised to stay away from the claim or his life would be in danger.

It further appears that in July, 1887, the then owners of these and the George and Van Cleve placer claims, among whom was the witness George, acting for himself and two others, sold and conveyed to the D. and R. G. R. R. Company the right of way for its road-bed through the claims for a consideration of \$1,425 cash.

From the evidence filed since appeal it appears that the entryman Williams, on February 19, 1892, sold and conveyed to David R. C. Brown (the same Brown who was a witness at the hearing) the easterly forty acres of his entry, "together with all the improvements upon said land situate," for the stated consideration of \$110,000, and, on February 23, 1892, said Brown conveyed said forty acres of land and improvements to one Joel T. Vaile for the consideration of one dollar; that under a charter of the last mentioned date, but not recorded until June 9, 1893, the Free Silver Mining Company was organized with a stated capital of \$5,000,000, with the said David R. C. Brown as its President, one of its stated purposes being "to acquire, sell, lease and operate mines and mining properties bearing gold and silver" and other metals, in the State of Colorado; that on July 1, 1893, said Brown and Vaile by their joint deed conveyed said forty acres and improvements to said Free Silver Mining Company for the consideration of one dollar, and on the same date said company by its said President executed a mortgage upon said forty acres and improvements, excepting a small portion in conflict with the Emma Lode mining claim, to secure its bonds for a loan of \$100,000 to be used in the purchase of machinery and in the development of said land as mining property. It will be remembered that the Cowenhoven Tunnel, of which Branton is the General Manager, is situated on this forty acre tract; also that Williams testified at the hearing that he was then interested in it, although it now appears that he had previously conveyed the property away. His said deed to Brown was not recorded until June 7, 1893, after the hearing had ended.

It further appears that by deed of March 30, 1895, the Free Silver Mining Company conveyed to the Smaggler Mining Company a portion of said forty acres, probably about one-half thereof or less, for the consideration of \$25,000 cash, and the further sum of \$50,000 to be paid out of the returns from ores to be extracted therefrom; and that by contract of the same date, between said companies, it was agreed, among other things, that the former company should speedily sink a working shaft upon the premises to the depth of twelve hundred feet, and that upon certain stated terms the latter company should have the use thereof in the development of its said purchase.

On June 24, 1895, counsel filed the affidavit of Williams, Brunton, Hessong, MacFarlane and Atkinson, in substance reiterating their views expressed as witnesses, relative to the character of the land, and further stating that no assessment work was done on the placer claims for the years 1893 and 1894; and also the affidavit of James M. Downing to the effect that no notice in lieu of assessment work for those years had been given. Further affidavits of Williams and Brown to the effect that the former has no interest in either the Free Silver or Smuggler mining companies were filed December 4, 1895. Later still the affidavits of said Williams and Brown to the effect that the actual consideration of the deed of February 19, 1892, was \$20,000, instead of \$110,000, were filed; and also the further affidavits of Brunton and Brown, apparently in explanation of the various transactions of the Free Silver and Smuggler mining companies relative to the said forty acres of land and of the location of the Cowenhoven Tunnel thereon. Brunton states in this his last affidavit that "he is one of the original projectors and owners of the Cowenhoven Tunnel," although in his testimony he denied being interested therein except as General Manager.

Such is believed to be a fair resume of the evidence upon this branch of the case. In view thereof I am unable to escape the conviction that the land in controversy contains valuable mineral deposits such as the mining statutes declare to be "free and open to exploration and purchase." There can be no question that gold has been discovered on these claims, nor do I think there can be any reasonable doubt upon the whole evidence that it exists in sufficient quantities to justify men of ordinary prudence in the further expenditure of money and labor in their development (*Castle v. Womble*, 19 L. D., 455). Considerable money and labor were expended by the original owners, who appear to have been men of ordinary prudence, and much larger expenditures have been made by the persons composing the Aspen company, who appear to be business men of character and standing. All parties admit that in placer mining the richest deposits are generally found at bed-rock; and in this case the heavy preponderance of the evidence points, in my judgment, irresistibly to the conclusion that the working and development of these claims will disclose valuable deposits of mineral, and that in this respect the locations are such as are entitled to

the protection guaranteed by the mineral laws. True, no active mining operations have been carried on by the company since its purchase, and much is attempted to be made of this fact. The record discloses, however, that nearly the entire claim is covered by conflicts, and that, so to speak, almost every foot of the ground has been or is being stubbornly contested. Under such circumstances it would seem impossible for the company to carry on active and expensive mining operations until the conflicts have been adjusted. Active mining operations are not essential in order to establish the mineral character of land (*Johns v. Marsh*, 15 L. D., 196), and such a requirement under the circumstances of this case would be wholly unreasonable.

The good faith of Fowler, one of the original owners, has been attacked, and, also, to some extent, that of the present owners. The principal assaults have been made upon Fowler. His evidence, however, does not stand alone, but is abundantly supported by other witnesses and completely sustained by the reports and field notes of two deputy surveyors, as we have seen, based upon personal tests and examinations. The claims were located at a time when Aspen was not a town of any consequence, and they appear to closely follow the bed of the river. It seems unreasonable, therefore, that they could have been taken up for other than mining purposes.

There is no evidence to support the insinuations indulged in by some of the witnesses—Brown especially—to the effect that the present owners purchased the claims with the view to obtaining the valuable improvements thereon.

These charges and insinuations by Williams and Brown cannot have much weight, in view of their testimony at the hearing that the whole of the former's entry is agricultural land and of no value at all for mineral purposes, while at the very time they were so testifying there was in existence, but kept from the public records, the aforesaid deed of February 19, 1892, conveying forty acres of the land at an enormous price to be used for mining purposes. Williams also testified at the trial that he was then interested in the Cowenhoven Tunnel, notwithstanding the existence at that time of his said deed conveying to Brown the forty acres on which the Cowenhoven Tunnel is located, "together with all improvements;" and on November 30, 1895, he made an affidavit to be used in this case wherein he says that since said conveyance he has had no interest whatever in said forty acres of land or any part thereof. Brunton, another witness for Williams, to whose evidence considerable importance is sought to be attached, contradicts his own testimony relative to the Cowenhoven Tunnel, as we have seen, by an affidavit recently filed under the changed condition of things.

Considerable evidence was introduced upon the question of the compliance with the law by the mineral claimants in various and sundry particulars, and especially in respect of the annual assessment work required. That question, however, is not material to the present con-

trovery, inasmuch as it could not avail the agricultural entryman, even if it were shown that there was a failure in these respects. They are matters, so far as this case is concerned, between the government and the mineral claimants.

The evidence also discloses the existence of extensive improvements upon these placer claims estimated by some of the witnesses to be of great value. But few of these improvements are upon the land here in controversy, and none of any material consequence is shown to have existed at the date the placer claims were located and the locations recorded. They must be considered, therefore, as having been erected with full notice of these locations, and their existence cannot affect the question here.

A careful consideration of the whole record has produced the conviction that the land in conflict between the placer claims and said agricultural entry is mineral in character, and I must therefore so hold. No other part of the Williams entry, however, is in controversy in this case.

The only remaining question to be determined is, whether the land was known to be mineral at the date of Williams's entry. Here, as we have seen, the burden is on the protesting company.

The evidence on this point is that mineral was discovered in the placer claims, and they were located and their boundaries surveyed and marked on the ground and the locations recorded in 1883. The field notes of Deputy Mineral Surveyor Marks show that his subsequent survey of the claims (1890-'91) was based upon and is identical with the original locations.

Among the original locators were Lux and George, two of the defendant's witnesses. Of his other witnesses Herrick says he is acquainted with the river bed along where "these placers were staked out," and he thinks he first heard of the claims in 1883. McClure says he heard so much talk about them in 1883 that he went and prospected them for his own satisfaction. Atkinson says he heard in 1883 of gold being discovered in the claims, and "saw them working there." Williams himself says he heard of some work being done on the placer claims in 1883 or 1884, and "seen them do some work there at that time." Other witnesses testify as to the known existence of the claims in 1883 and 1884, and also as to gold having been discovered in them.

As against this showing nothing is presented by the record except the evidence denying the mineral character of the land, which, of course, involves a denial that it could have been known mineral land.

In the case of *Noyes v. Mantle* (127 U. S., 354) it was held by the supreme court that:

Where a location of a vein or lode has been made under the law, and its boundaries have been specifically marked on the surface so as to be readily traced, and notice of the location is recorded in the usual books of record within the district, we think it may safely be said that the vein or lode is known to exist, although personal knowledge of the fact may not be possessed by the applicant for a patent.

. . . . The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the applicant with the existence of the vein or lode.

While the court in that case had under consideration the location of a lode or vein, there can be no question that the language used is equally applicable to placer locations. The decision of the court is therefore directly in point, and would seem to be a controlling authority. Independently thereof, however, I am persuaded by the facts of this case that Williams knew at the date of his amended filing, as well as at the date of his entry, of the existence of the placer locations, and that the land embraced thereby was claimed as mineral land; and that many other people in and around Aspen knew the land to be mineral. I am constrained to hold, therefore, that at that date the area embraced by the conflict here presented was known mineral land, and in view thereof the entry of Williams must to that extent be canceled. It is not intended, however, to express any opinion as to the character of the land covered by said entry outside the said conflict. That question is not involved in this controversy.

Under date of October 21, 1895, an opinion was handed down in this case embodying conclusions in some respects different from those herein set forth, but was subsequently recalled for further consideration. That opinion is now hereby revoked, and the case will be finally adjudicated upon the principles announced in this opinion.

NOTICE OF SETTLEMENT CLAIM—PRIORITY OF SETTLEMENT.

PERRY ET AL. v. HASKINS.

The notice of a claim given by settlement is confined to the technical quarter section on which the settlement is made.

A contestant alleging priority of settlement, as against the right of a record entryman, is not entitled to a favorable judgment, if the fact as alleged is not established by some preponderance of the testimony.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 7, 1896. (C. J. W.)

George F. Haskins made homestead entry No. 11, for lots 2 and 3 and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 15, T. 29 N., R. 12 W., Alva, Oklahoma, on September 18, 1893.

On September 26, 1893, Ezra Perry filed affidavit of contest against said entry, alleging prior settlement as to lot 2 and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said section; also that said entry was fraudulent by reason of Haskins having entered the Cherokee Outlet in violation of the President's proclamation.

On September 30, 1893, Hattie M. Davis filed an affidavit of contest against said entry, alleging that she was the first settler; also that Haskins was not a qualified homesteader.

A hearing was ordered between the parties for June 13, 1894, at which time the parties appeared and submitted testimony.

On January 7, 1895, the local officers rendered their decision, in which they recommended that Haskins' entry be held subject to the prior right of Ezra Perry as to lot 2 and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the contest of Hattie M. Davis be dismissed.

From this decision Haskins and Miss Davis appealed. On June 15, 1895, your office passed upon the several grounds presented by said appeals, and affirmed the decision of the local officers as between Haskins and Perry, but modified their decision as between Haskins and Miss Davis, by directing that they be allowed to divide lot 3, and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ equitably between them, and that failing to agree upon such division, it be sold to the highest bidder.

From this decision Haskins and Miss Davis have appealed to the Department.

The most important questions presented by the appeals are, first, as to the qualifications of Haskins and Perry as settlers, and, second, as to who made settlement first as between Haskins and Miss Davis.

Your office found that the charge of disqualification was not sustained against either Perry or Haskins, and that finding is approved. As neither Haskins nor Miss Davis made settlement on the NE. $\frac{1}{4}$, and Perry did settle on it before Haskins made homestead entry, since he is found to be a qualified settler, his right to lot 2 and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ would seem to be settled. The settlement of Haskins and Davis being upon the NW. $\frac{1}{4}$ was no notice to Perry that they, or either of them, claimed anything on the NE. $\frac{1}{4}$, and did not therefore operate as an appropriation of the NE. $\frac{1}{4}$. It is a well-established doctrine, that actual settlement upon and possession of any subdivision of a quarter-section will constructively extend to and embrace all of its subdivisions, but will not extend beyond them. *Pooler v. Johnson* (13 L. D., 134). The date of Haskins' entry, therefore, fixes the date of his claim to the NE. $\frac{1}{4}$, and as Perry's settlement upon it preceded the entry, this part of the entry must fall.

The evidence shows that Haskins and Miss Davis made their respective settlements on September 16, 1893, and near the same time, upon fractional NW. $\frac{1}{4}$ of Sec. 15. On September 18, 1893, Haskins made homestead entry No. 11, which embraces both the fractional NE. $\frac{1}{4}$ and the fractional NW. $\frac{1}{4}$ of said section. Haskins followed his settlement and entry promptly by improvements and the establishment of residence, and the main question remaining to be determined, is whether or not Miss Davis has made good the allegation in her affidavit of contest, that she was the first settler upon the land. The entry must either stand or fall. If the proof shows that Miss Davis preceded Haskins in reaching the land and performing the first acts of settlement upon it, as she alleges is true, then the entry must fall, but if the proof fails to show that, then the entry must stand. The local officers express

the opinion that she has failed to show by a preponderance of the evidence that her settlement was prior to that of Haskins. On this subject your office says:

Davis and Haskins both rely on their acts of settlement. The evidence shows that they were on the line, separated from each other by the fence enclosing the booth, one of them at the SE. and the other at the SW. corner of said enclosure; that at the signal given Haskins took one step and commenced to dig a hole and Miss Davis stuck a stake.

Your office finds that the testimony is conflicting, but that Miss Davis does not show by a clear preponderance thereof, that she performed the first act of settlement, but that the acts were simultaneously performed by her and Haskins.

It is to be borne in mind that the allegation of Miss Davis is that her settlement was prior to that of Haskins, and not that it was made at the same time. Her undertaking was to show that it was prior. If she had only alleged simultaneous settlement, her affidavit would have stated no cause of action as against the entry, and would have been demurrable. Having alleged priority of settlement, she must show by some preponderance of the testimony, that her settlement was prior, or her case fails, and the entry must stand. That she has failed to do this, is the conclusion reached by the local officers and your office, and that conclusion is concurred in here.

The other questions presented by the assignment of errors do not affect the merits of the case, and need not be considered.

Your office decision is affirmed, as far as the same relates to Perry's contest, and reversed as to the contest of Miss Davis, which is dismissed, and Haskins' entry held intact as to the fractional NW. $\frac{1}{4}$ of section 15, T. 29 N., R. 12 W.

HOMESTEAD ENTRY—MARRIED WOMAN—WIDOW.

MARTHA E. WHITE.

Where a single woman makes a homestead entry and thereafter marries a man who has a similar claim, and the husband dies, the widow is entitled to submit proof under the claim of her deceased husband, and also maintain her own claim, by compliance with the law in the matter of residence, if no adverse right attached thereto during the time her legal residence was on the land covered by her husband's entry.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 7, 1896. (W. A. E.)

On October 27, 1890, Martha E. Church made homestead entry, No. 6584, for the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 14, T. 12 S., R. 62 W., Pueblo, Colorado, land district;

and on December 6, of the same year, Richard H. White made homestead entry No. 6662, for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 2, and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 11, T. 12 S., R. 62 W., same land district.

December 31, 1890, said Martha E. Church and Richard H. White were married, and lived together as husband and wife until the time of his death, which occurred July 3, 1891.

September 10, 1894, Mrs. White submitted final proof on her deceased husband's entry.

March 12, 1895, your office approved said entry for patent and at the same time held Mrs. White's entry for cancellation, assigning as reason for this action, that:

It appears from the record in these two cases that Mr. and Mrs. White intended to maintain separate residences at the same time, so that by virtue of such residence they could perfect title to the lands covered by their respective entries. This can not be done. See cases of Hattie E. Walker, 15 L. D., 377; and Jane Mann, 18 L. D., 116.

Mrs. White's appeal brings the case before the Department.

The testimony and affidavits submitted show that from the date of their marriage to June 6, 1891, Mr. and Mrs. White resided upon her claim; that on the latter named date they moved on to his claim, where they resided until July 3, 1891, when he died; and that shortly after the death of her husband Mrs. White moved back to her own claim, where she has since resided.

"A husband and wife, while they live together as such, can have but one residence, and the home of the wife is presumptively with her husband." *Bullard v. Sullivan*, 11 L. D., 22. From June 6, 1891, to the date of the death of Richard H. White, Mrs. White's legal residence was with her husband on his claim and she stood in the position of having abandoned her own claim. After his death she was under no legal obligation to continue her residence on his claim in order to perfect title thereto. *Tauer v. Heirs of Walter A. Mann*, 4 L. D., 433. She might reside where she pleased. She chose, as shown by the testimony, to renew her residence upon her own claim.

In the case of *Dillivan v. Snyder*, 5 L. D., 184, it was held that a widow may make in her own right a homestead entry, though at such time holding land covered by the homestead entry of her deceased husband upon which final proof has not been made.

No adverse right had attached to Mrs. White's claim during her temporary abandonment of residence thereon and she still had time, after her return, to comply with the legal requirements in regard to residence. I am consequently of the opinion that your office decision holding her entry for cancellation was erroneous. Departmental decision of June 13, 1896, (not yet promulgated) is revoked and set aside. Your office decision is reversed, and Mrs. White's entry will remain intact, subject to compliance on her part with law.

RE-INSTATEMENT—INTERVENING ENTRY—COMPLIANCE WITH LAW.

UNITED STATES *v.* DAYTON.

An entry inadvertently canceled on the report of a special agent, pending the application of the entryman for a hearing, should be reinstated, with due opportunity given for the entryman and intervening claimants to be heard.

A timber culture entryman cannot be required to show compliance with the law after his entry is canceled, and while the land is covered by the intervening entry of another.

A timber culture entry will not be canceled for failure to secure satisfactory results while in good faith on the part of the entryman is manifest.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 7, 1896. (C. W. P.)

I have considered the case of the United States against Lyman C. Dayton, involving his timber culture entry, No. 5259, of the SE. $\frac{1}{4}$ of Sec. 2, T. 122 N., R. 64 W., Watertown land district, South Dakota.

The entry was made March 10, 1882.

Upon a report of a special agent, "that five acres had been broken late in the fall of 1882, and seven acres late in the fall of 1883, some sod plowed under in the fall of 1884, and since then nothing done except a little pretended cultivation until July, 1886, when seven acres were plowed, but not planted or cultivated. The balance of the tract said to have been broken is now a mass of weeds and grass. Not two hundred live trees on the land. Entire want of good faith shown by claimant," the entry was held for cancellation by your office on June 22, 1887.

Owing to the application of Dayton for a hearing being mislaid in the local office, the entry was erroneously canceled on March 12, 1889. On March 18, following, J. H. Hauser made timber culture entry of the land. Afterwards Dayton's application for a hearing having been found, a hearing was ordered by your office on August 18, 1891, "with the view of reinstating Dayton's entry, if found, in all respects, valid, and in the event of such finding, to cancel that of Hauser." On April 15, 1893, the register and receiver rendered a decision adverse to Dayton, and recommending that Dayton's entry should not be reinstated, and that Hauser's entry should remain intact. Dayton appealed. Your office reversed the judgment of the local officers, reinstated Dayton's entry, and held Hauser's entry for cancellation.

Hauser has appealed to the Department. I agree with your office decision, that the cancellation of Dayton's entry being illegal, it should have been reinstated, a hearing ordered on the special agent's report, and Hauser required to show cause why his entry should not be canceled. William E. McIntyre (6 L. D., 503); Fleetwood Lode, (12 L. D., 604); Southern Pacific R. R. Co. *v.* Stillman, (14 L. D., 111).

But this error was in effect cured by the hearing which was had pursuant to your office order of August 18, 1891, and the parties in interest have therefore had their day in court.

Testimony was taken on both sides, and shows that during the first year (1882) five to seven acres of land were broken; that the next year (1883) seven more acres were broken in the early summer, and the land broken in the preceding year harrowed and sowed to oats; that in 1884 the land was re-plowed and planted to tree seeds of elder and ash; that in 1885 the land was plowed and seven acres planted to tree seeds; that in 1886 trees only came up on about three acres, which were cultivated by claimant, and nine acres plowed and planted to seed; that in 1887, the trees planted in 1886 came up and were cultivated during the spring, but died during the summer; that the land was cultivated and nine acres plowed back and planted to tree seeds; that in 1888, not a great many of the seeds planted in 1887 came up, but that the trees growing were cultivated, and the rest of the land, about nine acres, plowed back, and about three acres planted to tree seeds.

On March 12, 1889, Dayton's entry was canceled, and on March 18, following, Hauser was allowed to make entry of the land, which conferred upon him the right of possession (*Sinms et al. v. Busse*, 14 L. D., 429). After that Dayton was not required to cultivate the land, and it is not necessary to inquire whether anything was done by him upon the land or not.

As is usual in cases of this character the evidence as to the condition of the ground, the cultivation of the trees and the growth of weeds is conflicting, but, in my judgment, the government failed to show by a preponderance of the evidence submitted, that the claimant had not acted in good faith, or that he had not planted and re-planted the land, and endeavored to promote the growth of trees. Owing to his absence from the land, his ill health and bad judgment in planting, he appears not to have obtained as good results as some of his neighbors, but I am of opinion that what he did manifested good faith—a *bona fide* effort to comply with the law, which is held in the recent decisions of the Department to excuse a failure to comply with the letter of the law. (*Taylor v. Jordan*, 18 L. D., 471; *Greenough v. Wells*, 19 L. D., 172.) Consequently I am of opinion that your judgment, reversing the register and receiver, is correct. The decision appealed from is therefore affirmed.

HOMESTEAD CONTEST—DEATH OF ENTRYMAN—AMENDMENT.

GAUNT v. RUTLEDGE ET AL.

In a contest against the entry of a deceased homesteader the heirs should be made party thereto, but, if they are not so included in such proceeding, and the Commissioner thereafter remands the case with leave to amend, such right of amendment, so allowed, is not defeated by a subsequent intervening contest.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1896. (J. L. McC.)

On April 10, 1890, John C. Stewart made homestead entry for lots 4 and 5 of Sec. 12 T. 12 N., R. 5 W., I. M. Oklahoma land district, O. T.

It is shown that he resided upon said tract until his death, which occurred on January 26, 1891. He was about seventy years of age. So far as known he left no widow nor descendants. Whether he died testate or intestate does not appear.

After his death one Rebecca A. McKeurley claimed to be his niece, only heir at law and devisee.

On June 23, 1891, Sarah R. Rutledge bought from said Rebecca A. McKeurley her relinquishment to the United States of all her right title, and interest, in and to the land embraced in the entry of said Stewart, deceased, paying therefor a tract of land in Kansas, valued at \$700 or \$800. The next day (June 24, 1891), said relinquishment was filed in the local office, Stewart's entry was canceled, and Sarah R. Rutledge was allowed to make homestead entry of the land.

The relinquishment was transmitted to your office, which, by letter of August 3, 1891, refused to accept it, because no satisfactory evidence was submitted to show her right under the law to the land in question, and directed the local officers as follows:

You will therefore reinstate said entry on your records, advise all parties in interest of the action taken, and at the same time notify McKeurley that before her right to relinquish said entry can be recognized by this office, it will be necessary for her to produce evidence, under the seal of the proper court, showing that she is either devisee or only heir of said Stewart.

On October 6, 1892, Mrs. Rutledge filed her affidavit of contest against Stewart's homestead entry, alleging that he had

wholly abandoned the tract, and changed his residence therefrom for more than one year since making said entry, . . . and that said abandonment now exists, [and] that said tract is not settled upon and cultivated by said party as required by law.

The local officers accepted said contest affidavit, and fixed the date of hearing for December 1, 1892. At that date no one appeared for Stewart or his heirs. An *ex parte* hearing was had, at which Mrs. Rutledge and one other witness testified to abandonment as alleged, adding that to the best of their knowledge and information said Stewart was dead and had no living heirs. The local officers thereupon found that abandonment existed as charged.

Notice of the decision was served upon defendant by registered letter, mailed to his last known address; but was returned to the local office uncalled for. The local officers thereupon transmitted a report of their proceedings to your office.

On March 14, 1893, your office notified the local officers that their proceedings in the case had been irregular and improper in entertaining a contest against a dead man; and returned the record to them with instructions concluding as follows:

The papers in the case are herewith returned, with leave to said Rutledge to file a new and amended affidavit against said homestead entry, making the heirs of the entrymen, including said Rebecca A. McKeurley, parties defendant, and proceed to a hearing, after due service of notice. In case no defense is interposed upon proper

service of notice, the testimony heretofore presented may be presented in evidence, upon which you will render your decision and give the usual notice thereof, and in due time report to this office.

On April 6, 1893, Mrs. Rutledge filed a new affidavit of contest against the entry, alleging that Mr. Stewart died prior to February 24, 1891; that neither Rebecca A. McKeurley nor any other heirs of said Stewart had resided upon or cultivated the land since his death, and that she, the said McKeurley, and the said heirs, had wholly abandoned the land for more than one year.

On that same day (April 6, 1893), but an hour or two earlier, one William H. Gaunt filed affidavit of contest against Stewart's entry, alleging that Stewart had died in the year 1891; that his heirs, if any, were unknown; that they had for more than six months wholly abandoned the land; and praying that he be permitted to prove said allegations.

On April 21, 1893, the local officers made an order allowing Gaunt to make service of notice of hearing by publication, making Mrs. Rutledge a party defendant; and May 31, 1893, was fixed as the date of hearing.

On the same day, April 21, 1893, counsel for Mrs. Rutledge filed a motion, praying that a notice of hearing of her original contest, filed October 6, 1892, be issued; that said contest be considered prior and superior to that of Gaunt, filed April 6, 1893; and that Gaunt's contest be suspended until after the final termination of her contest.

This motion the local officers overruled, and ordered that all parties claiming any interest in said homestead entry be made parties.

On the day fixed for the hearing in Gaunt's contest (May 31, 1893, *supra*), both Gaunt and Mrs. Rutledge appeared by their attorneys. Neither Mrs. McKeurley nor any other heirs of Stewart appeared, and their default was entered. Testimony was taken in support of Gaunt's contest affidavit.

It appearing that Mrs. Rutledge had not made service as directed in your office letter of March 14, 1893 (*supra*) her contest was continued until August 15, 1893. On that day she appeared with her attorneys, and renewed her motion that her contest be considered prior and superior to Gaunt's; and to suspend further action on Gaunt's contest until the termination of her own. This time the local officers sustained said motion. Thereupon Mrs. Rutledge's contest was proceeded with and closed, and decision rendered by the local officers in her favor. From this action and decision Gaunt appealed to your office, contending that Mrs. Rutledge ought not to have been allowed to amend her contest against a deceased entryman in the face of his intervening adverse right.

Your office decision of January 11, 1894, affirmed that of the local officers.

Thereupon Gaunt appeals to the Department.

It is to be observed that Mrs. Rutledge's original contest against Stewart's entry was accepted by the local officers. If there was any error in proceeding to a hearing on her first contest affidavit, it was the

fault of the officers of the government in misleading her by such acceptance. If they had rejected it, and so notified her, a very different question might have arisen. Again, your office, upon receiving the record, returned it, giving her permission to file an amended affidavit which she did within a reasonable period. The manifest trend of departmental decisions is, to allow amendments, even in the face of an intervening claim, unless they introduce a substantially new ground of contest, or otherwise differ essentially from the original affidavit, so as to prejudice the right of the intervening claimant. In the case at bar, on the contrary, if Mrs. Rutledge were inhibited from amending her original affidavit, it would be greatly to her prejudice and loss, she having previously furnished all the proof necessary to show abandonment and to secure the cancellation of Stewart's entry, while the intervening claimant had done nothing whatever.

In the case of *Wallace v. Woodruff* (19 L. D., 309, syllabus), the Department held:

The amendment of an affidavit of contest relates back to the original, and excludes intervening contests, where the said amendment does not introduce a new ground of contest, but merely makes more specific and definite the original charge.

Still more completely on all-fours with the case at bar was that of *Norton v. Thorson et al.* (10 L. D., 261), in which the departmental decision is correctly summed up by the syllabus as follows:

The death of the entryman prior to the initiation of contest being shown, . . . the contestant should be required to make such heirs parties defendant, by amendment of the charge and due service of notice. The right of the contestant to thus amend on suggestion of the entryman's death is not defeated by an intervening contest.

The decision of your office was correct, and is hereby affirmed.

RAILROAD GRANT—INDEMNITY WITHDRAWAL—CONFLICTING GRANTS— FORFEITURE.

TOBIN ET AL. *v.* TRIPP.

The status of lands withdrawn by executive order for indemnity purposes under the grant of 1856, for the benefit of the Omaha company, and afterwards falling within the primary limits of the grant of 1864, to the Wisconsin Central, was changed by operation of the latter grant, and definite location thereunder, from lands reserved by executive order for indemnity purposes, to granted lands, and, on the failure of the latter company to construct its road opposite said lands, the grant therefor was forfeited, and the title to the lands embraced therein restored to the United States; and by the terms of the act of forfeiture said lands were made subject to settlement after the passage thereof.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1896. (F. W. C.)

With your office letter of May 16, 1896, was forwarded a motion for review of departmental decision of March 27, 1896, in the case of

Thomas Tobin and Claud Goff *v.* Winfield Tripp, involving the SE. $\frac{1}{4}$ of Sec. 21, T. 48 N., R. 8 W., Ashland land district, Wisconsin.

With your office letter of May 22, 1896, was also forwarded a motion for review of said decision, filed on behalf of Robert W. Parsons, intervenor; also a letter from Claud Goff in which he asks for a "review or re-hearing of said decision."

As stated in the previous opinion in this case this tract is within the fifteen-mile indemnity limits of the grant made by the act of June 3, 1856, to aid in the construction of the Bayfield Branch of the Chicago, St. Paul, Minneapolis and Omaha Railroad, and is also within the ten-mile primary limits of the grant made by the act of May 5, 1864, to aid in the construction of the Wisconsin Central Railroad.

At the time of the adjustment of the Omaha grant it was held that the reservation for indemnity purposes on account of that grant was sufficient to defeat the attachment of rights under the grant of May 5, 1864, for the Wisconsin Central Railroad, and this tract, with others, not being needed in the satisfaction of the Omaha grant, was ordered restored to entry on November 2, 1891.

Under the terms of this order of restoration acts performed prior to the day set for the opening were held to be ineffectual as the initiation of a settlement right.

By the decision of the Supreme Court in the case of the Wisconsin Central Railroad Company *v.* Forsythe (159 U. S., 46) the previous construction of this Department, as to the effect of the indemnity reservation under the act of 1856 upon the grant made by the act of 1864 for the Wisconsin Central Railroad, was reversed; and following the interpretation of the acts of 1856 and 1864, made by the court, it was held, that the land in question was a part of that granted to aid in the construction of the Wisconsin Central Railroad, and as it was opposite the unconstructed part of that road it was further held, that it was restored to the public domain by operation of the forfeiture declared in the act of Congress approved September 29, 1890, commonly known as the general forfeiture act.

Under the provisions of the act of 1890 settlement rights were protected, and in the decision under review, as it was shown that Tripp was the prior settler and claimant for this land, he was accorded the right of entry under his application, which was presented on November 2, 1891.

In said decision it was stated that:

Your office decision further held that Tobin's settlement made upon the S. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ did not protect him in any claim to any part of the SE. $\frac{1}{4}$, the tract here in question. . . . Tobin failed to appeal from your office decision, so he is not a party to the present controversy.

In his motion Tobin alleges that an appeal was duly filed, and upon inquiry at your office it is learned that such is a fact. Said appeal bears date of having been filed in the local office on March 14, 1893,

within time. It was not forwarded, however, to this Department, with the record made, but appears to have been in some way mislaid. Its consideration, however, will not alter the judgment previously rendered in favor of Tripp, for the reason that Tobin does not claim to have settled upon the land until after midnight of the day preceding the opening, namely, November 2, 1891, while Tripp was shown to have settled upon the land in 1890.

Goff's request for a review or re-hearing presents nothing in support thereof and is accordingly denied.

The motion filed on behalf of Robert W. Parsons, intervenor, does not disclose the nature of his interest in the tract, otherwise than, in concluding, said motion states:

We therefore, for these reasons, respectfully move review and reconsideration of your decision of March 27, 1896; the rejection of the pending applications to enter, and the allowance of the application of Robert W. Parsons.

In forwarding the papers you fail to make any reference to Parsons' connection with this case, but it is presumed from the above statement that Parsons has applied to make entry of the land involved. His motion might be denied for the reason that he is not a proper party to the controversy which was before the matter of consideration by this Department, but as this case was the first in which the decision of the court in the case of the Wisconsin Central R. R. Co. *v.* Forsythe (*supra*) was applied, as affecting the status of settlers, and as the motion raises a question as to the correctness of the application made in said decision, which affects many other tracts having a similar status, I have considered the grounds of error set forth in the motion. In effect the motion urges that the withdrawal made in 1856, of these lands, for indemnity purposes, continued in full force until the restoration ordered on November 2, 1891. With this position I am unable to agree, for, as the grant made by the act of May 5, 1864, was a present grant, acquiring precision by the definite location of the Wisconsin Central Railroad, the status of the lands, which were before reserved lands for indemnity purposes to satisfy the Omaha grant, was changed to granted lands, the title to which passed by the definite location of the Wisconsin Central Railroad, and upon the failure of the Wisconsin Central Railroad Company to construct its road opposite this land, it was necessary, either by judicial proceeding or an act of Congress, to forfeit said grant and restore title to the United States. To hold that, after the grant of 1864, these lands yet remained reserved under the act of 1856, would be to hold, in effect, that the indemnity reservation under the act of 1856, resting entirely upon executive action, could not be annulled by Congress, for its action in making other disposition of the land must be construed as nullifying such previous reservation. That such was the effect of the act of 1864, I have no doubt, as it would be inconsistent to hold that the same lands were granted to one company and yet remained reserved to satisfy the grant for another company.

It is further urged that, whether reserved under the act of 1856 or 1861, the reservation continued until the lands were restored on November 2, 1891.

This position is equally untenable, for, in view of the plain terms of the act of September 29, 1890, recognizing the rights of settlers on the lands forfeited by said act, while it might be possible to hold that they were not formally opened to entry until notice had been given by the Land Department, which I do not mean to hold in this case, yet there can be no doubt but that after the passage of said act all lands restored to the public domain thereby were at once subject to settlement.

For the reasons herein given the several motions are denied.

REPAYMENT—DESERT LAND ENTRY.

SIMEON D. WYATT.

A desert land entry made in good faith under the general act of 1877 by one who has theretofore had the benefit of the special act of 1875, is an entry "erroneously allowed," and repayment of the money paid thereon may be properly allowed.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1896.
(G. C. R.)

Simeon D. Wyatt has appealed from your office decision of January 19, 1895, rejecting his application for repayment of purchase money paid on desert land entry, No. 428, made January 16, 1890, (final certificate No. 164,) for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$; the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the S. $\frac{1}{2}$ of Sec. 20; and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 29, T. 29 N., R. 14 E., M. D. M., Susanville, California.

Said entry was canceled because the entryman had exhausted his rights by previously filing his declaration to make entry of the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the S. $\frac{1}{2}$, Sec. 29, T. 29 N., R. 14 E., under Lassen county act of March 3, 1875 (18 Stat., 99).

Your office declined to recommend said application for repayment, because there was evidence of *mala fides* on Wyatt's part, in that he either swore falsely or concealed the facts of his prior entry when he applied to make the entry in question, also when he submitted his final proof thereon.

Appellant insists that there is nothing in the record which justifies the finding that he concealed the facts of his former entry, or that he made any false statements in his final proof.

It appears that Wyatt was allowed to make the entry in question, which is under the act of March 3, 1877 (19 Stat. 377), after he had made a desert land entry for four hundred and eighty acres under the Lassen county act of March 3, 1875, *supra*. He undoubtedly made an erroneous statement when he applied to make his second entry, for he then swore that he had "made no other declaration for desert lands."

This statement, however, is in the printed form (4—274) for desert land applications, and may not have been an intentional deception.

In the appeal to this Department from the action of your office holding for cancellation his second desert entry, it was then insisted that a desert entry under the Lassen county act (*supra*) did not debar the entryman from making a second entry under the more general law of 1877; and in the motion for review of departmental decision, sustaining the action of your office, it was alleged that one and the same person had been allowed to make entries under the acts of 1875 and 1877.

In the decision on this motion (19 L. D., 247), it is said:

In a number of cases two such entries by the same person or by the same name, one under each act, were discovered; but final certificate having issued, and more than two years having elapsed, the entries went to patent under the confirmatory provisions of the act of March 3, 1891 (26 Stat., 1095).

Accompanying this motion are two affidavits, one made by W. P. Hall, the present receiver and from 1884 to 1888 the register of the office; one made by A. F. Dixon, also register on November 1, 1890.

Receiver Hall states in his affidavit that he is well acquainted with Wyatt, who made the desert entries in question; that on the day (November 1, 1890,) upon which he submitted his final proof under the Lassen county act for four hundred and eighty acres in sec. 29, he also made desert entry for the six hundred and forty acres under the act of 1877 (*supra*); that affiant then informed said Wyatt that

he had a legal right to make both entries, and that the usages of the Department sanctioned entries under both acts; that there was no attempt whatever on the part of Wyatt to conceal the fact that he was seeking to gain title to land under both of said acts; (that it was the) open, notorious and uniform practice of the land office at Susanville to allow entries and filings to be made by one and the same person under both of said acts during all the time that affiant was register as aforesaid, and that the propriety of said practice was never questioned by the General Land Office, so far as affiant has any knowledge, until said entry, No. 428, final certificate 164, of S. D. Wyatt was held for cancellation, etc.

Ex-register Dixon makes substantially the same statements in his affidavit.

While these two officers were in error as to their interpretation of the law, it may be stated that they are not in error as to the practice of their office in allowing an entry to one and the same person under both acts.

From these considerations it is clear that Wyatt could have no purpose in concealing the fact of his having made a desert entry under the act of 1875, when on July 16, 1890, he made desert entry for the land in question under the act of 1877; and his unfortunate statement in his application, wherein, in the printed part, he stated that he had made no other declaration for desert lands, deceived no one—on the contrary, the officers who allowed the entry were in full possession of all the facts, and assured him of his legal right to make the second entry.

To all intents and purposes the entry in question "was erroneously allowed" within the meaning of the act of June 16, 1880 (21 Stat., 287). And it may be fairly said that the erroneous entry was in no sense the fault of the entryman, but resulted from an erroneous interpretation of the desert land laws on the part of the local officers, without whose advice and instruction the entry would never have been made.

The application for repayment will therefore be allowed.

The decision appealed from is accordingly reversed.

OKLAHOMA LANDS—SECOND HOMESTEAD—SETTLEMENT RIGHT.

HEISKELL *v.* McDOWELL.

Presence within the territory, after the act authorizing the President to open the same to settlement, but prior to the proclamation issued thereunder, will not operate to disqualify the settler, if he was not then within said territory for the purpose of selecting lands, and by his presence therein secured no advantage over other settlers.

If one in good faith, claiming the right to make a second homestead entry, settles upon land subject to entry, and applies for the restoration of his homestead right, and permission to enter the land so settled upon, and is adjudged to be entitled to make such entry, such judgment validates his acts of settlement, and removes from them the presumption of invalidity.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 7, 1896. (C. J. W.)

It appears from the record that the plaintiff, Felix Heiskell, made homestead entry for the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ of section 21, T. 13 N., R. 7 W., on April 10, 1890, which was cancelled by relinquishment May 7, 1891. On December 7, 1892, the local officers denied the application of Heiskell, made April 25, 1892, for restoration of homestead right, and for re-instatement and permission to file his homestead entry for the land in dispute, the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and lots 1 and 2, Sec. 30, T. 18 N., R. 8 W., Kingfisher land district, Oklahoma.

The defendant, McDowell, on April 30, 1892, made application to enter said tract, which application was rejected on account of the prior one of Heiskell, and also upon the ground that McDowell was disqualified by reason of his being in the Cheyenne and Arapahoe country prior to the opening of the land to settlement. Each of the parties appealed from the decision of the local officers in rejecting his application. Your office,—passing upon the question presented by the appeal,—rejected the claim of Heiskell to make entry of the tract in question.

From this decision Heiskell appealed to the Department. The case was considered here on April 4, 1893, and it was remanded for further hearing, and specifically to determine, 1st. Is Heiskell disqualified from

making entry for the tract described in his second application? This may be found to depend upon whether the local officers rejected his second application for leave of absence, and if they did so, whether they acted properly in so doing. 2d. If it should be determined that he can be permitted to make a second homestead entry, was he or McDowell the prior settler on the land now claimed by both? 3d. Is McDowell, because of his entry in Kansas in 1885, disqualified from making another homestead entry? 4th. Did either Heiskell or McDowell enter the Cheyenne and Arapahoe country prior to the time they were justified in so doing, under the terms of the act, and the proclamation opening the same to settlement and entry?

The decision of your office being thus modified, a hearing was had before the local officers on November 16, 1893, both parties and their counsel being present, for the purpose of considering said specified questions. On March 16, 1894, the local officers made their finding and judgment on the questions presented. In reference to the first question, they say:—

It appears that on April 10, 1890, Heiskell made homestead entry for the E. $\frac{1}{4}$ NW. $\frac{1}{4}$ and lots 1 and 2, section 21, township 13, range 7, which was canceled by relinquishment May 7, 1891, and it is satisfactorily shown by the testimony in this case, that the contestant on September 15, 1890, applied for six months leave of absence from the tract of land last mentioned, which was granted until March 15, 1891. Afterwards in April, 1891, he applied for additional leave of absence for the term of six months, based on the sickness of his wife. It is this second alleged leave of absence which is alluded to in the decision *ex parte* Heiskell (*supra*). The testimony in this case sustains the case made by Heiskell, that he did in April, 1891, make such application for leave of absence to the local land office at Oklahoma City, and that this application was refused by the local officers, and from the showing made in this case, we find that it was improperly refused. Heiskell then alleges that owing to this refusal to grant him leave of absence from his homestead he was forced to abandon it, and did so May 7, 1891. His position on this point has not been successfully assailed though it was attempted to show that he had been holding his relinquishment for sale and had offered to sell it for a stipulated price. The fact remains, however, that he relinquished without consideration, and in our opinion his actions throughout show perfect good faith. It would seem that under the circumstances, he was properly entitled to restoration of his homestead right and privilege and upon that point it is so held.

On the question of settlement they held Heiskell to be the first settler. In reference to McDowell's entry of certain lands in Kansas in 1885, which he subsequently abandoned, they held that he was entitled to the benefits of the act of March 2, 1889, which restored his homestead right. In reference to the alleged disqualification of both parties by reason of their presence inside the Territory during the inhibited period, they hold that neither party was disqualified. The sequence of the finding of the local officers was a recommendation that Heiskell be allowed to make second homestead entry for the land in question, and that McDowell's application to enter be rejected. The defendant duly appealed from this decision of the local office, and on April 20, 1895, your office considered said appeal, and therein treated

each of the questions covered by their report and finding, except the one of priority of settlement, remarking as to this, that

as the final disposition of this case depends upon another question than priority of settlement, I will not consider the evidence on that question.

In reference to the question as to whether the local officers acted properly in rejecting Heiskell's application for leave of absence, and its effect on his qualification to make second entry, your office says:

I am clearly of the opinion that your finding that said second application for leave of absence was improperly refused, is correct, and that this leave of absence should have been granted.

In reference to the effect of McDowell's homestead entry in Kansas, made in 1885, and which appears to be still of record, your office held that inasmuch as McDowell had not perfected said entry, that the act of March 2, 1889 (23 Stat., 854), applied, and McDowell could make second entry. In reference to the alleged disqualification of the parties by reason of having entered the country to be opened during the inhibited period your office differed with the local officers, and found that both parties were disqualified. Your officer, therefore, concurred with the local officers on two of the questions covered by the report, reversed it as to one, and withheld judgment as to the other. From this decision both parties have appealed. Each alleges that it was error to hold that he was disqualified by reason of premature entry into the Cheyenne and Arapahoe country, and as this may be regarded as a ground common to both appeals, it will be considered first.

Both parties are shown to have been inside the Territory after the passage of the act authorizing the President to open it to settlement, but before the issuance of his proclamation for its opening. In both instances the parties went in on business unconnected with the selection of land, were not in the neighborhood of the land in dispute, and obtained no advantage over anyone in the matter of selecting lands, and at that time, so far as the evidence discloses, were not even contemplating entry when the land should be opened to settlement.

In the light of the later decisions, I cannot concur in the conclusion reached, that these parties were "sooners," and therefore disqualified as entrymen. As the facts do not present either one of them as an infractor of the spirit of the law, following the rule in the case of *Curnutt v. Jones* (21 L. D., 40), I must hold that neither of them is disqualified on the ground stated. It must then, in some way, be determined which one of these parties has a superior claim to this land. Heiskell insists that it was error to hold that McDowell was qualified to make a second entry under the provisions of the act of March 2, 1889, as was held both by the local officers and your office. This conclusion is reached by giving a literal construction to the second section of said act, which is as follows:

That any person who has not heretofore perfected title to a tract of land of which he has made entry under the homestead law, may make a homestead entry of not

exceeding one quarter section of public land, subject to such entry, such previous filing or entry to the contrary notwithstanding.

Inasmuch as the local officers and your office concluded, that under the facts, McDowell was entitled to make second entry, that conclusion will not be disturbed, but the rights of the parties submitted to other tests.

McDowell while he claims to be free from any disqualification to make a second entry, by mere operation of law, insists that Heiskell is to be regarded as a mere trespasser on the public domain, until he has of record an application for the restoration of his homestead rights. As under my view of this case it must turn upon the question of prior settlement, this insistence of the defendant will be considered, since, if Heiskell is to be regarded as disqualified to perform any act of settlement, until he filed his application on April 25, 1892, for restoration of homestead right and permission to file his entry for the land involved, then McDowell would necessarily be the prior settler. So far as this particular case is concerned, it would seem that the question was virtually decided in the decision ordering a hearing between these parties, of April 4, 1893, in which it was specifically directed that they should be heard as to which one performed the first acts of settlement on the land.

If one in good faith claims the right to make a second homestead entry, settles upon land subject to entry, and applies for restoration of homestead rights and for permission to enter the land settled upon, and is adjudged to be entitled to make a second entry, such judgment validates his acts of settlement and removes from them the presumption of invalidity. The parties will, therefore, be regarded as starting into the race for this land on the day of its opening to settlement, on terms of equality under the law. The question then is, which one settled on it first? Each has a residence and improvements on it of something like equal value. As to the exact time of the arrival of each party on the land there is considerable conflict in the testimony. On this subject the local officers say:

Upon the question of prior settlement upon the tract in dispute, as is usual in such cases, the testimony is conflicting, but upon the whole, after careful review of the claims of the parties and their witnesses, I am satisfied from the evidence adduced that Heiskell was the first in making claim to and appropriating the tract; he came upon the tract a few minutes past twelve o'clock, noon, of April 19, 1892, began to make improvements, and has measureably resided on the land since that time. Whereas on the contrary I find that McDowell first began to assert claim to the tract on April 20, the next day, and like Heiskell has since resided on the land, if not continuously, at least to the exclusion of a home elsewhere.

This finding seems to be justified by a preponderance of the testimony, which I think shows that Heiskell performed the first acts of settlement on the land. I, therefore, find that, under the facts disclosed by the record, he is entitled, under the law, to make a second homestead entry, and that being the first settler on the land in question, his

application to enter it should be allowed, and that McDowell's application should be rejected.

Your office decision is accordingly reversed.

RAILROAD RIGHT OF WAY—RESERVATION IN PATENT.

DUNLAP *v.* SHINGLE SPRINGS AND PLACERVILLE R. R. Co.

A railroad right of way under the act of March 3, 1875, is fully protected by the terms of the act as against subsequent adverse rights, and a reservation of such right of way, in final certificates and patents issued for lands traversed thereby, is therefore not necessary, and should not be inserted.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 7, 1896. (C. W. P.)

By your office letter of October 20, 1894, Elon Dunlap was allowed thirty days within which to show cause why the patent issuing on his cash entry, No. 4702, for the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 24, T. 10 N., R. 10 E., Sacramento land district, California, which was sold to him by the local officers of the district on April 28, 1894, under section 2455 of the Revised Statutes, should not contain a reservation of right of way for the Shingle Springs and Placerville Railroad.

Upon the showing made by said Dunlap, your office, on March 26, 1895, held that patent should issue to Dunlap, without reservation of right of way for said railroad, saying:

Since the date of office letter calling on Mr. Dunlap to show cause, the Honorable Secretary in the case of Mary G. Arnett decided that the language of section 4 of the act of 1875 "is not a direction to the Land Department to insert limitations and restrictions in the final certificate and patent, but a legislative declaration of the reservation of a right of way to such railroad companies as may have complied with the law." The effect of this decision in the Arnett case is to revoke the instructions of the circular as to making reservations in the certificate, and patent will therefore issue thereon without reservation.

On April 2, 1895, the company filed a motion for review of your office decision of March 26, 1895, and on July 3, 1895, your office revoked said decision and held that said entry was subject to the action required by the instructions at the bottom of page 6, circular of March 21, 1892, that is, that the notation, "subject to the right of way of the Shingle Springs and Placerville R. R. Co.," should be written across the face of the final certificate in red ink.

Dunlap appeals to the Department.

It is contended by Dunlap that your office decision of March 26, 1895, is correct, and that no reservation should be made in his final certificate and patent.

It appears that a map of the definite route of said company's road through the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, was approved by the

Department on April 27, 1888, under the act of March 3, 1875 (18 Stat., 482), and that the company, on December 28, 1888, filed a map, showing that the road had been constructed on the approved right of way.

The question is, should the right of way clause be inserted in the final certificate of entry and patent for the land over which a right of way has been acquired by a railroad company, under the act of March 3, 1875, *supra*.

In the case of *ex parte* Mary G. Arnett, 20 L. D., 131, it is said:

The injustice to the patentee of placing such a limitation in the conveyance, is apparent when it is remembered that the patent is the strongest and best evidence of title, and the patentee would be thereby concluded in an action at law instituted against him by the railroad company for the possession of such right of way. The right of way clause should not then be inserted in the applicant's final certificate, unless it is necessary to protect whatever rights the railway company may have in the land by virtue of its grant.

Under the act of March 3, 1875 (*supra*), such protection does not appear to be necessary. The act itself affords ample protection to the company, if it has any rights which the courts may hereafter determine have not been forfeited. The language of section four of said act is, "and thereafter all such lands over which such right of way shall pass, shall be disposed of, subject to such right of way." These lands are then disposed of, subject to such right of way, by virtue of the statute.

This is not a direction to the Land Department to insert limitations and restrictions in the final certificate and patent, but a legislative declaration of the reservation of a right of way to such railroad companies as may have complied with the law. The insertion of the right of way clause would answer no purpose except to embarrass the settler, and leaving it out does not affect the rights of any railroad company under said act.

In this regard, the case at bar may be distinguished from the recent case of the Pensacola and Louisville R. R. Co. (19 L. D., 386). In that case, the granting act did not impose a penalty of forfeiture on the company for failure to perform its conditions, nor did it direct that the lands over which the right of way was granted should be disposed of, subject to such right of way.

In the absence of such statutory protection, and it not appearing that the rights of the company had been forfeited by legislative enactment, or judicial determination, it became the duty of the Land Department to insert the right of way clause in all patents issued for lands over which such right of way had been granted.

In the case of Florida Central and Peninsular R. R. Co. *v.* Heirs of Lewis Bell, deceased (22 L. D., 451), it is said:

In the case of *ex parte* Mary G. Arnett (20 L. D., 131), it was held that a claim reserving the right of way should not be inserted in final certificate of entry and patent for land over which a right of way has been granted under the act of March 3, 1875, where it appears that there has been a breach of the conditions imposed by said act, but no re-assertion of ownership by the government. This was put on the express ground that the fourth section of said act provided, that "all such lands over which such right of way shall pass shall be disposed of subject to such right of way," that therefore the rights of the railroad company (if it had any) were protected by statute, and the case of the Pensacola and Louisville railroad company (*supra*) was in this regard distinguished.

In the case at bar there is no question of forfeiture for failure of the conditions subsequent, and the public land laws under which these patents will issue do not in terms protect the company's rights. I am, therefore, of opinion that if the plaintiff company has a grant of right of way across said reservation on the line of its constructed road, and is not estopped from asserting that right by its own acts, the limitation asked for should be incorporated in the patents.

The latter case is not to be understood as overruling or modifying the decision of the Department in the Mary G. Arnett case.

In the case at bar, the land being subject to the right of way by virtue of the act of March 3, 1875, comes within the reason of the decision in the Arnett case, to wit, that the act itself affords ample protection to the company for its rights.

The decision of your office of July 3, 1895, is, therefore, reversed.

MINING CLAIM—ADVERSE CLAIM—PROTEST—APPEAL.

PARSONS ET AL. v. ELLIS.

A protest against a mineral application, filed after the period of publication, will not be considered by the Department on appeal, unless it is shown that the protestant has an interest in the ground involved, and that the law has not been complied with by the applicant.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1896. (P. J. C.)

It is shown by the record in this case that Charles W. Ellis by W. S. Morse, his attorney in fact, on September 27, 1894, filed application for patent for Pine Mountain lode mining claim, survey 1146, in Prescott, Arizona, land district. The first publication of notice was on October 3, and the last December 5, 1894. The sixty days period within which protest and adverse claim should be filed expired December 3, 1894.

E. D. Parsons and Anna D. Faulkner, by J. C. Herndon, attorney in fact, filed on December 5, 1894, their protest and adverse against the entry of Pine Mountain. The local officers "rejected the same as an adverse, for the reason that it was not filed within the sixty days period of publication of notice, but filed and allowed the same as a protest and set for hearing on December 29, 1894."

On December 6, 1894, applicant made application to purchase and tendered payment for the land. On December 10 following, a certificate of the clerk of the district court, dated December 8, was filed, wherein it is stated that no suit was pending in said court affecting the title to the Pine Mountain, prior to December 4, 1894.

It is alleged in the protest that the protestants are the owners and in possession of the Morning Star lode; that the same was located in 1882, and the law and mining regulations have been complied with in all respects by themselves and their grantors; their mining improvements, consisting of shafts and tunnels are recited and valued at \$3,800; "that the said Ellis desiring to wrong, defraud and injure protestants, shifted the monuments of the Pine Mountain lode so as to cover six and one-tenth acres of the Morning Star lode and in so shifting said monuments, he caused to be embraced within the boundaries

of his pretended Pine Mountain location" some of the improvements belonging to protestants; that Ellis knew these improvements belonged to protestants; that these improvements are noted on the plat of the Pine Mountain, but are designated as belonging to unknown claimants; that Morse was the only assistant of the deputy surveyor in making the survey, and on information and belief charges that he is interested in the Pine Mountain lode; that he is the attorney in fact of Ellis.

A hearing was had on the protest, and as a result the local officers recommended that Ellis' application to purchase be rejected.

The applicants appealed, and your office by letter of May 17, 1895, reversed their action, whereupon the protestants prosecute this appeal, assigning numerous grounds of error. It is not deemed necessary to quote these for the reason that there is but one material question involved in this controversy, and upon that the case may be determined.

A motion to dismiss the appeal has been filed on the ground "that the protestants as such have no right of appeal, occupying the position of *amicus curiae*, merely, and not being parties in interest."

It will be observed that the allegations of the protest raise but a single issue, and that is the possessory right to the ground in controversy. This is a question, the determination of which Congress has lodged in the local courts. (Sec. 2325 and 2326 R. S.).

The Department will consider a protest against a mineral entry, after the period of publication has elapsed, where it is shown that the protestant has an interest in the ground in controversy, and that the law has not been complied with by the applicant. Both of these elements must be present. In the case at bar the protestants allege interest in the ground, but they do not charge a failure on the part of the applicant to comply with the requirements of the law in any particular. Hence it must be assumed that the proceedings on the part of the applicant were regular. The protestants were therefore charged with notice of the application for patent, and to protect their interests were required to do so in the manner provided by law. (See *Bright v. Elkhorn Mining Company*, 8 L. D., 122; *Hopeley et al. v. McNeil et al.*, 20 L. D., 87; *Gowdy et al. v. Kismet Gold Mining Co.*, 22 L. D., 624).

The appeal is therefore dismissed.

RAILROAD GRANT—ADJUSTMENT—TERMINAL LINE.

NORTHERN PACIFIC R. R. CO.

The joint resolution of May 31, 1870, designated the city of Portland as the point of connection between the branch line as originally provided for in the grant of July 2, 1864, and the extension to Puget Sound authorized by said joint resolution, and it therefore follows, that in the establishment of a terminal line between the lands granted by said joint resolution, and those of the prior grant forfeited by the act of September 29, 1890, said line should be drawn through the city of Portland.

Secretary Smith to the Commissioner of the General Land Office, July 9, 1896. (W. A. L.) (F. W. C.)

With your office letter of March 26, 1896, was transmitted a petition filed on behalf of certain settlers praying for a change in the terminal established to the unconstructed portion of the Northern Pacific railroad *via* the valley of the Columbia River, to a point at or near Portland.

To a proper understanding of the question a brief recitation of the legislation and previous action taken by this Department in relation to the grant is necessary.

The act of July 2, 1864 (13 Stat., 365), incorporating the Northern Pacific R. R. Co. made a grant to aid in the construction of a continuous line of railroad—

Beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget Sound, with a *branch via the valley of the Columbia River, to a point at or near Portland*, in the State of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus.

By the joint resolution of April 10, 1869 (16 Stat., 57), said company was

authorized to extend its branch line from a point at or near Portland, Oregon, to some suitable point on Puget Sound, to be determined by said company, and also to connect the same with its main line west of the Cascade Mountains in the Territory of Washington.

By the joint resolution of May 31, 1870 (16 Stat., 378), said company was authorized—

To locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main *road* to some point on Puget Sound *via* the valley of the Columbia River, with the right to locate and construct its *branch* from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound.

In the case of *Spaulding v. Northern Pacific R. R. Co.* (21 L. D., 57), it was held that—

At Portland, Oregon, the Northern Pacific has two grants, the first for the line eastward, under the act of 1864, and the second northward, under the joint resolution of 1870, and, so far as the limits of the grant east of said city overlaps the subsequent grant, the latter must fail; and, as the road at such point eastward is unconstructed, and the grant therefor forfeited by the act of September 29, 1890, the lands so released from said grant, do not inure to the later grant, but are subject to disposal under the provisions of said forfeiture act. (Syllabus.)

After this decision it became necessary to establish a terminal separating the grants in the neighborhood of Portland, and the diagram submitted showed the location of the terminal to be at a point selected on the line of general route to the north of the Columbia River, which point your office denominated as Vancouver, Washington.

The petition urges that the point selected is about two miles east of the actual location of Vancouver, and in reporting on said petition your office letter states:

In submitting this matter, I have to say that the diagram prepared by this office nearly twenty-six years ago, to show the limits of the withdrawal which took effect upon the filing by the railroad company of the map of the general route of its road from Puget Sound, by way of the valley of the Columbia River, to the mouth of the Walla Walla River, was prepared from said map, and the line of the road on the diagram corresponds with that on the map of location as nearly as it is possible to make it, the roughness and crudity of said map being considered.

The claim that Vancouver is two miles west of the place fixed on the diagram, if true, is not material, the spot on the line of the road fixed as the most westerly point nearest to Portland being taken as the end of the location under the act of 1864, and the diagram showing Vancouver at that point it was so stated in the letters treating of the matter. It was the most westerly point on the line of the located road nearest Portland that was sought and fixed upon, and it matters not whether this point is at Vancouver or elsewhere. The line of the road where it touches Vancouver according to the copy of the township filed and marked exhibit B, is not such point. The location map of the company and the map of the State prepared by this office both show Vancouver east of its actual location, but as before stated, this is not material.

An examination of the map of location shows that line of the road as a continued line along the north bank of the Columbia, with a spur to Portland, from a point near Vancouver and east thereof, which as before stated is practically the same as fixed in the preparation of the diagram of the grant.

No reference is made to the spur to Portland either on the map itself or the letter transmitting it to this office, nor has mention of it been made until now, in any manner. It is not shown on the withdrawal diagram, and no attention was paid to it in the construction of said diagram. No withdrawal on account of it was ever made, although the first withdrawal on account of this portion of the road was of twenty miles only and did not cover all lands within twenty miles of the spur.

To sum up the facts in relation to this matter, the line of the road was laid down on the diagram of withdrawal as nearly as possible in conformity with that shown on the map of location, this diagram has governed the action of this office in the administration of the company's grant for nearly twenty-six years, and ever since the earliest action affecting said grant was taken; the point fixed for the western terminal of the forfeiture is the most westerly point on the located line of the road, nearest Portland, Oregon, for which any withdrawal was made, and said terminal as shown is as nearly correct as it is possible to get it.

From the previous recitation it is apparent that Congress first provided for a main line to Puget Sound with a branch *via* the valley of the Columbia River, to a point at or near Portland.

Under the resolution of 1869, said company was authorized to extend its branch line from a point at or near Portland to Puget Sound, but without a land grant.

The joint resolution of 1870, changed the branch to main line, the company being authorized "to locate . . . its main road to some point on Puget Sound *via* the valley of the Columbia River," etc.

This same resolution provides—

And that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon, shall be completed by January 1, 1872, and

forty miles of the remaining portion thereof each year thereafter until the whole shall be completed between said points.

In referring to this resolution, the supreme court in the case of *United States v. Northern Pacific R. R. Co.* (152 U. S., 294), said:

Undoubtedly, this resolution gave authority to locate and construct a main road *via* the Columbia River Valley to Puget Sound. A road so located and constructed would, or might, have passed the city of Portland. But if, as the company now insists, the act of 1864 gave ample authority to locate and construct a road extending from Lake Superior to Puget Sound, along the valley of the Columbia River, *and by the way of Portland or its vicinity*, the resolution of 1870 was entirely unnecessary in so far as it gave authority to the company to locate and construct its road through the Columbia River Valley to some point on Puget Sound. We cannot agree that this resolution is to be held, in this respect, as simply a recognition by Congress of an existing right, in the company, to locate and construct a road from Portland to Puget Sound, with the right to obtain lands, in aid thereof, as provided in the act of 1864. On the contrary, it should be regarded as giving a subsidy of lands in aid of the construction of a *new* road, not before contemplated, that would directly connect Portland and its vicinity with Puget Sound.

This would seem to make it clear that the point of connection between the branch line originally provided for, which was to end at a point "at or near Portland," and the extension to Puget Sound, which under the resolution of 1870 became a continuous line was, by the joint resolution of 1870, made at Portland, Oregon, instead of "at or near Portland." The map filed in 1870 shows a continuous line to the north of the Columbia River with a line dropped from a point nearly due north of Portland to Portland, a distance of about seven miles.

In the building of the road from the western terminus at Tacoma the company built directly to the city of Portland.

It will thus be seen that the resolution of 1870 designated the city of Portland, the company's map of location made connection with that city and in the building of the road southward from Tacoma, the company built direct to Portland, so that had the company proceeded with the construction under its charter it would necessarily have been obliged to build eastward from Portland.

In this connection I have to call attention to the fact that in considering the question of the conflict between the grant made by the act of 1864 for the Northern Pacific R. R. Company, and the Oregon and California R. R. Co., under the act of July 25, 1866 (14 Stat., 239), Portland was accepted as the western terminus of the branch line of the Northern Pacific railroad provided for under the act of 1864, at which point the terminal was drawn. Upon the basis of this terminal suit has been begun against the Oregon and California railroad company, in which judgment below has been given against the company.

For the reasons given I am of opinion that the terminal to the portion of the line *via* the valley of the Columbia River should be drawn through Portland, Oregon, thus forming a continuation of the terminal heretofore established at that point.

Under date of May 20, 1896, you transmitted the papers relative to

a demand made upon the Northern Pacific railroad company for the reconveyance of certain lands erroneously patented to the east of the terminal heretofore established by your office, from which it appears that the resident counsel for the company, Messrs. Britton and Gray, have refused to accede to the demand.

These papers are returned to the end that the demand may be amended to agree with the change in the terminal herein directed to be made.

TOWNSITE SETTLEMENT—CONFLICTING SETTLEMENT RIGHTS.

WEST RENO CITY ET AL. *v.* SNOWDEN.

The amount of land reserved by a townsite settlement may be properly limited to the legal sub-division on which actual settlement is made, where the townsite claim is for the purpose of securing an entry of lands additional to a prior townsite settlement.

As between parties claiming priority of settlement, preference must be given to the one who first performs some act on the land indicative of an intent to appropriate the same.

Secretary Smith to the Commissioner of the General Land Office, July 9, 1896. (C. J. W.)

The land in dispute is a part of the Cheyenne and Arapahoe country, which was opened to settlement April 19, 1892, at 12 o'clock M. A narrow strip of land known as lot 5, section 28, T. 13 N., R. 7 W., estimated to be one hundred and fifty-five feet in width lies between the line of old Oklahoma and the quarter-section in dispute. This strip had to be crossed by those who made the race on the day of opening. On April 19, 1892, Persie Snowden and Rose Goenawein, with a view to homestead entry, and several hundred people with a view to settlement for townsite purposes, at the signal given started into the race from the outer border of this strip and ran towards the quarter-section in dispute. On the same day at 2.45 P. M., Persie Snowden filed her application at the Oklahoma City land office, and made homestead entry No. 3489, for the NE. $\frac{1}{4}$ of Sec. 29, T. 13 N., R. 7 W. On April 20, 1892, Rose Goenawein visited the land office to file her homestead application for the same land, but on finding Miss Snowden's application of record she filed her affidavit of contest against said entry, alleging settlement on the land prior to Snowden or any other person. On May 14, 1892, John Fox, probate judge of Canadian county, Oklahoma Territory, applied to enter said quarter-section, together with lot 5, Sec. 28 (the narrow strip before described), for townsite purposes, which application was rejected for conflict with Snowden's entry. By letter "G" of March 15, 1893, your office directed that a hearing be had to determine the

priority between Persie Snowden and the townsite claimants. On May 15, 1893, such hearing was had, and as no hearing had been given as between Snowden and Goenawein, Rose Goenawein was made a party and allowed to intervene with her claim to prior settlement. On the close of the evidence introduced by the townsite claimants, Goenawein and Snowden joined in a demurrer to the sufficiency of the evidence so introduced, which was sustained by the local officers. From this decision the townsite claimants appealed to your office, and on January 2, 1894, your office reversed the local office, and remanded the case for further hearing.

Notice was duly given and on May 17, 1894, further hearing was had at which all the parties appeared, and submitted testimony. The hearing, after a number of continuances, was closed on September 20, 1894. On July 8, 1895, the local officers rendered their decision, in which they found that Rose Goenawein had sustained her claim of prior settlement, and recommended the cancellation of Snowden's entry and the dismissal of the townsite application. From this decision the townsite applicants and Snowden appealed, and on December 21, 1895, your office passed upon the case and again reversed the local office, rejecting the application of Goenawein, allowing that of the townsite claimants as to the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, cancelling the application of Snowden as to the W. $\frac{1}{2}$ and holding it intact as to the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$. From this decision the townsite claimants, and Goenawein and Snowden have all appealed. The appeal of the townsite claimants specifies three grounds of error:

1. That it was error to award the east half of the NE. $\frac{1}{4}$ to Persie Snowden, when she made her affidavit in support of her application before the land was opened to entry which invalidated her application and entry.
2. Error not to award the entire quarter-section to the West Reno City townsite as neither Snowden or Goenawein were entitled to any right thereto.
3. Error in not awarding the entire quarter-section to West Reno townsite, when it was all claimed by original settlement or staking of lots.

It will relieve the case of some confusion to consider and dispose of this appeal first.

The first ground, if supported by the proof, would be fatal to the entry. The rule is recognized, that an affidavit which is the basis of an application to enter, made before the land is subject to entry, is invalid. The facts as disclosed by the record render this rule inapplicable in this case. The affidavit in question appears to have been sworn to before William J. Grant, U. S. Commissioner, second district, Oklahoma, on the 18th day of April, 1892, but the name of Grant is stricken out, and qualification finally made before J. C. Delaney, receiver. There was no change of the date made on this paper, but the date of the other papers made before this officer as well as the parol testimony on that subject makes it clearly appear that this affidavit was in fact made and filed on the 19th day of April, 1892, the evening of the day of opening, thereby

depriving this objection of its force. The failure to change the date seems to have been a mere clerical error or oversight.

The remaining exceptions of the townsite claimants may be considered together. They assert an absence of right on the part of either Goenawein or Snowden to any part of the land in dispute, and the existence of a prior and superior right to the entire quarter-section upon the part of the townsite claimants. It is insisted that some of the townsite claimants reached some part of the quarter-section and planted stakes before either of the homestead claimants, and that the prior occupancy of any one of them inured to the benefit of all, as against the homestead claimants. By way of supporting this contention it is insisted that under sections 2387 and 2388 and 2389, Revised Statutes U. S., no stated number of inhabitants is necessary to enable them to make an entry for a townsite, when the number is less than one hundred, and that the Department is without jurisdiction or authority to limit the amount of land to be entered for such purpose to the legal subdivision upon which actual settlement is made. Under the facts of this case this reasoning is without force or applicability, this attempted entry in fact being an addition to a townsite already settled upon on an adjacent subdivision. The staking of lots for townsite purposes was confined on the day of opening to the west half of the NE. $\frac{1}{4}$, and it is not believed that your office exceeded its authority in recognizing the settlement rights of a homesteader upon the east half of said NE. $\frac{1}{4}$, especially when the evidence shows that the land awarded meets all the requirements of the townsite claimants for business purposes. Under the facts as disclosed by the record the townsite claimants seem to have been awarded all the rights they are entitled to.

The appeals of Goenawein and Snowden remain to be considered. Each of these parties insists that it was error to award any part of said NE. $\frac{1}{4}$ to the townsite claimants, and each lays claim to the quarter-section by reason of being the prior settler thereon, on the day of opening. While Goenawein undertakes to present fifty-three specified exceptions to your office decision, it is not believed that either her rights or a full consideration of the vital questions connected with the case, require any detailed statement of these exceptions, or their separate consideration. The errors alleged to have been committed refer to errors of law and of fact. The one class has led to a careful consideration of the record, and the other to the examination of such questions of law as seemed to be material.

On the line of facts, your office found, among other things, as follows:

Miss Goenawein has possession of from three to five acres of the east half of said land. She erected a dwelling house and made other valuable improvements thereon. There is testimony tending to show that she did not reside on the land but resided with her father on his homestead near Reno City, and in the town of El Reno. She and her father and mother and one or two of her sisters testified that she had resided on said land since April 30, 1892. The records of this office show that Rose Goenawein, in the case of *Goenawein v. McComb et al.* was an applicant for lot 15, block

94 (T. S. copybook 22, -371), El Reno. She was also an applicant in the case of Goenawein and Roff v. Haddon for lot 11, block 104 (T. S. copybook 22, -31), El Reno. In each of these cases she testified that she had resided on the lots and was an actual occupant of them from sometime in March, 1892, to May 23, 1892, the time of the entry of the townsite of El Reno. The testimony of Snowden and witnesses tends to show that Miss Goenawein was only at said house on said land, once or twice a week, and only remained thereon over night about twice per month. In *Langford v. Butler* (20 L. D., 76,—syllabus), it is stated that,—“residence cannot be maintained by occasional visits to the land, while the actual home is elsewhere.”

It further appears that the house she erected on the land was a frame building, weather-boarded, floor laid, but said house was not plastered nor sheeted inside, and was open from floor to roof. Those who kept company with Miss Goenawein generally found her at her father's house and on returning would leave her there. I am inclined to think that she did not maintain such a residence on said land as the law requires of a person entitled to a homestead, and I so find. I also find that Persie Snowden made a settlement on said land before Goenawein settled thereon.

This part of your finding is the subject of several of the exceptions filed. In so far as it purports to be the substance of facts shown by the testimony and record, it seems to be fairly supported. This additional state of facts is further gathered from the record: Goenawein made the race across the one hundred and fifty-five foot strip on horseback while Snowden made it on foot. Goenawein reached the line of the quarter-section first, throwing an iron stake upon the land with a flag attached as she entered upon it, and while her horse was in full career. Her horse carried her about four hundred feet further before she stopped and dismounted. Her father rode in the race with her and after she stopped and dismounted, she requested her father to bring her the stake from the place where she had thrown it, which he proceeded to do, and in a few moments afterwards she stuck it into the ground near where she dismounted. It was the opinion of many of the witnesses that many of those who ran afoot reached the limit of the one hundred and fifty-five foot strip about as soon as those on horseback or on wheels. There can be no doubt, however, from the evidence that Miss Goenawein rode a very fleet pony, and that she crossed this strip and threw her stake upon the ground in advance of Miss Snowden. Miss Snowden ran rapidly across the strip on to the land, stopping a few yards from the line, carrying a stake and hatchet, where she stuck the stake and at once commenced digging. It is apparent that she was thus engaged before Goenawein stuck her stake at the point where she dismounted. Leaving the question of whether or not Goenawein maintained her residence on the land after settlement as required by law in abeyance, for the present, the question as to which one of them performed the first acts of settlement on the land will be considered as a further test of their respective claims.

It seems to be insisted that the mere act of running to and upon the land is an act of settlement, and especially that the throwing of a stake upon the land, as in this instance, constitutes an act of settlement in the meaning of the law. It has been held in a number of

cases, that one who goes upon public land with the intention of making it his home, and does some act in execution of that intention, which is sufficient to give notice to the public generally of his intention to appropriate the land is a settler in the meaning of the law, if such initiative act is followed up and maintained. It may be said at once that the mere going upon the land, whatever may be the purpose, is not an act of settlement which charges others with notice of the intent or purpose and as such appropriates the land. This being true, the mere reaching the land first by Goenawein would not in itself confer any superior right upon her. It is insisted, however, that the throwing of her stake upon the land as her horse ran over it, was an act of settlement sufficient to segregate the land. A small stake with a flag or inscription upon it set in the soil, high enough above the surface to attract attention will be deemed an act of settlement, but it has in no instance been held that such a stake lying upon the ground would be notice to the public. In this case the stake thrown upon the ground was not permitted to remain there, whatever its position was, but at Miss Goenawein's request was removed by her father and carried to the point where she dismounted from her horse and there set up. The effect of the act of throwing the stake need not be further considered as a means of notice to the public, since it lacks the necessary element of permanency. This means of notice was at once abandoned, and the stake removed. The setting of the stake by Miss Goenawein at the point where she dismounted from her horse was the first act of settlement which could estop Snowden and others from settling upon the land. Snowden having performed a similar act of settlement upon the land earlier in point of time must be regarded as the prior settler, and Goenawein can take no benefit from this final setting up of her stake.

A different question might arise, if Snowden had observed the throwing of this stake, and thus had actual notice of Goenawein's intention to claim this particular tract; but she is not shown to have had any knowledge of what Goenawein was doing or intending, and the mere racing over the land was not significant, as it was but the border of a vast tract of the Cheyenne and Arapahoe country, that day opened to settlement; thus there was no presumption that those starting into the race there intended stopping on this tract.

The purpose of Miss Snowden's appeal is to insist upon her right to the whole of the NE. $\frac{1}{4}$, as the prior settler upon it. It is not necessary to consider her appeal further than to say that sufficient grounds have not been found to authorize the dispossession of the townsite claimants on the west half of the quarter-section. In the light of the whole record, the rights of the parties seem to have been fairly adjudged by your office, and your office decision is accordingly affirmed.

RAILROAD GRANT—PLAN OF ADJUSTMENT.

IOWA RAILROAD LAND CO.

The grant to the State of Iowa by the acts of May 15, 1856, and June 2, 1864, is a grant in place, the extent of which is determined by the location under the original grant, and the amount of lands earned thereunder ascertained by the line of road constructed west of Cedar Rapids, with the additional right under the act of 1864, to satisfy deficiencies within the grant in place by resorting to even numbered sections within the six mile limits, and both even and odd within the fifteen mile limits, and if there is still a deficiency to resort to the even and odd sections along the modified line within twenty miles thereof.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 9, 1896. (F. W. C.)

I have considered the matter of the adjustment of the grant made by the acts of May 15, 1856 (11 Stats., 9), and June 2, 1864 (13 Stats., 95), to the State of Iowa to aid in the construction of a railroad

from Lyons City to a point of intersection with the main line of the Iowa Central Air Line Railroad, near Maquoketa, thence on said main line, running as near as practicable to the forty-second parallel across the State, to the Missouri River.

By the act of 1856 a grant was made to the State of "every alternate section of land designated by odd numbers for six sections in width on each side" of the road, with provision for the selection of other lands from the odd numbered sections within fifteen miles of the line of the road, in lieu of those lost in place.

This grant was, by the State, conferred upon the Iowa Central Air Line Railroad Company, which company surveyed the line shown upon the map filed October 31, 1856, as the definite location of the road, which location was duly accepted, the limits of the grant adjusted thereto, and withdrawal made of the odd numbered sections within such limits. This company failed to construct any part of the road, and the State resumed the grant in 1860 and conferred the same upon the Cedar Rapids and Missouri River Railroad Company.

Prior to this time, however, a road had been built by the Chicago, Iowa and Nebraska Railroad Company (not a land grant road), from a point on the Mississippi River within about three miles from Lyons City to Cedar Rapids, and practically upon the location theretofore made between said points by the Iowa Central Air Line Company.

The Cedar Rapids Company was, therefore, on its own request, released from the building of a railroad east of Cedar Rapids. This company began the construction of the road at Cedar Rapids, upon the original location, and prior to the year 1864 had completed about one hundred miles, or, as appears from your letter, to Nevada.

By the fourth section of the act of June 2, 1864 (*supra*), it is provided:

That the Cedar Rapids and Missouri River Railroad Company, a corporation established under the laws of the State of Iowa, and to which the said state granted a

portion of the land mentioned in the title to this act, may modify or change the location of the uncompleted portion of its line, as shown by the map thereof now on file in the general land-office of the United States, so as to secure a better and more expeditious line to the Missouri River, and to a connection with the Iowa branch of the Union Pacific Railroad; and for the purpose of facilitating the more immediate construction of a line of railroads across the State of Iowa, to connect with the Iowa branch of the Union Pacific Railroad Company, aforesaid, the said Cedar Rapids and Missouri River Railroad Company is hereby authorized to connect its line by a branch with the line of the Mississippi and Missouri Railroad Company; and the said Cedar Rapids and Missouri River Railroad Company shall be entitled for such modified line to the same lands and to the same amount of lands per mile, and for such connecting branch the same amount of land per mile, as originally granted to aid in the construction of its main line, subject to the conditions and forfeitures mentioned in the original grant, and, for the said purpose, right of way through the public lands of the United States is hereby granted to said company. *And it is further provided*, That whenever said modified main line shall have been established or such connecting line located, the said Cedar Rapids and Missouri River Railroad Company shall file in the general land-office of the United States a map definitely showing such modified line and such connecting branch aforesaid; and the Secretary of the Interior shall reserve and cause to be certified and conveyed to said company, from time to time, as the work progresses on the main line, out of any public lands now belonging to the United States, not sold, reserved, or otherwise disposed of, or to which a pre-emption right or right of homestead settlement has not attached, and on which a bona fide settlement and improvement has not been made under color of title derived from the United States or from the State of Iowa, within fifteen miles of the original main line, an amount of land equal to that originally authorized to be granted to aid in the construction of the said road by the act to which this is an amendment. And if the amount of lands per mile granted, or intended to be granted, by the original act to aid in the construction of said railroad shall not be found within the limits of the fifteen miles therein prescribed, then such selections may be made along said modified line and connecting branch within twenty miles thereof: *Provided, however*, That such new located or modified line shall pass through or near Boonsboro', in Boon County, and intersect the Boyer River not further south than a point at or near Dennison, in Crawford County: *And provided, further*, That in case the main line shall be so changed or modified as not to reach the Missouri River at or near the forty-second parallel north latitude, it shall be the duty of said company, within a reasonable time after the completion of its road to the Missouri River, to construct a branch road to some point in Monona County, in or at Onawa City; and to aid in the construction of such branch the same amount of lands per mile are hereby granted as for the main line, and the same shall be reserved and certified in the same manner; said lands to be selected from any of the unappropriated lands as hereinbefore described within twenty miles of said main line and branch; and said company shall file with the Secretary of the Interior a map of the location of the said branch: *And provided, further*, That the lands hereby granted to aid in the construction of the connecting branch aforesaid shall not vest in said company nor be encumbered or disposed of except in the following manner: When the governor of the State of Iowa shall certify to the Secretary of the Interior that said company has completed in good running order a section of twenty consecutive miles of the main line of said road west of Nevada, then the secretary shall convey to said company one third, and no more, of the lands granted for said connecting branch. And when said company shall complete an additional section of twenty consecutive miles, and furnish the Secretary of the Interior with proof as aforesaid, then the said secretary may convey to the said company another third of the lands granted for said connecting branch; and when said company shall complete an additional section of twenty miles, making in all sixty miles west of Nevada, the

secretary, upon proof furnished as aforesaid, may convey to the said company the remainder of said lands to aid in the construction of said connecting branch: *Provided, however*, That no lands shall be conveyed to said company on account of said connecting branch road until the governor of the State of Iowa shall certify to the Secretary of the Interior that the same shall have been completed as a first-class railroad. And no land shall be conveyed to said company situate and lying within fifteen miles of the original line of the Mississippi and Missouri railroad, as laid down on a map on file in the general land-office: *Provided, further*, That it shall be the duty of the Secretary of the Interior, and he is hereby required, to reserve a quantity of land embraced in the grant described in this section, sufficient, in the opinion of the governor of Iowa, to secure the construction of a branch railroad from the town of Lyons, in the State of Iowa, so as to connect with the main line in or west of the town of Clinton in said state, until the governor of said state shall certify that said branch railroad is completed according to the requirements of the laws of said state: *Provided, further*, That nothing herein contained shall be so construed as to release said company from its obligation to complete the said main line within the time mentioned in the original grant: *Provided, further*, That nothing in this act shall be construed to interfere with, or in any manner, impair any rights acquired by any railroad company named in the act to which this is an amendment, or the rights of any corporation, person or persons, acquired through any such company; nor shall it be construed to impair any vested right of property, but such rights are hereby reserved and confirmed: *Provided, however*, That no lands shall be conveyed to any company or party whatsoever, under the provisions of this act and the act amended by this act, which have been settled upon and improved in good faith by a bona fide inhabitant, under color of title derived from the United States or from the State of Iowa adverse to the grant made by this act or the act to which this act is an amendment. But each of said companies may select an equal quantity of public lands as described in this act within the distance of twenty miles of the line of each of said roads in lieu of lands thus settled upon and improved by bona fide inhabitants in good faith under color of title as aforesaid.

It will be seen that this act authorized a change in the location of the *unconstructed* portion of its line and adjusted the grant for such modified line "to the same lands and to the same amount of lands per mile" as originally granted for the same road; it also provides for a connecting branch line with a new grant of "the same amount of land per mile, as originally granted, to aid in the construction of its main line."

After the passage of this act the road was constructed to the Missouri River, upon the modified location made thereunder, and as constructed is somewhat longer than the original location west of Cedar Rapids.

In the case of the Cedar Rapids and Missouri River Railroad Company *v.* Herring (110 U. S., 27), the court says:

We are of opinion that the purpose of this enactment was—

1. To relieve the company from the obligation to build that part of its line as found in the land office, between the Mississippi River and Cedar Rapids, because there already existed a road between those points built by another corporation.

2. To require the company to connect the city of Lyons with that corporation's road, so that it would be, as originally intended, the Mississippi terminus of the land-grant road across the State. This required the construction of about two and a half miles of road.

3. To authorize the company to change the location of its road yet to be constructed west of Cedar Rapids for its convenience.

4. If this change left the city of Onawa, in Monona County, off the line of the road, they were to build a branch to that place.

5. To construct a new line connecting its existing road with the road from Davenport on the Mississippi River, to Council Bluffs, on the Missouri River.

6. To adjust the amount of lands, to which the company would be entitled under this new order of things, and to enlarge the source from which selections might be made for the loss of that not found in place.

In this adjustment it becomes necessary in the first instance to determine the amount of lands earned by the construction of the road west of Cedar Rapids.

You present five plans of adjustment, and the results thereof are as follows:

Exhibit A is an adjustment upon the theory that the company takes under the original grant from Cedar Rapids, and that the only additional right given the company under the act of 1864 was to satisfy deficiencies within the grant in place, by resorting to the even numbered sections within the six mile limits and both even and odd within the fifteen mile limits, and if there was still a deficiency to resort to the even and odd sections along the modified line within twenty miles thereof. Under this settlement there have been excess approvals to the company of 57,570.24 acres.

Exhibit B is a statement upon the same theory for that part of the road between Cedar Rapids and Nevada, as exhibit A, but for that portion west of Nevada six sections per mile of constructed road have been allowed. Under this statement, there have been excess approvals of 5,814.20 acres.

Exhibit C is an adjustment upon the theory that the company is entitled to six full sections per mile of constructed road west of Cedar Rapids, and if that theory be correct, there would still be due the company 9,512.43 acres.

Exhibit D shows an adjustment upon the same theory for that part of the road between Cedar Rapids and Nevada as exhibit A, and for the balance, or the modified line under the act of 1864, 171.60 miles, for the same amount of lands per mile as was granted by the act of 1856. If this statement is correct, there has been approved to the company 14,943.32 acres of the land in excess of the quantity it is entitled to.

Exhibit E shows an adjustment upon the theory that the grant should be adjusted as a whole from Cedar Rapids to the eastern terminus, 271.6 miles, and the company is entitled to the same amount of land per mile therefor as was granted by the act of 1856. The amount of lands per mile granted by said act was 3,786.80 acres, and this multiplied by the number of miles of road constructed west of Cedar Rapids gives 1,028,494.88 as the number of acres to which the company is entitled.

You are of the opinion that the latter plan is the correct one, while the company claims six full sections per mile for the entire road constructed, being the plan described in exhibit "C", thus making an absolute grant of quantity for the entire line west of Cedar Rapids.

The act of 1856 did not grant any specific number of sections per mile, it was "every alternate section of land designated by odd-numbers for six sections in width on each side," being a grant "in place," and indemnity was not granted in quantity sufficient to make up any specified amount, but only as to such sections in place as had been disposed of prior to definite location.

This company had, at its own request, been released from building

the road east of Cedar Rapids, the same having been built by another company, and, as held in Cedar Rapids, etc., *Railroad v. Herring* (*supra*), this company earned no lands by such construction, as it was not the purpose of the act of 1864 to give lands on account of the whole line, when only a part had been constructed, but that the quantity of the grant is to be determined by the constructed line.

The effect of this decision was to establish a new terminus at Cedar Rapids for the measure of the grant.

Prior to the passage of the act of 1864, about one hundred miles of road had been constructed west of Cedar Rapids; any *further grant* made by said act must therefore have been made in contemplation of the continued construction to the western boundary of the State as originally intended.

By the act of 1864 the company was permitted to change the unconstructed portion of its line, and for such modified line, it was to be entitled "to the same lands and to the same amount of lands per mile." It was apparant, however, that the necessary quantity of lands in lieu of the odd sections disposed of within six miles could not be satisfied by *alternate* sections within the fifteen mile limits along the *original* line; hence, said act of 1864 provides that—

The Secretary of the Interior shall reserve and cause to be certified and conveyed to said company, from time to time, as the work progresses on the main line, out of the public lands now belonging to the United States . . . within fifteen miles of the original main line an amount of land equal to that originally authorized to be granted to aid in the construction of the said road by the act to which this is an amendment. And if the amount of land granted by the original act, to aid in the construction of said railroad, shall not be found within the limits of the fifteen miles therein prescribed, then such selections may be made along said modified line and connecting branch within twenty miles thereof.

I am unable to find anything in the act of 1864 to sustain the position that, by said act, the grant was changed from one "in place" under the act of 1856, to an absolute grant in quantity.

In the case of Cedar Rapids, &c., *Railroad v. Herring* (*supra*), the court says:

The words "the same lands," which plaintiff's counsel insist mean *all* the lands of the old grant, are intended, we think, to show that the lands are to be taken along the line of the old survey; that the odd sections on each side of that old line which became vested in the State when it was established should be a part of the new grant to this company, and that the deficiencies should in like manner be made up by sections within the fifteen mile limit of that line. This is confirmed by that part of the next sentence of this section, which directs the Secretary of the Interior, when the new line shall have been established, to reserve all the lands without regard to alternate sections within that limit, so far as may be necessary to satisfy these selections, for the loss of odd sections previously disposed of.

Under said decision, any lands along the "old survey," except those "in place" west of Cedar Rapids, must be taken as indemnity, and "for the loss of odd sections previously disposed of." Where was said loss to occur? Not along the new location, for there were no place

limits provided for along such line. It could only be along the original location, or, as it is called, the "old survey."

In the case of the Iowa Railroad Land Company (9 L. D., 370), it was said that—

The quantity of land to which the company is entitled under the grant of 1864 is to be determined by the length of the road actually constructed by it, and not by the length of the road as originally located under the act of 1856;

i. e., that the company was not to receive any lands on account of any portion of the road not constructed by it. In said case it was also held that lands lying within the indemnity limits of the old line *east* of Cedar Rapids may be selected in lieu of lands lost "in place" *west* of said city.

It is plain to my mind, therefore, that the original location is the measure of the grant for the main line of said road, and that the only purpose of the act of 1864, so far as said main line is concerned, was to authorize a change in the line, secure the building of a connection with Lyons City, and "to enlarge the source from which selections might be made for the loss of that not found in place," along the original line, i. e., to fully satisfy the amount granted or intended to be granted for the road west of Cedar Rapids by the act of 1856.

It would therefore seem that the plan set forth in exhibit "A" is in accord with my views on the subject, in so far as the extent of the grant is concerned.

Against the charges made on account of the grant in your adjustments, the company claims and insists that there should be deducted—

First, "lands erroneously or mistakenly certified, namely 109,756.85 acres, known as the Des Moines River lands."

If, in the adjustments heretofore submitted, this grant is charged with any lands erroneously certified within the limits of the Des Moines River grant, the same should be deducted, as such lands are not properly chargeable to this grant.

Second, "There should be deducted from the area of lands charged against the grant 6,358.71 acres of swamp lands in Carroll county."

In support thereof it is insisted that:

In 1853, Iowa, by an act of the General Assembly, granted to each county all such lands lying within its limits. Carroll county sold and conveyed, or agreed to convey to the American Emigrant Company all its swamp lands. In an action brought in the district court of that county in September, 1853, against the Iowa Railroad Land Company, assignee and successor in interest of the railroad companies, the county sought to recover the possession of and to quiet the title to several thousand acres of land which had been certified to the railroad company. In this action it was claimed that the certification of the lands to or for the railroad was a cloud upon the title of the county. The American Emigrant Company intervened as a party, claiming that all the right, title and interest of the county in and to the said lands had been conveyed to it. The court held that of the lands in controversy 6,358.71 acres were swamp lands in fact and passed to the State under the act of September 28, 1850; that the American Emigrant Company was the grantee of the State and of the county; that the certificates issued to the State for the benefit of the railroad

company were a cloud upon the Emigrant Company's title. December 16, 1878, a decree was entered "that the title to all of said lands and to each particular tract and parcel thereof be quieted and confirmed in the intervenor, the American Emigrant Company, and that all right and apparent title and interest of the defendant, the Iowa Railroad Land Company, in and to the same, or any tract or parcel thereof, be and the same is hereby extinguished, canceled and set aside, and the said defendant is hereby barred and estopped from having or asserting any title to or interest therein, to any part or parcel thereof."

A list of these lands has been filed by the company.

Perhaps the government is not bound by this decision. But it is best that you will investigate this matter, and if it is found that these lands are swamp and overflowed the deduction should be allowed.

Third: "There should also be deducted from the area of lands chargeable against the grant 2,569.75 acres, erroneously certified, as set forth in 'Exhibit B' herewith, they having been previously disposed of by the United States."

The certifications, on account of the grant, being outstanding, must remain a charge to the grant, but should the company reconvey these lands to the United States, and thus remove the cloud upon the previous titles given to other parties, the deduction should be allowed.

Fourth: "There should also be deducted from the area of lands chargeable against the grant the 76,916.75 acres sold by the Iowa Central Air Line Railroad Company out of the grant of 1856, prior to resumption by the State of Iowa, and to the enactment of the grant of June 7, 1864."

These lands were certified on account of the grant made by the act of 1856, and this claim for deduction seems to rest upon the ground that the company receiving the lands did not earn the same, and that the present company never received any benefit from such certification, and therefore should not be charged with the same.

Having held that the purpose of the act of 1864 was merely to enlarge the source from which the amount of lands granted by the act of 1856 might be satisfied, it follows that indemnity can not be allowed for lands certified under the act of 1856 and prior to the passage of the act of 1864, and this claim for deduction must be denied.

This disposes of the claims for deduction made on behalf of the company, and it but remains to consider the lists, submitted by you, of lands held to have been heretofore erroneously certified on account of the grant.

These lists are described in your letter as follows:

List A 1 embraces lands covered by entries which were either made prior to and were extant upon the records at the time the company's right attached, or were authorized or confirmed by this office or Department.

List B 1 embraces lands which have been approved to the State as swamp.

List C 1 embraces lands within the six mile limits, which were covered by unexpired pre-emption filings at the date of the definite location of the road.

List D 1 embraces lands lying east of the terminal at Cedar Rapids.

In the answer made on behalf of the company, to the rule issued by you to show cause why the lands embraced in these lists should not be reconveyed to the United States as contemplated by the act of March 3, 1887 (24 Stats., 556), many general questions as to the rights of the United States under said act are discussed, but these questions are fully answered in the case of Winona and St. Peter Railroad Company (9 L. D., 649), and the position there taken is adhered to.

As to the lands in list "A 1" the company disclaims any interest in a large part thereof.

Those are, perhaps, the same lands for which a deduction is claimed by the company, and, as it lays no claim thereto, it should convey the lands to the United States and thus remove the cloud from the title of others, and in this way facilitate the adjustment of its grant.

Should such conveyances be made, the rule, to this extent, might be dissolved, otherwise demand should be made for reconveyance as in other cases heretofore directed.

In this connection I might add, as stated in the matter of the adjustment of the grant for the St. Louis, Iron Mountain and Southern Railroad Company (13 L. D., 559),

that any tracts covered by entries upon which patents have also issued, should be eliminated from the demand. In such cases, i. e., where two patents are outstanding, the parties should be left to their remedies before the courts.

As to the lands in list "B 1," they have all been twice approved to the State; first, as "swamp lands," and, later, on account of the railroad grant.

For the reason above given, I am of the opinion that, as the government can have no interest in the lands, and is under no obligation to an individual, that as to those the rule should be dissolved.

As to the lands embraced in list "C 1," viz: those covered by pre-emption filings, I have to direct that the list be amended so as to include all lands shown to have been covered by uncanceled pre-emption filings at the date of definite location, which I note is erroneously given in your office letter as October "13," 1856, instead of October 31, 1856.

See recent decision of this Department in the case of Fish v. Northern Pacific R. R. Co., on review, (23 L. D.,).

As to the lands in list "D 1," claimed to have been erroneously certified, for the reason that they lie east of the terminal at Cedar Rapids, I do not think that such fact is sufficient upon which to base a suit for the recovery of the land.

In the case of the Iowa Railroad Land Company (9 L. D., 370), it was held that lands might be selected within the indemnity limits east of Cedar Rapids, in lieu of lands lost in place west of that city.

I am of opinion that lands might be taken anywhere "along the line of old survey" to satisfy the grant, which, as before stated, is to be measured by the odd sections in place west of Cedar Rapids and within the limits of the original location.

While these lands may have been improperly certified as granted lands, yet, as they are subject to the grant as indemnity under the act of 1864, if found to be needed on the adjustment of the grant, no good purpose could be served by a suit, which must result in a judgment for the company, (*Kansas City, Lawrence and Southern Kansas Railroad Company v. The Attorney General*, 118 U. S., 682), but they should be charged to the company as so much indemnity for other losses.

It appears from this list that a large number of the tracts had been filed for and entered prior to the certifications on account of the railroad grant, and the same should be examined, with a view of determining the effect of such filings and entries upon the certifications made, and such tracts as have a status similar to those heretofore referred to, and for the reconveyance of which demand has been directed, should be included in such demand.

In this connection I note that the company alleges that it has sold many, if not all, of the lands shown to have been erroneously certified.

Under the act of March 2, 1896 (Public No. 35), these sales, if shown to have been bona fide, are confirmed, and the action against the company would necessarily be for the value of the land.

In resubmitting the case you will consider the showing in this particular in recommending further action.

This disposes of all questions necessary to a complete adjustment of this grant, and the papers are herewith returned.

HOMESTEAD CONTEST—SETTLEMENT RIGHTS—SECOND HOMESTEAD ENTRY.

NORTH PERRY TOWNSITE ET AL. *v.* MALONE.

In the case of an attack upon a homestead entry, based on alleged priority of settlement, it is incumbent upon the contestant to show that his acts of settlement were followed by the establishment of residence on the land to the exclusion of a home elsewhere.

When it appears that an entry fails because of the entryman's negligence in the matter of ascertaining prior adverse rights, he will not be allowed to make a second entry, if at the date of his application for such privilege there is a qualified adverse claimant for the land applied for.

The right to make a second entry will not be accorded to one who relinquishes his prior entry on account of a money consideration or its equivalent.

The sale by a settler of part of the land settled upon disqualifies him as an applicant for the right of entry under the homestead law.

A settlement right will not be held to relate back to the alleged initial act, if such act is not followed by substantial and bona fide acts of settlement and improvement.

A settlement made ostensibly for the purpose of securing a homestead, but in fact with a view to speculation in town lots, is lacking in good faith, and should not be accepted as the basis of a homestead entry.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 9, 1896. (G. C. R.)

This case involves the SW. $\frac{1}{4}$ of Sec. 14, T. 21 N., R. 1 W., Perry, Oklahoma, upon which John J. Malone made homestead entry at 3:59 o'clock P. M., September 16, 1893.

It appears that a hearing was ordered by your office letter "G" of March 12, 1894, upon contests filed against the entry by the townsite settlers of North Perry, by D. C. French, William R. West, William Mackel, and H. C. Schilling, alleging prior settlement, etc.

Upon that hearing your office affirmed the action of the register and receiver, dismissing all the contests and holding Malone's entry intact.

From that judgment the townsite settlers, West, Mackel and Schilling have, respectively, appealed. French appears to have made default at the hearing.

The land is in that part of Oklahoma known as the Cherokee Outlet, and was opened to settlement and entry at noon on September 16, 1893.

The land in controversy lies adjacent to and immediately north of the east half of the original townsite of Perry, which covers three hundred and twenty acres of land, being the NE. $\frac{1}{4}$ of Sec. 22 and the NW. $\frac{1}{4}$ of Sec. 23, of said township. This townsite was surveyed prior to the opening into blocks, lots, streets, etc.

The Atchison, Topeka and Santa Fe Railroad passes through the central part of the town of Perry, and it was over this road that the major part of the settlers reached the town on the day of opening, coming from the south boundary of the strip. The first train that arrived from the south was crowded with intending settlers, most of whom were seeking town lots. It was upon this train that Malone, West, Mackel, and many of the townsite contestants and settlers came.

Frank Corrigan, a witness for townsite claimants and clerk to the provisional board for North Perry, testified that he came in on the first train, which arrived in Perry about 12:35 P. M.; that he was among the very first to get off the train, having stood on the steps of the coach; that on leaving the train he went by the land office, where he stopped two or three seconds, and then went directly north to Sec. 15, just one and a half blocks from the land in controversy, reaching that place in three minutes from leaving train; that he staid in that locality all the afternoon; that on getting off the train it appeared to him that all the town lots were taken, not less than two or three thousand persons being scattered over the townsite; that a large number of people reached the land in controversy about the same time he arrived on Sec. 15; that he could see nearly all over the land from his position; that many people from the train "passed right on like a wave up the hill;" that he saw people east of the railroad (on land) immediately after he stopped; that four or five hundred people settled on the land in controversy that afternoon; when night came many of them went to the

creek on the land to get out of the heat and dust and to get water, but did not abandon their lots, returning to them; that the settlers on the lots on the land in controversy, and also on lots in Sec. 15, held a public meeting on the evening of the 16th of September (day of opening), looking to organization of the town of North Perry; that the meeting was adjourned until Monday evening following, when officers were elected; that the firm of Jacobs and Lindsey, surveyors and civil engineers, were employed to survey the land in lots; that the land was laid out into lots and blocks, the work commencing September 21, 1893, and ending October 7, thereafter; that one hundred and ninety-six certificates for lots were issued by the provisional board of trustees, and the same were paid for; thirty-four certificates were issued and partly paid for, and the remainder in possession of board; that the sum of eight hundred dollars (\$800) had been paid for lots; and out of this sum two hundred and fifty dollars (\$250) had been paid for their survey; that at date of hearing there were one hundred and ninety people living on the land; that the estimate was carefully made by going over the land lot by lot; that the improvements on the land were also carefully estimated by witness and one Bonty, and amounted to \$18,000, including some live stock.

Lindsey also testified that he assisted in the survey; that while this work was being done "a great many stakes were changed so as to be on blocks and not on the streets."

Nettie Weld also testified that she came in on first train, went at once to the land, with her mother; that she staked a lot and slept there that night; that there were two hundred people on the land that evening; that her mother has a house on the land; and has lived there since they first settled.

Isam Woolgridge testifies that he came in on first train about 12:35 P. M.; that he went at once to the land, he then saw people on west side of railroad, digging holes and driving stakes; that there were from three to five hundred people on the land that afternoon; that he still resides on the land; has a house, well, storm cellar, etc.

The above is substantially the testimony in behalf of the townsite claimants.

William Mackel, who claims the right of entry by reason of his alleged prior settlement, testified that he, too, came in on first train, which stopped "directly south of the boundary line in question; that he went at once to the land; that he "did not know of any one else there;" that he ran to the land and staked a homestead, placing his stake "probably twenty-five yards north of south line," and same distance from west line; three-quarters of land level; that there was no townsite settlement on land when he got there; did not then see Malone, Schilling, French or West; no one claimed the land as a townsite; that after he reached the land, "saw some parties staking for

lots, expecting it to be a townsite;" this was fifteen or twenty minutes after he reached the land; staid on land that night, and next day went to Orlando after team; returned on the 17th; went back again to Osage country, where he was sick three weeks, returned to land October 25; that the land was then fenced up with lots, so he could not find a place to put a house without having a quarrel; went back to Osage country, remained there on account of his son's sickness until December 15, 1893, when he returned to land; then built a house, fourteen by sixteen feet, and has lived there since; impossible to cultivate the land, since same was taken for town lots; many people could not get town lots and came at once to the land; before train stopped there were two or three hundred people on townsite of Perry, and on night of 16th (day of opening) there were town lot claimants on land; there were no people settled on the land "in my view until I got there."

The evidence shows that Mackel kept up his farm in the Osage country, where his son staid; he only moved part of his household goods. He could not say how much he staid on the land, and it is very questionable that his real home was at any time on the land. He fails entirely, except by mere negative testimony (as "there was no one in my view"), to show that he was in fact the first settler. His grounds of error relate, principally, to the findings in Malone's behalf and in failing to grant a new hearing upon his showing as to Malone's conduct. In view of what follows, it is unnecessary to discuss these grounds. Suffice it to say, that Mackel has failed to show that he was the prior bona fide settler on the land; even if he had established his averments in this respect, he failed to show that he made the land his real home. His contest is therefore dismissed.

Henry C. Schilling. It is unnecessary to set forth the voluminous testimony respecting Schilling's alleged prior settlement on the land. His peculiar methods of reaching the land in advance of the first train, by the aid of his old friend Summerville, superintendent of bridge construction, were of questionable regularity. He swears that he came in on a hand car, and reached the land before it was possible for those on the train to get there; that he saw no other person when he got there.

His own witness (S. B. Strahn) admitted that Schilling endeavored to get him (Strahn) to furnish Schilling with \$100 on consideration that a man would be furnished to hold a claim for witness until the latter could reach the land.

But, independently of these circumstances showing questionable conduct, Schilling is not a qualified entryman, and therefore his alleged prior settlement, even if established at the hearing, could avail him nothing.

It was shown that on September 22, 1891, Schilling made homestead entry for the NW. $\frac{1}{4}$ of Sec. 15, Tp. 14 N., R. 4 E., Guthrie land district;

that contests were filed against said entry, as follows: October 6, 1891, by one Berner; by one Dauron, October 22, 1891; and by one Adams, April —, 1892, all alleging prior settlement, and that Schilling did not go upon or settle on the land prior to his making entry.

Schilling relinquished said entry January 16, 1892, prior to the date fixed for the hearing. Sundry affidavits were introduced, stating that Dauron, one of the contestants, settled on the land on the afternoon of the day the land was opened to settlement and entry (April 22, 1891), and that in the judgment of affiants, Schilling's right there was inferior to that of contestant, and that he could not have successfully defended against said contest.

Schilling testified that he relinquished to avoid litigation and settle a contest; that he found out others had settled before he made entry. Being asked on cross examination what he received for the relinquishment, he answered: "I forget just now what it was in amount;" that he received thirty or forty dollars.

It does not appear that he has ever made application to make a second entry. When he made entry of this land, he, as an intelligent man, knew that another might have settled upon it; that among the many who made the race hundreds would in all probability fail to find unoccupied land; but he appears to have taken the risk, and made the entry without first going to and examining the land.

The general law prohibits one and the same person from making two homestead entries. While, under certain circumstances, a second homestead entry will be allowed upon proper showing, yet when it appears, as in this case, that the entry failed because of the entryman's laches or neglect in visiting the land, where he might have learned of a prior settler's rights thereto, he will not be allowed to make a second entry, when at date of his application therefor there is an adverse claimant for the desired tract qualified to make entry.

Again, Schilling received a consideration for his relinquishment—as to how much, his memory was strangely at fault; he thinks it was thirty or forty dollars. His evidence on this point is not satisfactory. If the sale of his relinquishment was induced solely by a money consideration, or its equivalent, either promised or received, it is plain he should not be allowed to make a second entry. His failure of memory as to what he did receive, the correct answer to which would have been the principal test, is hardly in accordance with the ability he exhibited in delineating many minute circumstances necessary to his cause, and it is doubtful on this account that he would be allowed the right of making a second entry, even in the absence of an adverse claim.

It is clear that Schilling is not a qualified entryman, and, therefore, his settlement, even if prior to all others (which is not admitted), can not avail him. His contest is therefore dismissed.

William R. West. West testified that he also came in on the first

train; and went at once to the land; that he did not see any one "on that part of the land;" that his family has been on land since September 18, 1893, and lived in a tent; admits he saw a young man (Gage) on the land just after he stuck his flag; admits having sold lots to the amount of ten dollars to one Dr. Pierce, and that his wife sold lots to a Bohemian.

There is no evidence showing that West reached the land in advance of others. Besides, he appears to have disqualified himself even if he were the first settler, by selling a portion of the lands. His contest is dismissed.

John J. Malone. As before seen, your office affirmed the action of the register and receiver in allowing Malone's entry to remain intact. All appellants allege error in this holding.

Malone testifies that he came in on the tender of the first train; that he jumped off the train before it hardly came to a stop; that he then went east, probably one thousand feet; then went over the railroad track and on to the land; carried with him a stake, two feet long, with his name written thereon; stuck his stake and pushed it down, and "skipped for land office on the dead run;" that that was all of the settlement he then performed. The stake had no flag, only his name written on it; that when he reached the land he saw two persons, French and one Walker; that as soon as he came to the land office "a man handed me my filing papers out of a window and a set of blanks; I got in line and I handed my papers to a man who came up there to make them out for me;" that he staid in line until he handed his papers to the register; that he had an interest in two tents which were put up in the town of Perry, but did not think it necessary to put up one on land until he built a house; that he started to build a house on land the last of February or first of March, 1894, "could not say positive;" house built by March 5, since which time has lived there; stay down town nights when can't get home; was in the saloon business in Perry; performed no acts of settlement from time he stuck his stake till he commenced his house.

It appears from papers in the case that John J. Malone, the entryman, died in the Insane Asylum, at Jacksonville, Illinois, January 27, 1895; that his father, John Malone, has qualified as his administrator, and seeks to be subrogated to all the rights of the deceased with respect to the land.

Certain phases of the testimony, disclosing glaring discrepancies in the testimony of the entryman, will not now be discussed.

A note on the homestead application, made by J. E. Malone, the register (a brother of the entryman), shows that the entry was made at 3:59 o'clock P. M., on the day of the opening (September 16).

Admitting that Malone stuck the stake, as represented, the act was not followed within a reasonable time by either improvements or residence. He waited nearly six months before he did anything whatever.

If he depended upon his settlement rights to secure title to the land, the initial act (sticking of the stake) should have been followed within a reasonable time by more conspicuous evidences of good faith. If he depended upon his entry, it should have been admitted to record before others had, in good faith, settled on the land. Before his entry was made many people were on the land claiming and staking the same for townsite purposes. It results that he was limited in his rights to his initial act, which failing to be followed within a reasonable time by more substantial and bona fide acts of settlement and improvements, his rights, if any, became subordinate to the townsite settlers.

The people who came into Perry on the day of the opening knew there would be a great rush for town lots; they had reasons to suspect that the lots then surveyed would be inadequate to the demands of the public, and that it would be necessary to obtain them from the lands immediately adjoining the townsite; such had been the history of Guthrie, the neighboring town, from which many of the settlers came; such was also the history of many other Oklahoma towns; and such is the history of Perry.

It is difficult to believe that the anxiety of the homestead claimants to secure the land in controversy was induced by a desire to use the land solely for agricultural purposes; it is more reasonable to conclude from all the circumstances that the primary purpose of the haste was to secure the land in anticipation of the inevitable and immediate demands of the same for town lots. As a matter of fact, all, or nearly all, the town lots of Perry were taken in a few minutes after the arrival of the first train; besides, many had preceded the train from nearer points on swift horses, and were on the lots when the train arrived. The result was that the supply of lots was vastly less than the demand, and the people in large numbers rushed to the adjoining tracts and began staking and claiming lots.

This state of facts was anticipated by every intelligent person; and if the land in controversy was sought for the purpose of preparing for this demand, and settlements were made thereon ostensibly for homestead purposes, but really for speculation in town lots, then the element of good faith would be lacking; in such case the entry of one, even if preceded by a prior settlement, could not be allowed to stand. *Guthrie v. Paine*, 13 L. D., 562.

It appears that the townsite of Perry has been extended, and that the land in controversy is now included in its corporate limits.

For reasons above given, Malone's entry will be canceled, and the corporate authorities of the town of Perry will be advised that upon a proper showing and application, the land may be entered for the several use and benefit of the inhabitants thereof.

The decision appealed from is accordingly reversed, in so far as the same holds the entry of Malone intact.

WAGON ROAD GRANT—DIAGRAM OF LIMITS.

HARDMAN *v.* THE DALLES MILITARY WAGON ROAD CO.

A diagram showing the limits of a wagon road grant, that has stood unquestioned for a long term of years, and under which rights have vested, will not be disturbed.

Secretary Smith to the Commissioner of the General Land Office, July 9, 1896. (C. W. P.)

The grantees of Joseph H. Hardman have appealed from your office decision of December 18, 1894, holding the homestead entry (No. 3516, LaGrande) of said Hardman of the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 5, the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 7, and the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 8, T. 14 S., R. 34 E., Burns land district, Oregon, for cancellation, for conflict with the grant to the Dalles Military Wagon Road Company.

In their appeal to the Department said grantees of Hardman allege that this land is within the limits of the grant to said company; that it appears from an inspection of the official map, or diagram, filed in the local office, township 14 south, range 34 east, lies next and directly south of township 13 south, range 34 east, and it appears from the official map published by the Department of the Interior, showing the location of the various townships in the State, as surveyed in the field, that said township 14 S., range 34 E., as surveyed and approved by the Department, does not extend as far east as the township next north, by more than one-half mile, that is to say, that the difference in the range of these townships is one-half mile; township 14 S., range 34 E., being one-half mile west of the extended east line of township 13 S., range 34 E.

It appears from your office letter of June 5, 1896, that "an examination of the records of your office shows that there is such a 'jog' between the said townships 13 and 14, which is not accounted for on the official diagram of said company's grant, for the reason that the said diagram was made long before these particular townships were surveyed;" and that "a re-adjustment of the limits of the grant to conform with this 'jog' would probably throw both of the said tracts outside the primary limits of the grant," but that "following the rule that has always obtained in this (your) office, this re-adjustment has never been made, so that according to the official diagram the said tracts are within the primary limits of the grant."

In the case of McLean *v.* Union Pacific R. R. Co. (22 L. D., 227), it was held upon the authority of the case of C. W. Aldrich (13 L. D., 572), that a diagram showing the limits of the railroad, prepared concurrently with the filing of the map of definite location, and upon which the withdrawal is ordered, will not be disturbed after such withdrawal has stood unquestioned for a long term of years and rights have vested thereunder.

This ruling will be adhered to, and your office decision is affirmed.

MINING CLAIM—PLACER LOCATION—APPLICATION—JUDICIAL AWARD.

AURORA LODGE v. BULGER HILL AND NUGGET GULCH PLACER.

The discovery and location of a placer mining claim establishes in the owner the right to the possession of the superficial area within its boundaries for all purposes connected with and incident to the use and operation of the same as a placer mining claim; such location, however, does not operate to give title or right of possession to veins or lodes within its limits, or preclude the right of discovery and location thereof by others.

A placer applicant will not be allowed to amend his application so as to embrace therein veins or lodes discovered by others after the location of the placer claim, but prior to the application therefor, and not included in said application as originally submitted.

A judicial award of the right of possession to an adverse placer claimant as against a lode applicant does not preclude departmental inquiry on the allegation of the lode claimant that said placer claim, as subsequently applied for, embraces known lodes or veins, where it appears that such question was not in issue before the court, nor determined by its judgment; but if such allegation of the lode claimant is sustained, on such inquiry, he will be limited to the land necessary to the occupation, use, operation and enjoyment of the lode thus shown to exist within said placer claim.

Secretary Smith to the Commissioner of the General Land Office, July 13, 1896.
(A. B. P.)

This is an appeal by William M. Bennett, who in his own right, and as representative of the estate of one M. H. Gibbon, deceased, claims to be the owner of the Aurora lode mining claim, from two decisions of your office, under dates, respectively, of January 28, 1896, and April 1, 1896, the first dismissing his protest against the application of the Silver Bow Basin Mining Company for patent to the Bulger Hill and Nugget Gulch placer claims based upon mineral entry No. 34 and the papers filed in support thereof, in the Harris mining district, Sitka, Alaska, and the second, denying his motion for review of said first decision.

The facts shown by the record are substantially as follows:

The Bulger Hill and Nugget Gulch placer claims were located March 19, and April 6, 1881, by the original owners thereof.

The Aurora lode claim was located April 9, 1881, by the present claimant Bennett and two others then interested with him in the claim.

The Silver Bow Basin Mining Company is now the owner of the Bulger Hill and Nugget Gulch placer claims, and the said Bennett and the estate of said Gibbon, who was also one of the original locators, are the owners of whatever rights exist under the location of the Aurora lode claim and the proceedings subsequently had thereunder.

By act of Congress approved May 17, 1884, the laws of the United States relating to mining claims were extended throughout the District of Alaska. (23 Stat., 24.)

A conflict, to the extent of 6.52 acres of surface ground, between the Placer and Lode claims furnishes the source of the present controversy.

In November, 1887, Bennett, for himself and his co-claimant, filed in the local office an application for patent for the said Aurora lode claim, which had been designated and was known on the files and records of the office as lot No. 41; and on January 25, 1888, one George Harkrader, then owner of the said placer claims, though he was not one of the original locators thereof, filed an adverse claim under section 2326 of the Revised Statutes. It does not affirmatively appear that this adverse claim was filed within the time allowed by law, but as no question has been raised in the record relative thereto it will be presumed to have been properly filed.

Upon his said adverse claim suit was instituted by Harkrader, in the United States district court for the district of Alaska, within the time allowed by the statute for such action to be taken by an adverse claimant. This suit came on for trial at the November term, 1888, of the said court, and resulted in verdict and judgment in favor of the plaintiff for the possession of the "placer mining claims" described in the complaint filed.

A writ of error was obtained to the judgment from the supreme court by Bennett, and by decision of that court, rendered May 27, 1895, the judgment of the court below was affirmed (158 U. S., 441).

In the meantime, to wit, on March 14, 1891, the Silver Bow Basin Mining Company, as successor to the rights of Harkrader, filed in the local office a certified copy of the judgment roll of the lower court, accompanied by an application for patent for the 6.52 acres, in conflict as aforesaid, as a placer mining claim, and was allowed to make mineral entry No. 34 covering the same. Why the application and entry were restricted to the 6.52 acres, and were not made for the whole area of the placer claims, does not appear. The said application and entry papers were forwarded to your office, but in view of the pendency of said suit in the supreme court on writ of error, as stated, further action in the premises was for the time suspended.

After the said decision of the supreme court had been rendered, to wit, on August 16, 1895, the Aurora lode claimant filed in your office his protest against the issuance of patent to the placer claim upon said mineral entry No. 34.

This protest, referring to the surface conflict as hereinbefore set forth, between the lode and placer claims, as originally located, alleges in substance, that there exists within the limits of said surface conflict a lode or vein, known as the Aurora lode claim, which was discovered by protestant and said M. H. Gibbon, and was, by them, on the 9th day of April, 1881, duly located and properly surveyed, marked and designated on the ground, by monuments, stakes and otherwise, in all respects in accordance with the local laws, customs, and regulations of the Harris mining district, and that notice of said location was duly filed and recorded in the proper records; that ever since its location,

the protestant had been in the actual, open and notorious possession of said lode claim, and had, in the year 1893, erected thereon a Huntington mill and other valuable improvements, and had extracted from the mine large quantities of valuable ores and milled the same on the premises; that he had continuously worked and operated the said mine since the time of the location thereof, had expended in developing and improving the same more than \$50,000.00, had driven during the time over three hundred feet of tunnels, had operated the mine at large profit, and had realized in the operation thereof more than \$75,000; that said Aurora lode claim was known by name and general reputation throughout the Harris mining district; and in the vicinity of its location, and especially to the original locators and to the present owners of the said placer claims, was known to contain rock in place and well defined veins or lodes of gold-bearing quartz; that said improvements were erected and are situated within the limits of the said overlap or surface conflict; that at the date of the placer locations the locators thereof knew, and at the date of the said application for patent the present owner thereof knew, of the existence of said Aurora lode mining claim, and none of them ever at any time asserted any claim to the lodes, veins or ledges, by reason of the placer locations and the proceedings thereunder, or otherwise, but always recognized the protestant's right thereto.

The protest is accompanied by the separate affidavits of said Bennett and six other persons, which fully sustain the allegations thereof. Two of these affiants were original locators of the placer claims, and they aver, among other things, that at the time of said locations the ground was covered with snow, the surface being wholly invisible; that three days after said locations were completed Bennett and others were seen by affiants upon the ground locating the Aurora lode claim; that after the snow disappeared affiants themselves discovered that there was in fact quartz and rock in place within the line of the Aurora lode claim as located; that said Bennett and others went immediately into possession of the Aurora lode claim and had been continuously in possession, improving and operating the same, ever since; and that the original locators of the placer claims never asserted any claim or right thereto in any respect whatever. One of said two affiants further states that he was a witness in the said suit in the district court and that at the trial thereof it was not claimed by the plaintiff, Harkrader, that he had any right or claim whatever to the quartz or rock in place within the limits of said Aurora lode claim.

Three of said affiants, after severally averring upon their personal knowledge the existence of rock in place, ledges and lodes of mineral bearing ore within the Aurora lode claim, further say, in substance, that they were of the trial jurors in the said suit in the district court and that during the trial of said suit no evidence was submitted to the jury tending to raise a question as to whether the Aurora lode claim con-

tained rock in place and valuable lodes, and that no such question was passed upon by the jury; there was no contention before the jury as to the right of the Aurora lode claimant to the rock in place, ledges and veins within the lines of said claim as originally located, it being conceded by all parties and known as a fact to the jurors that the defendant, Bennett, was the owner of and was operating, with large improvements thereon, his said Aurora lode mining claim, and that the only question argued before and submitted to the jury for their determination was as to the validity of the Bulger Hill and Nugget Gulch placer claims, and this was the only question passed upon by the jury.

In view of these things Bennett asked for a hearing in the case, in order that he might have opportunity to establish by proper evidence, in the regular way, the facts set forth in his protest, and especially the material fact of the *known existence* of the Aurora lode mining claim within the limits of the placer locations, at the time of the said application for patent by the placer claimant, March 14, 1891.

On consideration of the record thus presented, your office, on January 28, 1896, held, in effect, that the judgment of the United States district court is conclusive of the questions raised by said protest, and that by virtue of that judgment and its affirmance by the supreme court, as stated, the placer claimant is entitled to patent for the ground in controversy, and it was thereupon ordered that the said protest be dismissed.

On February 18, 1896, counsel for Bennett filed a motion for review of said decision, assigning various errors, which it is not deemed necessary here to specifically set forth.

Upon consideration of the motion for review, your office on April 1, 1896, denied the same, holding in substance and effect:

(1) That the original placer claimants, by virtue of their prior location were entitled, not only to the possession of their entire claim as located, but also to all the veins and lodes included within the boundaries thereof; and that their right to such veins or lodes within said boundaries could not be affected by the location of a lode claim within said boundaries, made subsequently to the placer location;

(2) That the present placer claimant therefore should be allowed to file an amended application for patent, embracing the lode claim in controversy; or if it should be charged by said claimant that no such vein or lode exists within the boundaries of the placer claim, a hearing should then be ordered to determine that question; and

(3) That at all events the rights of the lode claimant in this case were settled by the judgment of the court adversely to him, and there was, therefore, no error in the decision complained of, dismissing his protest.

It is not deemed necessary to set forth in detail the numerous specifications of error contained in the appeal by Bennett which brings the case here. Suffice it to say that they deny in toto the correctness of the several rulings of your office stated in substance as aforesaid.

These rulings will be considered in the order in which they have been already stated; and

(1) As to the effect of the placer locations:

In your said decision of April 1, 1896, you hold in substance that such a location gives to the locators or claimants under it a right to all veins or lodes included within its boundaries, though not claimed as such, or even discovered at the time; and that such right in the placer claimant can not be affected by any subsequent discovery or location by another, of a lode claim within the boundaries of the placer claim. In other words, a placer claim, once lawfully located distinctively as such, gives to the owner thereof the right to appropriate to his own use and benefit any lodes or veins of mineral bearing ores, which may thereafter be discovered and located by another within the limits of his claim; and all he will have to do in order to procure title to such subsequently discovered lodes or veins, in the discovery and location of which he took no part, would be to include them in his application for patent when filed, and pay the additional price per acre therefor as required by law. This I understand to be the logical effect of your said decision.

It does not appear to me that such is the law. No case has been cited in which the precise question has been decided, nor am I aware of any.

Under the mining laws of the United States property rights in veins or lodes containing mineral bearing ores are acquired in the first instance by discovery and location. It has frequently been held by the courts that a mining claim once perfected under the law by discovery and location, becomes property in the highest sense of that term (*Sullivan v. Iron Silver Mining Company*, 143 U. S., 431-434; *Belk v. Meagher*, 104 U. S., 279-283).

That there can be no valid location of a mining claim without discovery to support it will hardly be questioned. And a location on account of the discovery of a vein or lode can only be made by the discoverer, or one claiming under him. If the title to the discovery falls, so must the location which rests upon it. But if the discoverer has himself perfected a valid location on account of his discovery, no one else can have the benefit of that location, unless he should abandon his prior right (*Gwillim v. Donnellan*, 115 U. S., 45-50).

It is also to be remembered that the two classes of mineral deposits, namely, vein or lode deposits, and placer deposits, may exist in the same superficial area, and that they may be discovered, located and claimed by the same, or different persons, and patented accordingly. This is not only in accord with the plain import of the statute (Section 2333 R. S.), but is also well settled by both judicial and departmental decisions (*Reynolds v. Iron Silver Mining Company*, 116 U. S., 687-697; *South Star Lode*, 20 L. D., 204). The said two classes of mineral deposits are entirely separate and distinct from, and exist wholly independ-

ently of each other. The mining statutes appear to be founded upon the well-known and universally recognized difference in their character. The vein or lode of mineral bearing quartz is more valuable than the surface and placer deposits, and Congress has accordingly fixed the price per acre, as represented by the superficial area, of the former at \$5.00 per acre, and of the latter but \$2.50 per acre. This was stated in substance by the Supreme Court in the case of *Reynolds v. Iron Silver Mining Company*, just cited, wherein the court also said it had been shown by experience that both these classes of mineral deposits might be found in the same superficial area, and that section 2333 of the Revised Statutes makes provision for such a case. That section is as follows:

Where the same person, association, or corporation is in possession of a placer-claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer-claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer-claim, or any placer claim not embracing any vein or lode-claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer-claim, an application for a patent for such placer-claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer-claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer-claim is not known, a patent for the placer-claim shall convey all valuable mineral and other deposits within the boundaries thereof.

This section, as was stated by the supreme court in the case of *Noyes v. Mantle*, 127 U. S., 348-352, and in other cases both prior and subsequent thereto, makes provision for three classes, as follows:

1. When one applies for a placer patent, who is at the time in the possession of a vein or lode included within the placer boundaries, he must state the fact, and then, upon payment of \$5.00 per acre for such vein or lode claim and twenty-five feet of surface on each side thereof, and \$2.50 per acre for the placer claim, a patent will issue to him covering both the placer claim and the lode.

2. Where a vein or lode is known to exist at the time within the boundaries of the placer claim, an application for patent for the latter which does not include an application for the vein or lode will be construed as a conclusive declaration that the placer claimant has no right of possession to the vein or lode.

3. Where the existence of a vein or lode in a placer claim is not known at the time of the application for patent, title will be conveyed by such patent to all veins or lodes within its boundaries.

The present case, if the allegations of the protest filed by Bennett are true, would seem to come within the second of the three classes named, if within any of them. Certainly, it does not belong to either

of the other two. The original locators of the placer claims, assuming the allegations in the protest to be true, were not at the date of the placer locations in the possession of the vein or lode, and did not by their said locations lay any claim thereto. Their's were distinctively placer locations. They could not have had any just claim to the lode because, as we have seen, they were not the discoverers thereof, and could not therefore lawfully locate it, or assert any property rights in it. The lode claim was discovered by others; was located by others; and upon its location, as property under the law, belonged to others. Nor was the present placer claimant in possession thereof at the date of his application for patent, at which time and long prior thereto, the existence of the vein or lode within the limits of the placer locations, was a well known fact.

But whether this case comes wholly within the said second class or not, as to which more will be said when we come to consider the next question raised by the appeal, it cannot longer be doubted that the question as to whether lodes or veins of mineral bearing quartz pass under a patent covering a placer claim, is to be determined by the fact of the known or unknown existence of such veins or lodes *at the date of the application for patent* by the placer claimant, and not at the date of the location of his claim. If at that date the veins or lodes were known to exist and were not included in the application for patent, no title to them can pass by the patent; if not known to exist at that date, the placer patent will carry the title to them (South Star Lode, *supra*, and cases cited).

This being the settled law, both by departmental construction and judicial decision, as is also, as we have seen, that a mining claim once discovered and duly located becomes the property of the discoverer or locator; and in further view of the fact, as well as the settled law, that both placer and lode claims may and do exist within the same superficial area, and may be located by and patented to different owners, it would be strange indeed if a placer location can, as such, operate either to withdraw from subsequent discovery and location any lodes or veins within its boundaries by any one other than the placer claimant, or to appropriate the benefit of such discovery and location if made by another to the use and benefit of the placer claimant. This would give to the placer location an effect, in my judgment, not contemplated by the mining laws. Such a location, in and of itself, does not establish any right in the claimant under it to the superficial area within its boundaries except as a placer claim or mine. Of its own force, it cannot operate to give title to or property rights in any veins or lodes within its boundaries. True, a placer mining claim becomes property *as such* by discovery and location the same as a vein or lode claim, but it cannot and does not of itself in any sense give title to or property rights in veins or lodes; nor can it, in my judgment, operate to preclude a subsequent lawful discovery and location of veins or lodes within its boundaries.

If the contrary were the law, the more valuable of the two classes of mineral deposits, entirely separate and distinct from each other, but frequently existing in the same superficial area, as we have seen, might be absolutely withdrawn from exploration and purchase, by a location covering a claim to the less valuable; or, in cases like the present one, the effect would be to give to the locators of claims of the latter class all rights attaching by the discovery and location of claims of the former class, which are held to be property rights in the highest sense of that term. I cannot believe such is the law, and my conclusions, therefore, upon this branch of the case, are:

That while the discovery and location of a placer mining claim establishes in the owner the right to the possession of the superficial area within its boundaries for all purposes connected with and incident to the use and operation of the same as a placer mining claim, such location does not operate to give title or right of possession to veins or lodes within its limits, or preclude the right of discovery and location thereof by others.

2. As to the right of the placer claimant to amend its application for patent, so as to include an application for a lode.

The decision complained of in this respect necessarily implies the fact of the known existence of the lode claim at the date of the placer claimant's application for patent. This application, though it mentions the adverse lode claim of Bennett, does not include an application for said lode, but is distinctively a placer application, and that only. If section 2333 of the Revised Statutes is at all applicable to the case, then such an application for patent is thereby expressly declared to be a conclusive declaration that the placer claimant has no right to the possession of the lode, and in view thereof such claimant could not now be allowed to amend its application so as to include the lode, even if it had asked to do so, which does not appear from the record before me to have been done at the date of the decision complained of.

In your said office decision you make an exception of this case from the operation of said section 2333, based upon the idea that the placer claimant, by adversing the lode claim in the courts, thereby claimed possession of all veins or lodes within the placer limits during the pendency of such adverse proceedings. I do not think that such a claim of possession, even if made as stated, could in any event override the positive provision of the statute that the application itself shall conclusively determine the right of possession of the lode against the applicant if the lode is not applied for. But I do not understand that by the said adverse proceedings the owner of the placer claim asserted any right whatever to the possession of the vein or lode. On the contrary, the complaint filed in the court distinctly sets forth a claim to the premises in question as a placer mine, and makes no claim to any vein or lode that may exist therein. Instead, therefore, of any claim to the possession of the vein or lode being shown by the adverse proceedings, it

clearly appears therefrom that the then placer claimant *disclaimed* any such right of possession, by basing his said adverse proceedings wholly and solely upon a placer location or claim.

It is contended, however, that said section 2333 can have no application to the present controversy, because at the date of the placer application for patent the lode claim had been duly located, was the private property of the locators, and therefore could not have been lawfully included in the application for patent. That such were the facts is distinctly averred in the said protest by Bennett, the lode claimant.

In the case of *Noyes v. Mantle*, *supra*, the supreme court, in construing said section 2333, said:

This section can have no application to lodes or veins within the boundaries of a placer claim, which have been previously located under the laws of the United States, and are in possession of the locators or their assigns; for, as already said, such locations, when perfected under the law are the property of the locators, or parties to whom the locators have conveyed their interests. . . . The section can apply only to lodes or veins not taken up and located so as to become the property of others. If any are not thus owned, and are known to exist, the applicant for a patent must include them in his application, or he will be deemed to have declared that he had no right to them.

The same doctrine was again enounced and followed in the subsequent case of *Sullivan v. Iron Silver Mining Company*, 143 U. S., 431.

I conclude, therefore, that whether this case be considered as coming within the purview of said section 2333 or not, a question which it is not necessary here to determine, in neither event can the present placer claimant be allowed to amend his application for patent so as to include an application for the said vein or lode and thereupon secure patent therefor. If the statute applies, the placer claimant's rights in this respect are conclusively determined by its application for patent as filed. If the statute does not apply, as under the decision of the supreme court and the facts alleged in said protest it would seem that it may not, such right of amendment is nevertheless equally precluded, because to allow it would enable the placer claimant to appropriate to himself that which under the law, assuming the allegations of said protest to be true, is clearly the property of others.

3. As to the effect of the judgment of the court.

In your said office decision of April 1, 1896, you state, in effect, that the judgment of the court in this case determined but one question, and that, the right of possession; that the question as to whether there was a known lode within the limits of the placer claims, was not before the court and was not decided by it. This I believe to be the correct view of the scope and effect of the adverse proceedings in the court. The question there determined was simply the right of possession of the placer claims, distinctly as such; nothing more. No claim to the lode was asserted by the adverse claimant, although it appears from the said protest that its existence and its ownership by Bennett, etc.,

were at the time, well known and generally recognized facts. The complaint filed by the adverse claimant whereon the proceedings in the court were founded, which is not restricted to the premises in controversy here but appears to cover the whole area of the placer locations, avers the right of possession in the plaintiff of the premises described, as *placer claims*. The issue tried by the court, therefore, must necessarily have been simply whether the plaintiff was entitled to the possession of the premises *as placer claims*. It could have no wider scope under the pleadings.

By the judgment of the court there was awarded to the plaintiff "the possession of the above described placer mining claims." No question as to the ownership or right of possession of the lode was passed upon. No such issue was raised by the pleadings and therefore could not have been decided by the court.

In view of these things it is difficult to conceive upon what principle your office holding, to the effect that the lode claimant's right to the possession of the lode was decided adversely to him by the court, is based. I do not understand such to be the effect of the court's judgment. The court simply gave to the plaintiff what he claimed, namely, the possession of the ground within the limits of his placer claims as described; and, as stated in your said office decision of April 1, 1896, did not determine any question as to the known existence of a vein or lode within said placer limits. Neither in my opinion did the court undertake by its judgment to determine any question as to the ownership or right of possession of such vein or lode, nor could it have done so under the pleadings. Moreover, if the court did not determine the question of the known existence of such vein or lode, how could it have determined any question as to the right of possession or ownership thereof. And further, it is to be remembered that the application for patent by the placer claimant was not filed until March 14, 1891, more than two years after the date of the judgment of the district court; and that the date of the filing of that application is the time relative to which the fact of the known existence of a vein or lode within the placer limits is to be determined.

It thus clearly appears that neither the question as to the known existence of a vein or lode within the limits of the placer claims at the date of the placer application for patent, nor the question as to the right of possession and ownership of such vein or lode, if so known to exist, was before the court in the adverse proceedings, and neither was passed upon by the court. These important questions, both material to the present controversy, are therefore entirely open for departmental adjudication.

As already stated in another part of this opinion, the question as to the right of the placer claimant to the vein or lode, if in fact known to exist within the placer limits at the date of its application for patent must be conclusively determined against it by the fact that its appli-

cation for patent does not include an application for the vein or lode. But the question as to the known existence of such vein or lode within the placer limits, as alleged, still remains undetermined, and in view thereof I am of the opinion that the protest filed by Bennett should have been entertained by your office.

By said protest the known existence of a valuable vein or lode of mineral bearing quartz or rock in place within the placer limits, at the date of the application for patent by the placer claimant, is not only averred under oath, and the averment supported by numerous corroborating affidavits, but it is alleged in the same manner, that such vein or lode was discovered and duly located as a mining claim under the local rules and customs then in existence in Alaska, as far back as 1881, nearly ten years prior to the placer application for patent, and that the locators and present claimants thereunder have expended a vast amount of money in improving and operating the same, and have been continuously in its possession, improving and operating it as a mining claim ever since the date of said location, and were in such possession at the date of the filing of the placer application for patent. If these things be true as alleged, there can be no doubt, in my judgment, that the protestant, claiming in his own right and for another as stated, is the lawful owner of said vein or lode and should be protected in his rights thereto.

The only question which presents any serious difficulty to my mind relates to the extent of surface area the lode claimant will be entitled to in the event he sustains, by proof in the regular way, the allegations of his protest. His claim as originally located appears to be something over five hundred feet in width at the points of conflict with the placer locations. The extensive and valuable improvements erected upon the claim are alleged to be upon that part within the overlap. The surface ground being, however, only an incident to the lode and not a part of it, I am of the opinion that, under the judgment of the court, the placer claimant is entitled to the surface area within the overlap, except so much thereof as is necessary to the occupation, use, operation, and enjoyment of the lode claim by its owners. This may be more or less according to the extent and location of the present improvements, if any, and other conditions peculiar to this particular claim. I know of no established precedent controlling in such a case as this, but in view of the superior right of the placer claimant to the surface area as established by prior location and by the judgment of the court in the adverse proceedings, I do not think that the superior right of the lode claimant to the possession of his lode, if its discovery, location and known existence be true as alleged, should be allowed to carry with it more surface ground within the overlap than is necessary for the occupation, use, operation and full enjoyment thereof. Having been defeated in the adverse proceedings in the court, it would appear to be but just and right that the lode claimant should be thus restricted as touching the

surface area of his claim, and, indeed, such seems to be necessary in order to give effect to the court's judgment.

In view of the foregoing your said office decisions of January 28, and April 1, 1896, are reversed, and you are directed to order a hearing upon the protest filed by Bennett, for the purpose of determining:

1. Whether or not, at the date of the application for patent by the placer claimant, there was known to exist within the boundaries covered thereby, a vein or lode claim as alleged; and,

2. What extent of surface area on each side of said vein or lode within such boundaries will be necessary for the occupation, use, operation, and full enjoyment thereof by the owners, in the event its known existence shall be established as alleged.

Upon the report of such hearing you will proceed to adjudicate the case upon the principles herein enunciated.

FLORIDA CENTRAL AND PENINSULAR R. R. CO. *v.* BELL ET AL.

Motion for review of departmental decision of April 7, 1896, 22 L. D., 451, denied by Secretary Smith, July 13, 1896.

PRACTICE—APPEAL—MOTION TO DISMISS.

KEYES *v.* MACHOMICH.

Failure to appeal in time can not be excused on the ground that in the notice of the decision the period accorded for appeal was erroneously stated as thirty instead of sixty days, where the appellant has had the benefit of the full period, and the adverse party takes no advantage through said error.

Secretary Smith to the Commissioner of the General Land Office, July 13, 1896. (R. F. H.)

Elijah B. Keyes appeals from your office decision of April 30, 1895, dismissing his contest against homestead entry No. 3234 of Davenport T. Machomich, made December 7, 1893, for the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 31, T. 22 N., R. 16 E., Susanville land district, California.

Notice of said decision was served upon the attorney for Keyes May 7, 1895, but said written notice contained the statement that Keyes had *thirty* days in which to appeal from said decision.

Keyes filed his appeal from said decision in the local office July 10, 1895, and on the same day served notice of said appeal on the attorney for Machomich.

Motion to dismiss said appeal on the ground that the same was not

taken within the sixty days allowed by Rule 86 of Practice was filed by attorney for Machomich.

In opposition to the motion it is urged that the notice served was defective, in that it allowed but thirty instead of sixty days for appeal, and that had the register and receiver at the expiration of the thirty days reported that no appeal had been taken, it would have been the duty of the Commissioner to order a new notice, and that the time of appeal being governed by rule and not by statute, the presumption that all persons know the law does not apply. The answer to these arguments are, that the appellant has been in no manner injured or misled by the notice complained of; that he has had the benefit of the full sixty days allowed by the rule; that he saw and read the decision of the Commissioner from which he sought to appeal; that said decision did not limit the time of appeal as fixed by the rule of practice; and, lastly, that the entryman is not seeking any advantage by reason of the thirty days notice.

It is an elementary maxim of practice, that "the practice of the court is the law of the court," and this maxim goes hand in hand with the maxim, *ignorantia juris non excusat*, and the Rules of Practice must be observed, and such a deviation from them will entail consequences detrimental to the suitor. It is true that in cases of this nature, the government is always a necessary party, and by virtue of supervisory powers, may waive a defective appeal, and assume jurisdiction, whenever the interests of the government, or strong equities, demand the suspension of the rule, that gross injustice be not done, yet, such is not this case. In the case of *Julien v. Hunter* (18 L. D., 151), which involved a motion to dismiss an appeal on the ground that it was not taken in time, it was said in passing upon the question as to whether acceptance of notice of the appeal was a waiver of laches on the part of the appellant—

In the case at bar, however, there was no consent to delay, but simply an acceptance of service of notice after the time therefor had expired. It would therefore come within the rule already quoted, from *Sheldon v. Warren*, and in said case on review (9 L. D., 668), it was held that the rules of practice limiting the time within which appeals may be taken, will, in all contest cases, be strictly enforced, in the absence of valid excuse, or circumstances calling for the exercise of supervisory authority.

In the case before me, the excuse might be held sufficient, in the absence of any adverse claim, but from the examination of the record which I have made in determining the motion to dismiss, I am convinced that no injustice has been done by the decision already rendered in the case. There is no call, therefore, for the exercise of my supervisory authority.

In *Raven v. Gillespie* (6 L. D., 240), it was said: "On motion of the appellee, an appeal, not filed in time, must be dismissed."

In accordance with the foregoing rule, I am of opinion that the motion to dismiss the appeal in this case must prevail, and said appeal is accordingly dismissed.

RAILROAD LANDS—SECTION 4, ACT OF MARCH 3, 1887.

CARLTON SEAVER ET AL.

The right of a purchaser from a railroad company to perfect title under section 4, act of March 3, 1887, may be exercised without regard to whether his purchase was made before or after the passage of said act, if it was made in good faith, and before the land was held to be excepted from the grant.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 13, 1896. (C. J. G.)

This case involves the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 29, T. 1 N., R. 8 W., S. B. M., Los Angeles land district, California.

The said tract was patented to the Southern Pacific Railroad Company April 4, 1879, which patent was declared void by the U. S. Supreme Court in December 1892. After the land had been formally restored to the public domain in accordance with the decree of the U. S. circuit court filed April 27, 1893, Carlton Seaver and Stoddard Jess submitted proof under section 4 of the act of March 3, 1887 (24 Stat., 556), in support of their alleged right to said land. The said proof was rejected by the local office, it appearing that claimants had purchased the land from the company under deed dated May 19, 1887.

On appeal your office, under date of February 14, 1896, affirmed the action of the local office, holding that the right of purchasers to perfect title under section 4 of the act of March 3, 1887, is intended for those who purchase in good faith prior to the passage of said act.

The claimants have appealed from your office decision to this Department, assigning the following errors:

1. In holding that the remedy granted by the fourth section of the act of March 3, 1887, applies only to purchases from the railroad before the date of said act.
2. In not holding that said section applies to all purchases from a railroad, at any time before the decision of the supreme court, under or in accordance with which an adjustment provided by the first section of said act, shall be made.
3. In not holding that said section applies to all purchases from a railroad, before actual adjustment and finding of an erroneous certification or patent issued to a railroad, upon the grants therein mentioned or referred to.

On November 17, 1887 (6 L. D., 272) Attorney General Garland gave an opinion on certain questions proposed to him relative to the third, fourth and fifth sections of the act of March 3, 1887. Speaking of the section now under consideration he says:

The fourth section is a part of a general scheme for the disposition of lands which have been erroneously certified or patented to the railroads, which certification or patenting has been set aside and the title restored to the United States. . . . By the expressed words of the section with reference to the time when the patent shall issue: "The person or persons so purchasing in good faith . . . shall be entitled to the land so purchased . . . after the grants respectively shall have been adjusted." As the adjustment then must be completed first the patents under the fourth section are only intended to be issued after it shall have been

legally determined, in the mode prescribed in the second section, that the certification or patent to the railroad had been erroneously issued.

The second section of the act reads as follows: "That if it shall appear, upon the completion of such adjustments respectfully (*sic*), or sooner, that lands have been, from any cause, heretofore erroneously certified or patented etc."

It would appear from the language of the act and its interpretation by the Attorney General that said act was intended to include all lands erroneously certified or patented by the company prior to the date of adjustment, whether such lands were purchased before or after the passage of the act of March 3, 1887.

The Attorney General in the opinion cited continues as follows:

The whole scope of the law from the second to the sixth section, inclusive, is remedial. Its intent is to relieve from loss settlers and *bona fide* purchasers, who through the erroneous or wrongful disposition of the lands in the grants, by the officers of the government, or by the railroads, have lost their right or acquired equities, which in justice should be recognized. . . . The whole remedial part of the law was passed with a recognition of the fact that the railroad companies had sold lands to which they had no just claims.

The cases of *Sethman v. Clise* (17 L. D., 307) and *Holton et al v. Rutledge* (20 L. D., 22) were as to whether the right of a qualified transferee to purchase under section 5, act of March 3, 1887, was affected by the fact that his purchase was made after the passage of said act. In the former case it was said—

In my opinion it was the intention of Congress that the adjustment of these grants should be begun at once and completed as soon as possible, yet experience has shown that making these adjustments was not the work of a day and Congress must be held to have known that much time was necessarily employed before the end should be reached.

The act directed the manner of making adjustments, and it was the evident intention of Congress, as expressed in the 5th section of the act, that when in the adjustment of these grants it was ascertained that land had been bought from the railroad companies for which they could convey no good title, such buyers or their transferees, if *bona fide*, should be allowed to purchase the tracts claimed by them. And it can make no difference, I think, whether a transferee, otherwise entitled to purchase, bought the land before or after the day of approval of the act, if it was originally purchased in good faith from any said company.

The case of *Andrus et al v. Balch* (22 L. D., 238), cited the above decision, concluding as follows:

The argument here used applies with equal force where the original purchase was made after the passage of the act, as when the transfer from the original purchaser was made after the passage of the act and I am of the opinion that it can make no difference whether the purchase from the company was made before or after the passage of the act of March 3, 1887, if made in good faith, believing the title to be good and before the land purchased was held to be excepted from the grant.

It thus appears that the several sections of the act of March 3, 1887, are but different parts of the same scheme, namely, to secure from the

railroads a relinquishment or reconveyance to the United States of lands theretofore erroneously certified or patented, and

to relieve from loss settlers and *bona fide* purchasers, who, through the erroneous or wrongful disposition of the lands in the grants, by the officers of the government, or by the railroads, have lost their right or acquired equities, which in justice should be recognized.

It has been shown that relief similar to that applied for in the case at bar has been granted under the fifth section of the act of March 3, 1887 to transferees; there seems to be no good reason why the same relief should not be granted to an original purchaser under the fourth section thereof.

It is in evidence that the money for the purchase of the land in question was paid by the claimants to the company some time in the month of March, 1887. It also appears that there are no adverse claimants.

Your office decision is accordingly reversed, the claimants' proof will be accepted, and your office will accordingly demand payment from the railroad company for the land in question, as provided in section four of the act under consideration.

COAL LAND—PREFERENCE RIGHT OF ENTRY.

WALKER v. TAYLOR.

The preference right of entry conferred by section 2348 R. S., is dependent upon the opening and improving of a coal mine on public land that is in the actual possession of the applicant.

Secretary Smith to the Commissioner of the General Land Office, July 13, 1896. (E. B., Jr.)

Harry L. Taylor appeals from the decision of your office of July 11, 1895, holding his coal declaratory statement No. 601, filed July 6, 1893, for the NW. $\frac{1}{4}$ of Sec. 24, T. 21 N., R. 116 W., Evanston, Wyoming, land district, for cancellation and rejecting his application filed July 28, 1894, to purchase the land under his said declaratory statement.

Taylor's filing was made under section 2348 of the Revised Statutes to secure a preference right of entry to the land above indicated, and alleged, among other things, continued possession, commencing May 29, 1893, and that he had "located and opened a valuable mine of coal thereon." On March 12, 1894, Sharp Walker filed his coal declaratory statement for the same land, alleging possession since March 4, 1894, thus making a claim thereto adverse to that of Taylor. One J. S. Beckwith also subsequently made a coal filing for the same land. When Taylor offered final proof and applied to purchase the land, July 28, 1894, the local office suspended action upon his application until due notice should have been given to the adverse claimants of record as provided by paragraph 30 of Rules and Regulations under the coal land law, approved July 31, 1882.

Beckwith acknowledged service of notice on him in August following (the precise day of the month written in the acceptance is illegible). The record does not show when Walker received notice, but the same, apparently, brought out his protest, filed August 24, 1894, charging that Taylor never made any discovery of coal on the land, nor did any work upon the same in the way of taking out coal therefrom, and that since his filing the tract had remained vacant and unoccupied except as to his (Walker's) own possession. As the result of a hearing at which Taylor and Walker only appeared, the local office rejected the application of the former to purchase, on November 26, 1894, on the grounds, among others, that he had not been in possession of the land since March 4, 1894, and had not worked and made such improvements thereon and shown such good faith, generally, in the premises, as would entitle him to enter the land in the face of the protest of an adverse claimant in possession. Upon appeal by Taylor your office affirmed the decision of the local office, and held his filing for cancellation.

Only two of the nine assignments of error made in Taylor's appeal demand consideration here. These are that your office erred (1) in finding that the evidence did not show good faith in him in the matter of improvements, and (2) in holding his declaratory statement for cancellation. The first of these raises an issue of fact, the second, of law. It is unnecessary to set out or discuss at any length the testimony upon the question of fact. The decisions of the local office and of your office are in entire harmony upon that question and are adverse to appellant. The testimony has been carefully examined here and not only fails to show that any improvements in the way of opening a mine of coal on the land or of making it more valuable for coal mining purposes were ever made by appellant, but it is also shown both by the testimony of one Lessenger, Taylor's agent, and by numerous witnesses in behalf of protestant, that Taylor was not in actual possession of the land when he filed his application to purchase. The testimony further fails to show that Taylor ever made any discovery of coal on the land, and, as between him and Walker, shows that the latter was in possession when the former filed his application to purchase.

Section 2348 R. S. makes the opening and improving of a coal mine upon the public lands a condition precedent to the preference right of entry therein authorized. It also requires that an applicant to purchase thereunder must be in actual possession of the land (James D. Negus *et al.*, 11 L. D., 32). Section 2351 R. S. provides that "priority of possession and improvement followed by proper filing and continued good faith shall determine the preference right to purchase" in case of conflicting claims.

There were no improvements made upon this land by Taylor prior to filing. It is not shown that the Ogden Coke and Coal Co., whose assignee Taylor claims to be, had any right to the land in controversy, nor made any improvements thereon, nor that Taylor purchased any-

thing of any nature from said company. The only evidence in support of such claim is the statement of Taylor's agent Lessenger. Upon the facts found by your office and shown by the testimony, the holding of Taylor's filing for cancellation was abundantly justified.

Relative to Taylor's contention in appeal and argument that he should have been allowed to make private entry of the land under section 2347 R. S., notwithstanding his said filing, it may be proper—as it certainly is sufficient—to say in passing, (1) that he elected to proceed otherwise, as already indicated, (2) that he filed no application to make private entry thereof, and (3) that no such entry could have been legally allowed until the adverse filings of Walker and Beckwith were disposed of.

The rejection of the application to purchase and the proposed cancellation of Taylor's filing are accordingly affirmed.

MINING CLAIM—FINAL CERTIFICATE—TITLE.

J. C. BAKER FRACTION PLACER.

The final certificate of a mineral entry will not be allowed to embrace the name of one who fails to show that he owned an interest in the claim at the date of application, or that subsequently, and prior to entry, he acquired such interest from a legal applicant.

Secretary Smith to the Commissioner of the General Land Office, July 13, 1896. (E. B., Jr.)

Eli C. Wood, Adam Aulbach and Lawrence O'Neil, who made Cœur d'Alene, Idaho, mineral entry No. 168, March 28, 1895, for the J. C. Baker Fraction placer claim, appeal from your office decision of October 5, 1895, requiring proof that Aulbach and O'Neil owned, each, an interest in the claim at date of application, or subsequently and prior to entry acquired such from a legal applicant, and proof of O'Neil's citizenship, and holding that in default of the proof required the names of Aulbach and O'Neil must be stricken from the final certificate of entry. The contention of the appeal, briefly stated, is that the abstract of title and a certain judgment on file furnish the required proof.

The abstract of title does not show that at date of filing application, December 29, 1894, or of entry, either of the parties in question had any interest in said claim. Aulbach's claim of title through one Mary C. Nason, as widow of C. C. Nason, can not be recognized, for the reason that it is not shown that Mary C. Nason, as alleged widow, or otherwise, had any interest in the claim. It is not shown that Mary C. Nason, who made certain conveyances of record to Aulbach, was the widow of C. C. Nason. Your office properly held that an agreement to convey, under certain conditions, by J. C. Baker, the locator of the claim, which agreement is set up as a connecting link to show

an interest in C. C. Nason, did not convey any interest. Two deeds, one dated October 14, 1893, and recorded the same day, from "Mary C. Nason, widow of C. C. Nason, deceased," and one dated and recorded December 26, 1894, from Mary C. Nason, both to said Aulbach, constitute the only evidence afforded by the said abstract of any conveyance of an interest in said claim to Aulbach prior to date of entry. It is unnecessary, in view of the prohibition in paragraph 93 of current Regulations under the mining laws, to consider the record of certain conveyances from parties not applicants for patent, made subsequent to the application.

The "certain judgment" hereinbefore referred to is apparently a judgment such as is indicated in section 2326 of the Revised Statutes, rendered June 26, 1890, in a suit by certain claimants of said claim against the claimants of the Idaho Bar placer claim, by the district court in and for Shoshone county, Idaho. This judgment was in favor of the then J. C. Baker Fraction claimants, among whom were said O'Neil and "Mary C. Nason administratrix of Christopher Nason deceased." This judgment is of no avail so far as either Aulbach or O'Neil is concerned, before the land department, in view of the showing made by the abstract of title. Said abstract does not show, as already indicated in part, that any one authorized in the premises conveyed any interest of C. C. Nason or Christopher Nason in said lode claim to said Aulbach. Without setting forth the minutia of computation it is found that said abstract shows that by deed dated June 23, and recorded June 25, 1894, said O'Neil conveyed an undivided one eighth interest in the claim in question to Eli C. and James R. Wood, which was one seventy-second greater interest than he is shown to have at any time acquired. Said judgment does not show the amount of his interest. It is unnecessary in view of the foregoing to consider the question of O'Neil's qualification as to citizenship. Your office decision in accordance herewith is affirmed.

MINING CLAIM—REINSTATEMENT—RELOCATION.

MCGOWAN ET AL. v. ALPS CONSOLIDATED MINING CO.

A mineral entry canceled without notice to the entryman must be reinstated irrespective of any intervening adverse claim.

The cancellation of a mineral entry does not in itself render the ground covered thereby subject to relocation.

Secretary Smith to the Commissioner of the General Land Office, July 13, 1896. (P. J. C.)

The record in this case shows that The Alps Consolidated Mining Company, by G. L. Havens, Superintendent, on October 2, 1881, made application for patent for the Alps No. 2 lode mining claim, survey No.

1953, Leadville, Colorado, land district. On December 19, 1882, the Alps Company abandoned that portion of its claim that conflicted with the Great Eastern lode, and on the same day made entry, No. 1497, of the Alps No. 2, less this conflict.

In so far as material to the question involved here the next step was by your office letter of April 8, 1885, addressed to the surveyor general of Colorado, which required a new survey of the Alps No. 2, showing the exclusion of the Great Eastern. He was required to notify the parties in interest. Thus the matter rested October 9, 1894, when your office called for a report from the surveyor general as to what action had been taken under your former letter. On November 9th, following, he reported that on October 13, 1894, he "wrote J. W. Smith, Leadville, registered, \$25 deposit required, and sent a copy of former General Land Office letter;" that the registry receipt was returned, but no further action had been taken.

On March 19, 1895, your office addressed the register and receiver, calling attention to the correspondence with the surveyor general, and held the entry for cancellation.

On June 15, 1895, the register reported that notice had been mailed to the Alps Consolidated Mining Company at Leadville by registered letter and the same was returned uncalled for. Thereupon, by letter of June 24, 1895, your office canceled the entry.

On July 6, 1895, there was filed in the local office the affidavit of one B. F. Stickley, by which it is shown that he is the agent of the Alps Company, and has been such agent for ten years; that the company has no office in Leadville; "that affiant this day for the first time learned of the requirements of Hon. Commissioner's letter of April 8, 1885;" that the company never had notice of such requirement; that the company "stands ready, willing and able to comply with all the requirements of the General Land Office;" that the premises are valuable and large sums of money have been spent in the development of the same. The company ask that the order of cancellation be revoked and that it be allowed to meet all the requirements of your office.

Omitting further details, it is sufficient to say that McGowan *et al.* on June 26, 1895, located the ground under the name of the Clark lode, and they appeared by counsel and objected to the reinstatement of the Alps entry. Your office, however, by letter of October 16, 1895, held that the cancellation was erroneous, and the same was recalled and revoked, whereupon McGowan *et al.* prosecute this appeal, assigning numerous grounds of error.

The most material contention of counsel is that it was error to reinstate this entry in the presence of an alleged adverse right in the land, acquired as it was by a relocation of the identical ground, after the cancellation of the entry by your office.

There is nothing in the record that would justify the surveyor general in sending notice of your office order of 1885 to J. W. Smith. This is

the only mention of this name in the record. Neither was there anything to warrant the local officers in mailing the notice to the Alps Company addressed at Leadville. On the contrary, the certificate of incorporation filed in their office shows that the office of the company is in New York City. It follows that the cancellation was without notice to the claimant, and therefore erroneous. The attention of your office being called to this, it could do nothing less than reinstate the entry.

The fact that the entry was canceled would not of itself render the ground subject to relocation. The original location of the lode was not affected by the cancellation, even though it had been regular, and the owner could still hold it under its possessory right so long as there was a compliance with the requirements of the law. (*Branagan et al. v. Dulaney*, 2 L. D., 744).

An affidavit by McGowan has been filed in which he states that the annual assessment work for the years 1894 and 1895 was not performed on the Alps No. 2. This affidavit can not be considered, for the reason that the Alps Company has had no notice of it.

There is in the files an amended survey of the Alps No. 2, forwarded December 7, 1895.

Your office judgment is affirmed, and the papers transmitted by your office letter "N" of November 1, 1895, are herewith returned for appropriate action.

RAILROAD GRANT—SECTION 1, ACT OF APRIL 21, 1876.

NORTHERN PACIFIC R. R. CO. *v.* TREADWELL.

The confirmation of entries under section 1, act of April 21, 1876, is solely for the benefit of the individual claimant, conditioned upon his compliance with law, and was not intended to confirm the entry absolutely, as against the right of the company, so as to except the land from the grant, in favor of any other settler.

Secretary Smith to the Commissioner of the General Land Office, July 13, 1896. (F. W. C.)

With your office letter of November 4, 1895, are submitted the papers in the case of Northern Pacific R. R. Co. *v.* Treadwell, involving the SW. $\frac{1}{4}$ of Sec. 5, T. 23 N., R. 19 E., Waterville land district, Washington.

This land is within the limits of the withdrawal upon the map of general route of the branch line of said road, filed August 15, 1873. It fell without the limits of the withdrawal adjusted to the map of amended general route of the branch line filed June 11, 1879, and was restored to entry during that year. It again fell within the primary limits of the grant as adjusted to the map of definite location filed December 8, 1884.

The order of withdrawal on account of the map of definite location was not received at the local office until January 7, 1888.

Subsequently to the filing of the map of definite location and prior to the receipt of the notice thereof at the local office, to wit, on March 25, 1885, John Tymon was permitted to make homestead entry of this land, which entry was contested by Treadwell for abandonment and ordered canceled June 22, 1889. Thereafter Treadwell applied to file pre-emption declaratory statement for the land upon which the present controversy arose.

The testimony shows that Treadwell began working upon the tract in question September, 1887. He moved his family on the place the following spring and they have since resided thereon and made improvements valued at about \$200.

Your office decision rejected the application holding that as there was no authority for the filing of the map of amended general route, the withdrawal of 1873 continued and was a bar to the allowance of Treadwell's application.

The appeal urges that as Tymon's entry was made before the receipt of notice of the withdrawal at the local office upon the map of definite location, that the same served to defeat the grant.

For the disposition of this case it is unnecessary to consider the effect of the withdrawal of 1873 upon the map of general route. The record discloses no claim to the land at the date of the filing of the map of definite location December 8, 1884, and the land therefore passed under the grant. While it is true Tymon made entry before the receipt of the notice of withdrawal at the local office and might have been confirmed under the act of April 21, 1876 (19 Stat., 35), that is disregarding the withdrawal of 1873, yet as held in the decision of this Department in the case of Northern Pacific R. R. Co. (20 L. D., 191), the confirmation of entries under section one, act of April 21, 1876, is solely for the benefit of the individual claimant, conditioned upon his compliance with law, and was not intended to confirm the entry absolutely as against the right of the company so as to except the land from the grant, in favor of any other settler.

Whatever Tymon's rights under the act of 1876 might have been had he complied with the law, yet with the abandonment of his entry said act can have no application, and as Treadwell settled upon the land subsequently to the filing of the map of definite location, your office decision rejecting his application for conflict with the grant is hereby affirmed.

COAL LAND—SCHOOL GRANT—DISCOVERY.

STATE OF MONTANA *v.* BULEY.

Land known to contain coal prior to the admission of the State to the Union is excepted from the operation of the school grant.

It is not necessary to show that coal has been developed on all parts of a forty acre tract; if coal has been discovered thereon the applicant is entitled to the whole of such legal sub-division.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 13, 1896. (P. J. C.)

The record in this case shows that Charles E. Buley filed coal declaratory statement on December 15, 1891, for the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 36, T. 19 N., R. 6 E., Helena, Montana, land district; that on January 30, 1893, he presented his "affidavit at purchase," and this is endorsed "held thirty days to give notice to adverse claimants." The land being a school section the State of Montana was notified, and the Attorney General under date of February 18, 1893, replied:

The State elects to institute no contest in this case, upon the ground that your Department, and as well the General Land Office at Washington has decided that such lands do not pass to the State under general grant of Congress, from the fact that they are mineral lands.

Entry was made March 28, 1893.

On April 20, 1893, the Attorney General of Montana, in a letter to your office stated that he was in receipt of information "that there was not over three or four acres of coal land in said entire tract."

By letter of June 8, following, your office directed the local to allow the State sixty days within which to show cause why the entry should not proceed to patent.

On August 30, 1893, the Attorney General filed in the local office the affidavits of George M. Watson, Charles Ashworth, Frank Lewis and Edgar E. Jones, and on September 4, that of Jerauld T. Armington. Each of these affiants admits that there is coal on the land in controversy; that it has been developed and mined, and coal hauled away from the mine for use; that there was a tunnel more than one hundred feet in length showing a vein of coal; that prior to Buley's entry this tunnel had been started by witness Armington, who admits that he at one time contemplated taking it as coal land. All the affiants claim, however, that only about six acres of the forty is coal, and claim that the balance of it is more valuable for agricultural purposes. The affiant Watson says, "Mr. Buley stated to me that Clingan was in with him." Jones says that he had purchased the interest of Buley "about two months ago;"

there was some (coal) shipped late in the spring. We are selling all the time to local ranchers. It is worth three dollars a ton, that is what we charge for it We have sold I believe about six or eight tons since I bought in as far as I know Clingan has always owned one-half of it. I could not say whether Clingan owned one-half of it when Buley filed on it.

Without any formal charges being made, and upon these affidavits, your office by letter of October 6, 1893, ordered a hearing "to determine the character of the land" and "also whether the entry was made by said Buley for his own use and benefit."

The testimony was taken before the clerk of the district court, and upon examination the local officers found that the land was more

valuable for coal mining purposes than for agriculture, and recommended that the coal entry remain intact.

Your office by letter of August 9, 1895, reversed the local office, and held the entry for cancellation on the ground—

that the State has shown that the existence of coal within the limits of the land embraced in contestee's coal entry, in sufficient quantity to add to its value, and to justify the necessary expenditure for extracting it therefrom, was not known prior to November 8, 1889, and that therefore said tract of land passed to the State of Montana under its school land grant.

The entryman prosecutes this appeal, assigning errors both of law and fact.

The propriety of ordering a hearing in the case, under the circumstances and on the showing made, is very questionable, to say the least. The State had an opportunity to contest the entry in the first place and declined to do so on the ground that the land was mineral. Subsequently, on an informal suggestion that there were not more than three or four acres of land that was valuable for coal, affidavits were allowed to be filed by which it was shown that coal did exist on the land. There is not a statement in the affidavits, which, if admitted to be true, would entitle the State to the land under the circumstances. The hint as to the interest of Olingan in the entry is unworthy of consideration for the purpose of ordering a hearing in view of the entryman's proof.

The decision of your office, affirming that of the local, that there is no evidence in the record showing that Buley made this entry in the interest of others, is concurred in.

The only issue remaining to be determined is whether coal was shown to exist on the land prior to November 8, 1889, the date of the admission of Montana as a State. The testimony on this point as set forth in your office decision is quoted with approval:

As to the facts known November 8, 1889, relative to the existence of coal on this tract; and its value for coal mining purposes the evidence submitted at the hearing is very meager and somewhat conflicting, and is substantially as follows:

Frank Lewis, a witness for the State, testified that the tunnel was first opened by Mr. Armington in 1886 or 1887, who extended the same sixty or seventy feet; Mr. Carpenter filed on it and worked on it in 1887, and that the tunnel was in about seventy feet when Buley commenced work.

Mr. Armington, also a witness for the State, testified that he located this land three or four years ago; thought he was going to get good coal; expended six or eight hundred dollars, run in ten or twelve feet, then Mr. Carpenter took out a claim for him and run the tunnel sixty-seven or seventy feet, and received no return for his expenditure.

Mr. McQueen, another witness for the State, testified that when he was in the tunnel in 1889 or 1890, coal was visible.

Mr. Ashworth, a witness for contestee, testified that he did the first work in the tunnel; did it for Armington in 1889; worked two days and found coal; it was next opened in April, 1890, by Wall and Guesford who run the tunnel sixty feet for Armington.

Mr. Mortson, a witness for the coal claimant, testified that he located three coal claims in 1878, one of which embraces the land involved in this case; discovered

coal on it at that time; found a coal vein four feet five inches thick; the coal discovered in 1878, was too near the outcrop to tell whether it was *good* coal, but it was coal.

In addition to this it may be said that the Buley tunnel has been run two hundred feet with a cross-cut of twenty-one feet, and that there is four and one-half feet of clean coal in the breast of the tunnel, which is about one hundred and sixty feet under cover. Also, that one witness says that as early as 1874, while surveying a military road through this land, he reported to "the engineering department of the government" the existence of coal in that region, and that it was well-known at that time. In 1878 coal was opened and mined in this section, and the testimony shows that there are coal mines in the vicinity and adjoining the land in dispute. While this latter fact would not of itself establish the existence of coal on this identical tract, yet it is mentioned to show that in this particular region there is a coal measure, and that it was known prior to November 8, 1889.

It is true, as shown by the testimony, that coal has not been developed on all parts of the forty acre tract. But this is not required. The statute provides that parties "have the right to enter by legal subdivisions any quantity of vacant coal lands," not exceeding one hundred and sixty acres, (Sec. 2347 R. S.) For the purposes of this act the smallest legal subdivision is forty acres, and if coal has been discovered as in this case, the party is entitled to the whole of such legal subdivision.

Your office judgment is therefore reversed, and the coal entry will pass to patent, if otherwise satisfactory.

TIMBER CULTURE CONTEST—APPLICATION TO ENTER.

SHEA *v.* WILLIAMS.

An application to enter filed with a timber culture contest is a part of and dependent upon the result of the contest, whether it be the first or second contest; and, where for any cause the second contest fails, or never attaches by reason of the cancellation of the entry under the first contest, the application filed with the second contest does not serve to reserve the land after the disposal of said contest, but falls with it, and confers no right upon the applicant.

The cases of *Kiser v. Keech*, 7 L. D., 25, and *Heilman v. Syverson*, 15 L. D., 184, overruled.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 13, 1896. (F. W. C.)

I have considered the appeal by Williams in the matter of the contest of John Shea *v.* James B. Williams, involving the latter's homestead entry No. 15,228, made September 23, 1889, for the NW. $\frac{1}{4}$, Sec. 20, T. 18 N., R. 27 W., North Platte land district, Nebraska, from your office decision of May 28, 1892, holding said entry for cancellation

because it was adjudged that Shea had a superior right of entry in said tract.

The facts in the case, briefly stated, are as follows:

On March 24, 1886, one Peter Gavin made timber culture entry of this land against which one Lew Williams filed a contest on January 11, 1888, resulting in a decision of the local officers, dated May 7, 1888, recommending the cancellation of said entry, from which no appeal was taken.

Whilst said case was awaiting action in your office, to wit, on October 4, 1888, John Shea, the present contestant, filed a second contest against said entry by Gavin, which he amended on March 2, 1889, by alleging that the contest by Williams was speculative, "and that said contestant had filed contests against other claims and has no intention of entering said tract."

Shea's contest was accompanied by his application to enter the land in question under the timber culture laws. On the same day Shea filed a second contest in the case of Penner *v.* Baldwin, accompanying the same with a timber culture application to enter the land therein involved, and had, prior to this time, filed a second contest in the case of Shrader *v.* Dillie, accompanying the same also with his application to enter the land involved under the timber culture laws.

By your office letter of August 13, 1889, the entry by Gavin was canceled on Williams' contest, of which Williams was duly advised, and within the thirty days of preference right awarded successful contestants, to wit, on September 23, 1889, his brother, James Williams, filed his, Lew Williams', waiver of any preference right and same day he (James Williams) was permitted to make homestead entry of the land in question.

On November 6, 1889, Shea contested said entry claiming a preference right under his second contest, of which he had never been advised by the local officers upon the cancellation of Gavin's entry.

Upon the testimony adduced the local officers found that there was no fraud in the matter of Lew Williams' contest against Gavin's entry, and dismissed Shea's contest.

Upon appeal, your office decision of May 28, 1892, reversed the decision of the local officers upon the authority of the holding in the cases of Kiser *v.* Keech (7 L. D., 25), Carson *v.* Finity (10 L. D., 532), in which cases it was held:

The pendency of an application to enter filed by a second contestant with his affidavit of contest against a timber culture entry operates to reserve the land subject only to the rights of the first contestant.

The sole question for consideration therefore is: Did the application by Shea, filed with his second contest, serve to reserve the land after the entry had been canceled on Williams' contest and he had waived his preferred right of entry?

It is plain that your decision was warranted under the holding made

in the case of *Kiser v. Keech* (*supra*), but without attempting to question the merits of Kiser's claim in that case, yet the principle therein announced, to my mind, is in conflict with the fundamental principles governing the granting of a preferred right of entry and the disposition of applications filed for land already appropriated by entries of record.

It is a fundamental principle that rights secured by an application filed with a timber culture contest, depend upon the establishment of the charge, and if the contest fails the application falls with it. It is also well established that the second contestant does not secure any preference right by reason of his contest, where the entry under attack is canceled in the prior contest of another. *Armenag Simonian* (13 L. D., 696). It is plain then that Shea did not secure a preferred right by reason of his contest.

In the case of *Kiser v. Keech* (*supra*), it is adjudged that Kiser's contest was properly dismissed because the entry had been canceled upon a prior contest, but as Kiser had filed an application to enter the land along with his contest, it was held that "such application operated, upon the ascertainment of the default, to reserve the land, subject only to rights of the first contestant," thus, it was held that the application was separate and apart from the contest, and the pendency of the same was held to operate as a reservation of the land.

If this be the correct view of the law, then, as shown in the present case, Shea was in a position to claim three tracts, upon a certain contingency, without expending a cent or taking a step towards clearing the record of defaulted entries; further, before disposing of any of these tracts, where the first contestant from any cause failed to make entry, notice had to be given Shea of his preferred right, and he would thereby be entitled to a second preferred period and might make entry, if he desired, or dispose of his preference to others.

It has been repeatedly held that an application tendered for lands already appropriated by an entry of record, secures to the party no rights, and if rejected and appealed from, such appeal will not cause any rights to attach under said application, even if the prior entry be canceled during the pendency of such appeal. *Maggie Laird*, 13 L. D., 502.

It is clear, then, that there is a conflict in principle in the several rulings with that announced in the case of *Kiser v. Keech* (*supra*).

In *Carson v. Finity* (*supra*), although *Kiser v. Keech* is referred to as authority, the facts show the case presented to have been different.

In that case the prior contestant withdrew before the cancellation of the entry, hence the second contest attached.

So in *Hudson v. Francis* (15 L. D., 173), the prior contest was dismissed and the second contest attached before the entryman relinquished.

In the case of *Heilman v. Syverson* (15 L. D., 184), however, the case,

as presented by the record, was similar to the case of *Kiser v. Keech* (*supra*), and Heilman was awarded the land, by reason of his application filed with a second contest, over Syverson who secured the cancellation of the record entry but did not assert his preference right within thirty days from notice.

These are the only cases I have been able to find reported, involving directly the principle here at issue.

It is plain to my mind that the holding in the two cases referred to, is in conflict with the principles hereinbefore announced in the matter of awarding preferred rights under contests; the disposition of applications tendered for lands covered by existing entries, and that the conflict arises from considering applications filed with a contest as separate from the contest.

After careful consideration therefore, I am of the opinion that an application filed with a contest is a part of and dependent upon the result of the contest, whether it be the first or second contest, and that where, for any cause, the second contest fails or never attaches by reason of the cancellation of the entry under the first contest, the application filed with such contest does not serve to reserve the land after the disposal of the contest, but falls with it, and confers no right upon the applicant.

I must, therefore, decline to follow the decisions in the case of *Kiser v. Keech*, *supra*, and *Heilman v. Syverson*, *supra*, and so far as they conflict herewith the same are hereby overruled.

Had Williams failed in his contest, Shea would then have been entitled to proceed with his. Having been successful, the record was cleared upon Williams' contest, and if *he* failed to make entry, it became, as any other public land, subject to entry by the first qualified applicant. In this case the brother of the first contestant made entry of the land on the waiver of the preferred right. Had Shea shown that the contest was brought for a speculative purpose in the interest of the present entryman, he might have secured the cancellation of the present entry, and in that event, he would have been entitled to make entry, but not by reason of the application filed with his second contest against Gavin's entry. The record shows that he failed to sustain the charge of speculative contest as against Lew Williams, and I therefore reverse your office decision and direct that Shea's contest be dismissed and that Williams' entry be allowed to stand subject to compliance with law.

WILLIS v. MERRITT.

Motion for rehearing in the cause above entitled denied by Secretary Smith, July 13, 1896. See departmental decisions of February 4, 1896, 22 L. D., 79, and May 14, 1896, 22 L. D., 571.

SOLDIERS' ADDITIONAL HOMESTEAD—DUPLICATE CERTIFICATE.

HENRY N. COPP.

In view of the provisions of the act of August 18, 1894, validating outstanding soldiers' additional certificates in the hands of bona fide purchasers, a duplicate certificate may issue to such a purchaser, in the name of the soldier, on due showing of the loss of the original, and the further fact that it has not been located.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 13, 1896. (W. M. W.)

Henry N. Copp has appealed from your office decisions of July 10, and August 1, 1895, denying his application for the issuance of a duplicate certificate of right to make soldiers' additional homestead entry in the name of one Samuel Mitchell.

The record facts necessary to be considered in determining the questions presented show, that on January 8, 1893, your office issued, under section 2306 of the Revised Statutes, a soldiers' additional homestead certificate for 5.89 acres of land in favor of Samuel Mitchell, late private of Company B, 57th Regiment of United States Colored Troops. Said certificate was sent to H. J. Ennis of this city as the attorney for said Mitchell.

On December 8, 1886, said Copp addressed a letter to your office, stating that there had been lost or stolen from the mails a soldiers' additional homestead certificate for 5.89 acres, in the name of Samuel Mitchell, and requested that proper notings be made on the records of your office. Mr. Copp also stated in said letter that he desired

information as to the proper course to pursue to secure the additional homestead right thus lost to said Mitchell. If an indemnity bond will be accepted and a new certificate issued, I will gladly furnish the bond. I will furnish evidence of loss, such as affidavits of myself, the sender (and the person) to whom it was sent, but by whom it has never been received.

By letter of December 15, 1886, your office informed Mr. Copp—

That this office does not recognize the right of a soldier to sell or transfer his right to make an additional homestead entry, and the fact that said certificate of right is outstanding is no bar to the right of the soldier to make personal entry in his own name at any time prior to the satisfaction of his right by the location of said certificate of right, and I can see no way by which it would be safe and proper for me to issue a second certificate of right in this case.

On June 23, 1895, Mr. Copp made application to your office

for the issue of a duplicate of the additional homestead certificate in the name of Samuel Mitchell, late private Company B, 57th Regt. U. S. Colored Troops, and the certificate thereof to be in my name as the *bona fide* owner of the same, under the act of Congress approved August 18, 1894.

Mr. Copp filed with his application his sworn statement as follows:

Some time in the fall of the year 1886 I purchased of and received from Simeon H. Merrill, then chief of the money order office of the Washington, D. C., city post

office a certificate of right to an additional homestead entry under section 2306 of the U. S. Revised Statutes in the name of Samuel Mitchell, formerly private Co. B, 57th Regiment, United States Colored Troops, for five and 89/100 acres of public land. I paid said Simeon H. Merrill about eighty-five (\$85) dollars for said certificate and two powers of attorney executed by said Samuel Mitchell, one power of attorney to locate the said certificate on public land and the other power of attorney to sell, transfer, and convey any land so located or entered, the said powers of attorney being irrevocable by said Samuel Mitchell.

That on or about the 23d day of October in the year 1886 I enclosed said certificate and the said two powers of attorney in a letter addressed to the cashier of the First National Bank of Olympia, Washington, with instructions to deliver the said papers to John F. Govey on receiving from said Govey one hundred and ten (\$110) dollars, which sum less costs was to be sent to me by exchange on New York City. I placed the said letter in the Washington city post office and I was never able to trace the said letter and I supposed and do believe it was destroyed, lost in, or abstracted from, the United States mails, all without my knowledge, assent or connivance.

Further, I never received from said John F. Govey or the said cashier of the First National Bank, any pay for said certificate in whole or in part, or any promise to pay from either or both of them or any one else, in view of the loss or destruction of said certificate. Inasmuch as it was the common and universal custom of the commercial world to evidence the sale, transfer, assignment and conveyance of the right of the soldier under said section of the United States Revised Statutes and his certificate by means of the powers of attorney and not otherwise, and as the said cashier and the said John F. Govey claimed and affirmed that neither of them had received said papers, I never demanded payment therefor.

Further, I depose and say that I do not know the address of the said soldier Samuel Mitchell and I have not communicated with him or any one in his behalf on the subject of the said certificate or of an application for the issue of a duplicate certificate in the place thereof.

Further, I depose and say that I am the *bona fide* purchaser for value and the owner of said right and certificate, being the said additional homestead certificate in the name of Samuel Mitchell, late private Co. B, 57th Regiment U. S. C. T., as aforesaid, issued by the Commissioner of the General Land Office January 8, 1883; that I received in good faith as purchaser from said Simeon H. Merrill the said certificate and the said two powers of attorney, as was the custom of transfer of title by delivery of the papers and the possession thereof. Since the date of said letter I have never seen, heard from or been able to trace said additional homestead certificate in the name of Samuel Mitchell aforesaid.

And also the sworn statement of John F. Govey, as follows:

STATE OF WASHINGTON, *Thurston County*, ss:

John F. Govey, being duly sworn, deposes and states as follows: During the year 1886 it was part of my business to locate scrip on public land: As nearly as I can remember during the latter part of said year, I requested Henry N. Copp of Washington, D. C., to send by express C. O. D., to the city of Olympia, Washington, what is known as a fractional soldiers' additional homestead certificate of about five acres in area, which, if satisfactory in all respects, I would purchase.

In December of said year I received a communication from said Henry N. Copp to the effect that in October, the second month before, he had forwarded by mail to the cashier of the First National Bank, in said City of Olympia (of which bank I am now and have been vice president for the past four years and more, from the fall of 1887 to the fall of 1890, I was president of said bank and from July, 1882, to July, 1886, I was register of the U. S. Land office at Olympia, Wash.), a soldiers' additional homestead certificate for five (5) and 89/100 acres in the name of Samuel Mitchell, formerly private Co. B, 57th Regiment U. S. C. T. As I had never seen

nor received said certificate, I declined to pay for the same and I have never paid for it in whole or in part or promised to pay for it in whole or in part. I do not know what became of said certificate beyond the statement made by said Henry N. Copp.

(Signed)

JOHN F. GOWEY.

On July 10, 1895, your office denied Mr. Copp's application.

On July 11, 1895, he filed a motion for review of your office decision, which motion was overruled by your office letter of August 1, 1895.

In his appeal Mr. Copp specifies several grounds of alleged errors in the decisions appealed from, the sixth and ninth of which are as follows:—

6. In not holding that the evidence submitted together with the fact that no effort has been made to locate said certificate since it left the possession of said Copp, nearly nine years ago, raises a reasonable presumption of its loss or destruction and entitles him, as its owner, under the act of Aug. 18, 1894, to a duplicate certificate thereof, in his name, under said act.

9. In holding that 'Merrill's connection with Mitchell' must be shown, in the face of the fact that it is already shown that Merrill had possession of the certificate issued to Mitchell under claim of ownership, and sold the same to appellant.

It appears that the records of your office show:

That said Mitchell became entitled to enter the additional land under Section 2306 U. S. R. S., and does not appear therefrom that he has exercised that right.

The act of August 18, 1894 (28 Stat., 397), provides:—

That all soldiers' additional homestead certificates heretofore issued under the rules and regulations of the General Land Office under section twenty-three hundred and six of the Revised Statutes of the United States, or in pursuance of the decisions or instructions of the Secretary of the Interior, of date March tenth, eighteen hundred and seventy-seven, or any subsequent decisions or instructions of the Secretary of the Interior or the Commissioner of the General Land Office, shall be, and are hereby, declared to be valid, notwithstanding any attempted sale or transfer thereof; and where such certificates have been or may hereafter be sold or transferred, such sale or transfer shall not be regarded as invalidating the right, but the same shall be good and valid in the hands of *bona fide* purchasers for value; and all entries heretofore or hereafter made with such certificates by such purchasers shall be approved, and patent shall issue in the name of the assignees.

The material part of the decision appealed from necessary to consider in determining the case is as follows:—

It is found, however, that the evidence of assignment usually present in cases of the kind, consisting of the production of the certificate and the powers of attorney necessary for the use thereof by the holder in the name of the soldier, which have been held by the Department to amount to an assignment of the right, is not present in this case.

The certificate is said to be lost, as also the powers of attorney. The only evidence that the certificate and powers of attorney were transferred by Mitchell for the purpose of assignment are the affidavits above mentioned.

I think that Mitchell must be regarded as a claimant of record to the right of additional entry. To comply with Mr. Copp's request would be equivalent to a decision by this office against Mitchell's right to avail himself of the additional homestead privilege to which the record shows that he was found to be entitled, on the ground that he transferred the same and that Copp is the present owner thereof.

I am not satisfied that this can be properly done in an *ex parte* proceeding, and on

evidence of the character submitted. It does not appear that Mitchell has had notice of this proceeding, nor does it appear what, if any, effort has been made to ascertain his whereabouts, and to afford him an opportunity to be heard as to whether he ever parted with his right by assignment as alleged.

It is true that there are precedents for issuing new or duplicate certificates of additional right on application of the beneficiary, but I know of no case in which this has been done at the instance of a party claiming under the act of August 18, 1894, to the exclusion of the original beneficiary, without notice to the latter. Such reissue does not appear to be provided for in said act, or the instructions in circular of October 16, 1894, issued thereunder.

The evidence submitted by Mr. Copp, in connection with the records of your office, establishes the following facts:

1. That on January 8, 1883, your office issued, in the name of Samuel Mitchell, a soldiers' additional homestead certificate for 5.89 acres of land under the law and instructions of the Department, and on the same day mailed it to Mitchell's attorney, Ennis, in this city.

2. That said certificate has never been located by Mitchell or any one else.

3. That in the fall of 1886 Henry N. Copp purchased said certificate of Samuel H. Merrill and paid him a valuable consideration therefor.

4. That at the time of said purchase said certificate was delivered to said Copp, together with two powers of attorney executed by said Mitchell, one power of attorney to locate the certificate on public land, and the other power of attorney to sell, transfer and convey the land so located or entered under said certificate; both of these powers of attorney made irrevocable by said Samuel Mitchell.

5. That in October, 1886, Henry N. Copp enclosed said certificate and powers of attorney in a letter addressed to John F. Govey, Olympia, Washington, who never received them.

6. That said certificate has been lost in the mails, or otherwise, and cannot be found.

The questions to be determined are: First is Henry N. Copp entitled to have a duplicate certificate issued to him, and if so, then should it issue in his name or the name of the soldier Mitchell? The language used in the act of August 18, 1894, is very broad: "All soldiers' additional homestead certificates" issued prior to the passage of the act under the law and regulations, are made and "declared to be valid" notwithstanding any attempted sale, or transfer thereof; "and where such certificates have been or may hereafter be sold, or transferred, such sale or transfer shall not be regarded as invalidating the right but the same shall be good and valid in the hands of *bona fide* purchasers for value."

This language clearly covers a case of "sale" and purchase as well as one of "transfer." Mr. Copp is shown to be a *bona fide* purchaser for value and comes within the provisions of the act of August 18, 1894.

In the case of John M. Rankin (on re-review, 21 L. D., 404), it was held that said act validated all outstanding soldiers' additional certificates in the hands of *bona fide* holders. An outstanding certificate is

one that has been issued and has not been located, canceled or surrendered. Mr. Copp purchased this certificate and lost it; the mere loss of the certificate itself can not be treated as the loss or destruction of his rights thereunder. Since Congress has enacted a law validating and making good the certificates outstanding, it follows that Mr. Copp is entitled to have a duplicate certificate issued, and delivered to him, reciting that it is issued in lieu of the original which has been lost. Of course, it will issue in the name of Samuel Mitchell and for only 5.89 acres of land.

The lost powers of attorney have nothing to do with the case. The Department was in no sense connected with them in their inception and can make no order respecting them; they originated between the soldier, Mitchell, and his attorney or attorneys, and all matters relating to them must be settled outside of the Department.

The decision appealed from is reversed, and you are directed to issue a duplicate soldiers' certificate and deliver to Mr. Copp in conformity with the views herein expressed.

COAL LAND ENTRY—ASSOCIATION—IMPROVEMENTS.

MCWILLIAMS ET AL. v. GREEN RIVER COAL ASSOCIATION.

A coal land entry made by an association under the proviso to section 2348 R. S. may embrace by legal sub-divisions six hundred and forty acres including the legal sub-divisions on which the mining improvements are actually situated, whether the land covered by said improvements is coal or agricultural land.

Under an entry of such character the land must appear to be mineral in character as a present fact, and from actual production of coal, but the development of coal on each forty acre sub-division is not requisite.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 13, 1896. (W. M. W.)

I have considered the case of James McWilliams *et al.* v. The Green River Coal Association, on the appeal of the latter from your office decision of April 11, 1895, rejecting said association's coal declaratory statement and final proof thereon to the W. $\frac{1}{2}$ of Sec. 26, T. 22 N., R. 7 E., Seattle, Washington, land district.

The record shows that the approved plat of said township was filed in said local land office on the 5th of May, 1893.

On the same day The Green River Coal Association, by its attorney in fact, filed a coal declaratory statement for section 26 of said township, claiming it under the provisions of Section 2348 of the Revised Statutes.

On the same day, D. W. Wolters made homestead entry for the SW. $\frac{1}{4}$ of said section 26.

On May 18, 1893, Peter Brown made homestead entry for the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section 26.

On October 16, 1893, James M. McWilliams made homestead entry for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section 26.

On July 23, 1894, the coal applicant offered final proof, which the local officers declined to accept. Notice of a hearing was issued, citing the above named parties to appear and submit evidence as to the character of the land. At the time set for trial all the parties appeared and introduced their testimony.

On December 22, 1894, the register and receiver found that "the coal claimants have failed to show by their testimony that there are veins of coal upon this land that have been developed and worked, and that are actually producing coal." They recommended that the homestead entries of McWilliams, Brown and Wolters be sustained, the application of the Green River Coal Association to purchase said land be denied, and said association's final proof rejected.

The coal claimants appealed.

On April 11, 1895, your office concurred with the findings of the register and receiver as to the facts and rejected the coal declaratory statement and final proof of the coal applicants as to the W. $\frac{1}{2}$ of the section claimed.

The coal claimants appeal.

From an examination of the evidence and record in the case, it is apparent that it was tried before the local officers and passed on by your office on the part of the coal applicants upon the theory that all that was necessary for them to show, in order to enter the entire section, was that there was an association of four persons, that coal existed on the section, and that they had opened a coal mine on said section and had expended \$5,000, or more, in developing and improving the mine; on the part of the agricultural claimants it was tried upon the theory that, in order to be subject to entry under the coal land laws it was necessary to show the development of coal on each forty acre tract of said section. These theories were both erroneous, as will appear from an examination of the law.

• Sections 2347 and 2348 of the Revised Statutes are as follows:

SEC. 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal-lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

SEC. 2348. Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the

same, shall be entitled to a preference-right of entry, under the preceding section, of the mines so opened and improved: *Provided*, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

Section 2347 gives to properly qualified persons or associations the right to enter "by legal subdivisions" in the one case one hundred and sixty acres, and the other three hundred and twenty acres of "vacant coal lands," upon the payment of the statutory price of the land.

Section 2348 gives to duly-qualified persons, who have opened and improved, or shall hereafter open and improve, any coal mines on the public lands, and shall be in the actual possession of the same, a preference right of entry under section 2347.

In *Scott v. Sheldon* (15 L. D., 361), it was held that a coal land entry attacked by a subsequent homestead claimant may be canceled as to the legal subdivisions in conflict that are not valuable for coal. In the same case, on review, 15 L. D., 588, it was held that: "Coal land entries are made of 'legal subdivisions,' and if it is shown that any such subdivision, so entered, is not in fact coal land, the entry should be canceled as to such tract."

In that case Sheldon had entered lot 2, the NE. $\frac{1}{4}$ of the NW. $\frac{1}{2}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 23, T. 35, R. 6. Scott contested the entry as to lot 2, and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section, on the ground that said land was not coal land.

Whatever legal rights this association may have to enter six hundred and forty acres of land must be found in section 2347 and the proviso to section 2348 of the Revised Statutes. These sections must be construed together. Under section 2347 the right to enter coal lands "by legal subdivisions" is given. The *entry* when made must be made under this section; must be made in accordance with its provisions; the *right* to make entry of coal lands is given by this section; the right to enter lands under it is expressly limited to "coal lands." The proviso to section 2348 provides that: "Such association may enter not exceeding six hundred and forty acres, including such mining improvements."

It seems clear that this proviso means that where an association has expended \$5,000 or more in working and improving a coal mine or mines, then, in consideration of such expenditure, the association may enter by legal subdivisions not to exceed six hundred and forty acres of land, including the legal subdivisions of the land on which the mining improvements are actually situated, irrespective of whether the land covered by the improvements is coal land or agricultural land.

The use of the words "including such mining improvements" bears out this construction of the proviso, for one of the prerequisites to making a coal entry is that the land to be entered must contain coal, but in improving and developing a coal mine it is not always proper, profitable, wise or necessary, to place the improvements on land that

necessarily contains coal; indeed, cases might arise where it would be impracticable to place the improvements necessary to operate a coal mine or mines, on land that contains coal. The character of the land on which the improvements may be made for the purposes of working, developing and operating a mine or mines, is wholly immaterial.

As all entries under the coal land law are required to be made by legal subdivisions, it seems reasonable and proper that the land covered by the improvements should be limited to the subdivisions on which the improvements are actually situated.

With respect to the character of the land, outside of the improvements, the conclusion herein reached is in harmony with *Rucker et al. v. Knisley* (14 L. D., 113), and authorities cited, and is supported by *Hamilton v. Anderson* (19 L. D., 168). In the latter case it is said:

The rule of the Department undoubtedly is that the land must appear to be mineral in character, "as a present fact," and from actual production of mineral. *Rucker et al. v. Knisley* and cases cited (14 L. D., 113), but it does not follow, and has never been held by the Department that there must be an actual development of coal on each forty acre subdivision of the one hundred and sixty acres for which entry is allowed under the mining laws.

The evidence having been taken upon erroneous views of the law, and being indefinite in character, it is not sufficiently clear to warrant the Department in deciding the case on its merits.

The decision appealed from is vacated, the papers in the case are herewith returned, with the direction that your office order a hearing, at which all parties will be permitted to introduce such evidence as they may have, and upon the evidence so taken, the case will be rejudicated in conformity with the views herein expressed as to the law of the case, under the Rules of Practice.

PRIVATE CLAIM—SPECIAL ACT—RELINQUISHMENT.

JOHN HOUSTON M. CLINCH.

A patent having issued to the beneficiary in accordance with the terms of the special act of July 2, 1836, on application and payment for the land embraced therein, a conclusive presumption arises, as against a contrary claim on the part of the heir of said beneficiary, that all the requirements of said special act were complied with by said beneficiary, including the relinquishment of the lands specified in said act, a condition on which said act was dependent for its operative force.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 13, 1896. (J. L.)

This case involves section 38, T. 6 S., R. 26 E., containing 11,412 acres, section 37, T. 7 S., R. 26 E., containing 1007 acres, section 47, T. 6 S., R. 27 E., containing 4,106.80 acres, and section 44, T. 7 S., R. 27 E., containing 1454 acres; aggregating according to the official

maps on file in your office; 17,979.80 acres of land, in Gainesville land district, Florida: And also section 39, T. 6 S., R. 26 E., containing 860 acres, and section 38, T. 7 S., R. 26 E., containing 140 acres, aggregating 1000 acres of land in the same land district.

John Houston M. Clinch, claiming as heir and executor of Duncan L. Clinch deceased, who is alleged to have been assignee of George J. F. Clarke deceased, applied to your office for the issue of patents for the tracts of land aforesaid, under and by virtue of a Spanish grant to said Clarke dated and executed on April 6, 1816, and a Spanish concession dated October 7, 1816.

On February 3, 1887 your office rejected said application; and said John Houston M. Clinch appealed to this Department.

The material facts of the case disclosed by the record are as follows:

On April 6, 1816, the Spanish governor of East Florida granted to George J. F. Clarke five miles square (equal to sixteen thousand acres) of land, on the west side of St. John's River above Black Creek, at a place entirely vacant known by the name of White Spring. On January 11, 1819 said governor authorized

Dou Andres Burgevin, a competent surveyor, to survey the lands granted Clarke in property on the 6th of April 1816, on the west side of St. John's River, and at a place called White Spring, (so) that in the best form and exactness said lands shall have the equivalent to the square of five miles as mentioned in said grant; bounding on the north by Buckley creek on the south by the public road to Picolata where it meets the river, on the east by said river, and on the west by vacant pine land.

On January 25, 1819, said governor issued another order permitting the surveyor to contract the depth back from the river to about one and a half miles; and to survey to Clarke the balance of the 16000 acres "in the hummocks called Lang's and Cone's, situated on the south of Mizzell's lake, which are vacant."

Whereupon Burgevin made three surveys. The first, which was certified on February 24, 1819, included eight thousand acres of land

west of the river St. John, the admeasurement beginning at the mouth of Buckley Creek below White Spring, and following upwards the margin of said river to the point where the public road from Picolata to Alachua crosses the said river.

The second survey, which was certified on March 10, 1819, embraced five thousand acres in the place called Lang's hummock situated south of Mizzell's lagoon, west of the river St. John.

The third survey, which was certified on March 12, 1819, embraced three thousand acres of land in the place called Cone's hummock situated south of Mizzell's lagoon, west of the river St. John.

On May 23, 1832, the superior court of the eastern district of Florida, confirmed to said George J. F. Clarke said 16,000 acres according to said three surveys. On appeal, the supreme court of the United States (Marshall Ch. J. delivering the opinion of the court), on March 12, 1834,

affirmed so much the decree of the superior court as held that Clarke's claim of 16,000 acres was valid, and as confirmed the same

to the extent and agreeably to the boundaries as in the grant for the said lands, and in the plat of the survey thereof made by Don Andrew Burgevin of eight thousand acres, and dated the 24th day of February, 1819, filed in this cause;

and reversed so much of said decree

as confirms to the claimant the lands contained in two other surveys thereof, made by the said Don Andrew Burgevin, filed also in this cause, one for five thousand acres on the 10th of March, 1819, and the other for three thousand acres on the 12th of the same month.

And thereupon the supreme court remanded the cause to the said superior court.

With directions to conform to this decree; and to take such further proceedings in the premises that the remaining eight thousand acres which have been improperly surveyed without authority, be surveyed on any lands *now vacant* within the limits of the grant made to the petitioner on the 6th of April, 1816, and that the title of the petitioner to the land so surveyed be confirmed. (For this decree see 8 Peters 469).

The mandate of the supreme court was filed in the court below on August 16, 1834.

On May 22, 1835, the Commissioner sent to the surveyor general in Florida printed copies of supreme court decisions confirming eleven Spanish grants, and instructed him to survey them "*with the least practicable delay*", and to notify all parties interested. On June 25, 1835, the Commissioner instructed the surveyor general to give notice of his surveys by publication in the newspapers; and called his attention specially to the case of George J. F. Clarke, and to the necessity of action therein by the superior court of Florida. On August 8, 1835 the superior court appointed John Lee Williams to survey the additional eight thousand acres as required by the supreme court, and make return to court. On October 29, 1835, Williams returned a plat and report of his survey, describing the lines as follows:

Beginning (on St. John's River) at Narrow Bay, at a cypress marked with a cross, and running thence north 72, west 557 chains to a large pine on the south side of Buckley creek, marked also with a cross; thence north 12 east down the creek to a pine on the south bank marked with a cross 175 chains; thence south 68 east 510 chains to a water ash marked with a cross on the margin of the St. John's River; thence up the margin of the river 157 chains to the place of beginning: Containing (exclusive of a tract of one thousand acres marked "C" on said plat) eight thousand acres.

The plat, (which included the 8000 surveyed by Burgevin and the 8000 acres adjoining surveyed by Williams), showed the whole 16,000 acres conveyed by the grant of April 6, 1816, to be an irregular triangle, bounded on the west by Buckley creek, on the north and east by the St. John's river, and on the south by the straight line above described, extending from a cypress tree on the bank of the river to a pine tree on the bank of Buckley creek, north 72 west, 557 chains, "exclusive of the tract of one thousand acres marked C."

On November 2, 1835, the superior court of Florida examined Williams' return and plat aforesaid, and approved the same; and

Ordered that the said tract of eight thousand acres so returned be and the same is hereby confirmed to the said George J. F. Clarke as part and parcel of the sixteen thousand acres originally granted to him at that place.

From this decision the United States did not appeal. Whereupon it became and was in 1835 the duty of the U. S. Land Department to issue to George J. F. Clarke a patent for all the lands (except 1,000 acres) included within the three boundaries aforesaid, to wit: Buckley's creek, St. John's river, and the straight line aforesaid. And such is yet the duty of this Department, unless that duty has been modified by subsequent events. The grant aforesaid is called in the record, sometimes the "Bayard tract", and sometimes the "Mill grant." It will hereinafter for brevity be referred to, as Clarke's "mill grant."

The present applicant, John Houston M. Clinch, in a letter dated April 2, 1883, addressed to your office, claimed,

(1) That in the year 1834 his father Duncan L. Clinch bought said "mill grant" at a sale of Clarke's property made by the U. S. Marshal under a levy for debt, and received from the marshal a deed therefor; which deed has not been produced; and

(2) That afterwards his father took from Clarke a deed for the same property. A copy of said deed, dated December 16 1834, is filed in this record.

Therefore, Duncan L. Clinch, when he acquired an interest in said property under the deed aforesaid, knew that the survey of 3000 acres in "Cone's hummock" had been annulled by the supreme court of the United States. It must also be conclusively presumed that Duncan L. Clinch after November 2, 1835, knew that Williams' survey of the additional 8000 acres had been made, and had been confirmed by the superior court in Florida.

At the next session of Congress, which began in December, 1835, Duncan L. Clinch procured the passage of an act entitled "An act for the relief of Duncan L. Clinch."

It was approved July 2, 1836 (6 Statutes 676). Said act

authorized Duncan L. Clinch and John H. McIntosh assignees of George J. F. Clarke to enter at the minimum price for which the public lands are sold, (to wit, one dollar and twenty five cents per acre), a tract of land in East Florida, containing three thousand acres in Cone's or Moody hummock, south of Mizzell's lagoon, in lieu of the same quantity of land (to wit: 3000 acres), confirmed to them in another place, upon their filing in the office of the register of public lands for the district of East Florida, a relinquishment of all their right, title, claim and demand in and to the land last mentioned;

meaning plainly: Three thousand acres of the land confirmed to them (i. e. to their alleged assignor George J. F. Clarke); and in lieu of which the privilege of buying 3,000 acres at Cone's hummock, was granted them by Congress. By the terms of the act Clinch and McIntosh were free to accept the offer of Congress or decline it as they might see fit.

But they could accept it only by the performance of a condition precedent, to wit: "Upon their filing in the office of the register of public lands for the district of East Florida, a relinquishment of all their right, title, claim and demand in and to" three thousand acres out of the 16,000 acres of land confirmed to George J. F. Clarke under and by virtue of the decree of the supreme court of March 12, 1834. There is nothing in the record before me tending to show that McIntosh had any legal estate or interest in the premises. It seems that Clinch married one of McIntosh's daughters, and that McIntosh was the grandfather of Clinch's son, the present applicant. (See the affidavit of John Houston M. Clinch filed in this Department on September 27, 1887).

Duncan L. Clinch well knew that his estate and interest in the premises, was exclusive of McIntosh; and that he was obliged as a condition precedent to the assertion of any right under the act of July 2, 1836 aforesaid, to file his relinquishment of "the same quantity of land," out of the "mill grant", or "Bayard tract." On November 3, 1838, he, (ignoring McIntosh), filed in his own name in the Land Office at St. Augustine an application in the following words:

I, Duncan L. Clinch of Camden county, Georgia, do hereby apply to purchase the following parcels of public land granted to me by special act of Congress approved the 2d day of July A. D. 1836, amounting to three thousand acres to be taken up in Cone's or Moody's hummock south of Mizzell's lagoon west of the river St. John, by pre-emption, in lieu of three thousand acres on the St. John's river and situated on the west side of St. John's river, commonly known as the "Bayard tract;" a relinquishment of the same having been filed in the Land Office at St. Augustine district of East Florida.

(Then followed descriptions of ten subdivisions).

And the register certified the application.

On the same day, to wit: November 3, 1838, Duncan L. Clinch paid to the receiver \$3760.42, and took from him a receipt in the following words:

Receiver's Office, St. Augustine Nov. 3d, 1838.

Received from Duncan L. Clinch of Camden county, Georgia, the sum of three thousand and seven hundred and sixty dollars and forty two cents being in full for the following parcels or lots of land granted to him as a pre-emption to wit:

(Here follows list of subdivisions).

Being three thousand and eight acres and thirty four hundredths situated in Cone's or Moody's hummock Alachua county, at the rate of one dollar and twenty five cents per acre.

And on March 10, 1845, a patent was issued to Duncan L. Clinch for said 3008.34 acres of land, applied for and paid for as aforesaid.

It now appears that the signature of Duncan L. Clinch is not written on the face of the application. It also appears that the "relinquishment" required by the act of July 2, 1836, and referred to in said application as "having been filed in the land office at St. Augustine district of East Florida," has been lost or mislaid, destroyed or purloined, and

cannot be found. Whereupon John Houston M. Clinch, the applicant here; claims that he is entitled to a patent for the whole of the 16,000 acres of land embraced in the Spanish "mill grant" of April 6, 1816, in addition to the 3008.34 acres of land patented to his father Duncan L. Clinch under the act of July 2, 1836. In his letter of December 13, 1882 to the Commissioner of the General Land Office, he claims not only said tract of 16,000 acres, but also another tract of 1000 acres lying within the boundaries of the larger grant, but not being part thereof,—not having been included in the confirmatory decree of the court—He reiterated said claim in another letter to the Commissioner dated April 2, 1883. In his affidavit filed in this Department on September 27, 1887, he makes oath:

That affiant was executor of the will of his father General Duncan L. Clinch, and administrator of his grandfather General John H. McIntosh, and inherited from his father with the other heirs, the Clarke "mill grant", and the 3000 acres entered by his father under the act of Congress of July 2, 1836; and that he never heard that a relinquishment had been effected by them or either of them, of 3000 acres from the mill grant.

The third assignment of error filed with his appeal to this Department, is as follows:

III. The Commissioner erred in assuming that the private pre-emption act of July 1836 (6 Statutes 676), required Duncan L. Clinch and John H. McIntosh to file with the register a relinquishment of 3000 acres of the Clarke "Mill grant" as resurveyed by Burr; and erred in assuming that they made such relinquishment.

On page 17 of the printed brief of his attorneys, the present applicant again insists:

First, that the alleged application by Clinch (Duncan L.) of November 3, 1838, was wrong in reciting that a relinquishment had been made of 3000 acres on the Saint John in the Bayard tract; and wrong in reciting that the relinquishment had been filed in the Saint Augustine land office.

Second, that (Duncan L.) Clinch's letter of July 24, 1843, was wrong in saying that he had complied with all the requirements of the act of 1836.

Third, that Commissioner Sparks was wrong in relying upon the deceptive recitals in the paper of November 3, 1838, and in the letter of July 24, 1843:

Fourth, that Commissioner Blake, on whom the construction and enforcement of the act of July 2, 1836, was devolved, required and construed the act of July 2, 1836, to require, a relinquishment to the United States of the tract at Cone's hummock:

That is to say, that Clinch and McIntosh should relinquish to the United States the very land which the act authorized them to purchase from the United States, in lieu of the same quantity of land to be relinquished from the mill grant!

This Department will not entertain a proposition so absurd. It will not permit Houston Clinch to allege that his ancestor under and through whom he claims, fraudulently procured a patent for 3008.34 acres of land by means of "deceptive recitals." He will not be suffered to allege that his ancestor did not in good faith "comply with all the requirements of the act of 1836;" nor to deny that the "relinquish-

ment was duly filed in the office of the register of public lands for the district of East Florida." The meaning of the act of July 2, 1836, is too plain for serious discussion. This Department conclusively presumes that Duncan L. Clinch and John H. McIntosh did file a good and sufficient deed relinquishing to the United States 3008.34 acres of land out of the eight thousand acres which were located and surveyed by Williams, and confirmed by the superior court of East Florida in the year 1835. The land so relinquished became on March 10, 1845, the date of the patent to Clinch, a part of the public domain.

There is no room for dispute as to the boundaries of the "mill grant." Buckley's (sometimes called Governor's) creek is one; St. John's river is another; the third and last boundary is the straight line hereinbefore described. In the year 1849 Deputy Surveyor David H. Burr, under contract with the Commissioner of the General office for public purposes, located and resurveyed said straight line. Both Williams (in 1835) and Burr (in 1849) started on St. John's river, at Narrow Bay, at a cypress tree marked with a cross, and ran the line N. 72 W. to Buckley's creek. The public surveys were adjusted to and closed upon said line; and the plats made in accordance therewith were approved by the surveyor general. Since 1849, the location on the ground of the straight line confirmed by the superior court in Florida, has been a matter of public record in your office. All of the land included between Buckley creek and St. John's river north of that line, (exclusive of the thousand acre tract delineated on Williams' plat and also on the official map), was, by the judicial decree of November 2, 1835, confirmed to George J. F. Clarke as and for sixteen thousand acres in satisfaction of the Spanish grant of April 6, 1816. The alleged discrepancies since discovered as to lines and acres, are immaterial.

There is in this record sufficient evidence to show that Duncan L. Clinch in his life time acquired by sale and transfer from George J. F. Clarke, the 16,000 acres of land contained in the "mill grant;" and that said Clinch relinquished to the United States 3008.34 acres of land part of said 16,000 acres. Your office will therefore cause to be surveyed and cut off from said "mill grant" three thousand and eight acres and thirty four hundredths of an acre (exclusive of any part of the one thousand acre tract aforesaid); by locating and marking a line north of and parallel to the straight line aforesaid which appears upon the official maps as the southern boundary of said "mill grant"; and will cause the public surveys to be adjusted to and closed upon the new line so located and marked. Your office will then issue in the name of Duncan L. Clinch a patent for all the lands included within Buckley creek, St. John's river, and the new line aforesaid as boundaries, as and for 12,991.66 acres of land; describing the same also as usual according to the official maps. (See U. S. Revised Statutes, section 2448, and the case of Joseph Ellis, 21 L. D., 377).

It appears by the public records (See American State Papers Volume

5, page 376, No. 33 in Report No. 1, and p. 380), that in pursuance of a Spanish order of survey dated October 7, 1816, (and of a concession in 1817 and a royal title in the month of August 1818), one thousand acres of land on the west side of St. John's river opposite Picolata, were surveyed for and to George J. F. Clarke by A. Burgevin; and that said land and survey were confirmed to said Clarke by C. Downing, register, and W. H. Allen, receiver, under authority of an act of Congress of May 23, 1828 (4 Statutes 248). Clarke's claim and title to said thousand acres were again confirmed by the act of May 26, 1830 (4 Statutes 405). There is not sufficient evidence in this record to show that Clarke in his life time aliened or transferred his estate in said lands; and there appears no reason why patent therefor should not be issued. Your office will therefore issue a patent for said thousand acres of land in the name of George J. F. Clarke. The survey delineated on the plat of Williams made in 1835, does not exactly correspond with the survey made by Burr in 1849, and delineated on the official maps of T. 6 S., R. 26 E., approved July 7, 1849, and of T. 7 S., R. 26 E., approved June 19, 1851. The record shows that all parties claiming interests are content with the delineations on the official maps, and your office will follow them in issuing said patent.

Your office decision of February 3, 1887, is hereby modified in accordance with the foregoing opinions and directions.

REPAYMENT—ENTRY ERRONEOUSLY ALLOWED.

W. E. McCORD.

In case of an entry that is "erroneously allowed" for land not subject thereto, and canceled for that reason repayment may be granted without inquiry as to the truth or falsity of the final proof.

Secretary Smith to the Commissioner of the General Land Office, July 13, 1896. (J. L. McC.)

On May 2, 1893, May Campbell made timber-land entry for the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 8, T. 49 N., R. 6 W., Ashland land district, Wisconsin.

On January 25, 1894, your office directed the local officers to notify Miss Campbell that said entry was on that date held for cancellation, for the reason that it was "offered" land, and not subject to entry under the timber-land act. Such notification was transmitted to claimant's address at Iron River (given in the entry papers as her residence), but it was returned unclaimed. Your office, therefore, on June 8, 1894, canceled the entry on the records of your office.

On September 1, 1894, W. E. McCord, claiming to be owner of the land described through purchase from Miss Campbell, applied in due form for repayment of the purchase money, fees, and commissions. This

application your office, by letter of October 10, 1894, submitted to the Department, which returned the same approved, on November 13, 1894.

In order to obtain repayment it was necessary according to the regulations of your office, to submit "properly authenticated abstracts of title, or the original deeds or instruments of assignment" (General Circular of October 30, 1895, page 98). Upon examination of the deed and abstract of title it became apparent that such deed had been made and executed by Miss Campbell prior to her making final proof and receiving final certificate. Your office, therefore, by letter of June 26, 1895, re-submitted the case to the Department, with the suggestion that, as said final proof was false, the allowance of the application for repayment be canceled.

The Department therefore, on August 12, 1895, canceled the approval of said McCord's application for repayment.

On August 20, 1895, your office notified the local officers that McCord's said application was denied, for the reason above suggested, to wit, that Miss Campbell's final proof, upon which her entry was based, was false.

From this action McCord, the transferee, has appealed.

Section 2362 R. S. authorizes repayment upon satisfactory proof "that any tract of land has been erroneously sold by the United States, so that from any cause the sale cannot be confirmed," and Sec. 2 of the act of June 16, 1880, provides that the Secretary of the Interior shall cause repayment to be made, "when from any cause the entry has been erroneously allowed and cannot be confirmed."

In the case at bar the entry of the land in question under the timber land law was "erroneously allowed and cannot be confirmed;" it is therefore embraced within the class for which repayment has been provided and directed.

It is true that the Department has repeatedly held that "repayment will not be allowed where an entry is canceled on account of its fraudulent character" (Lydia Kelly, 8 L. D., 322, and many other cases). But in the case at bar the entry was not canceled "on account of its fraudulent character." It was canceled for a reason for which the law authorizes and directs repayment. In view of this fact it is not material whether Miss Campbell's affidavit is true or false, and that question will not be inquired into.

In my opinion repayment should be allowed. The decision of your office is therefore reversed.

DESERT LAND CONTEST—RECLAIMED TRACT.

NILSON v. ANDERSON.

The mere fact that a tract of arid land is traversed by an irrigating canal is not sufficient in itself to constitute reclamation thereof, nor take it out of the class of lands subject to desert entry.

Secretary Smith to the Commissioner of the General Land Office, July 13, 1896. (E. B., Jr.)

The case of Louis Nilson, contestant, against Gustave H. Anderson, on appeal from your office decision of August 8, 1895, holding that the S. $\frac{1}{2}$ of Sec. 9, T. 36 N., R. 9 E., N. M. P. M., Del Norte, Colorado, land district, for which tract the latter made desert land entry No. 10 June 11, 1891, was desert land at the date of said entry, that the entry should remain intact, and that Nilson's contest be dismissed, has been duly considered.

Nilson having initiated contest against said entry, September 11, 1894, alleging that the tract was not desert land at the date of the entry, having been reclaimed by sub-irrigation from the Empire Canal, at and prior to that date, a hearing between the parties was duly had November 17th to 20th, 1894, which resulted in a decision by the local office, February 15, 1895, in favor of contestant. The history of the case, not already indicated herein, is so fully set out in your office decision, as are also the facts and the law applicable thereto, as to make recital thereof here, at length, unnecessary. The allegation of the contest affidavit, as above stated, presents the only issue in the case.

I find the facts to be substantially as set out in the decision now appealed from. The only water shown to have been brought on the land is that carried by the Empire Canal, which crosses the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said section from northwest to southeast so as to leave about thirty-five acres of the tract on the westerly side of the canal. From the line of the canal the land slopes to the eastward, and along its eastern border there is some sub-irrigation from the canal. The testimony is decidedly conflicting as to whether such sub-irrigation is sufficient for trees, and to supply moisture enough for grass so as to produce an average crop of hay upon the land sub-irrigated, and as to the area of land sub-irrigated. The most reliable of the testimony, that of witnesses whose ranches or farms border on the land, and who have experimented in the premises, is that, except upon the immediate margin of the canal, trees cannot be grown by sub-irrigation, and that hay, or any other agricultural crop, cannot be successfully grown upon the tract in question by that means.

The region, and the tract in question, are naturally arid, desert lands upon which neither trees nor crops of any kind can be successfully grown without irrigation. No system of laterals or ditches from the said canal, or any other source of water supply, was in operation, or had been projected, so far as appears, upon this land, when Anderson made his entry. The Department agrees with the conclusion reached by your office that under all these circumstances the mere fact that an irrigating canal crossed one corner of this tract of three hundred and twenty acres of otherwise desert land, did not, of itself, constitute a reclamation of the tract and take it out of the class of desert lands.

This case is readily distinguishable from that of *Dickinson v. Auerbach* (18 L. D., 16), cited by appellant. In the latter case water had been experimentally, at least, by a system of laterals and ditches, conducted over each forty acre subdivision of the land, and the irrigation of the land at any time was subject to the will of the entryman. The Department held that it was proven in that case that the entryman, "had actual control of a sufficient water supply," and, therefore, the reclamation of the tract had been potentially effected. In the present case nothing of the kind had ever been done upon the land by any one when Anderson made his entry, and the land was as substantially desert land as if the Empire Canal had not touched its borders.

Your office decision is affirmed; Anderson's entry will remain intact, and Nilson's contest be dismissed.

EVIDENCE—PRACTICE—NOTICE OF CONTEST—FRAUDULENT ENTRY.

MCGRADE *v.* MURRAY.

Rule 35 of Practice does not require a commission to issue to the officer who may be designated to take evidence thereunder.

In the notice of contest issued by the local office the charges as laid in the information need not be set out in the language of the informant; it is sufficient if the grounds and purpose of the contest are stated briefly.

An entry made in the interest of another is fraudulent and must be canceled.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 13, 1896. (J. L.)

This case involves the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 5, and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 8, T. 28 N., R. 21 W., Missoula land district, Montana, containing eighty acres.

On April 29, 1891, Edward Murray made homestead entry No. 16 of said tracts. In his homestead affidavit dated April 20, 1891, and filed under section 2294 of the Revised Statutes, among other things he solemnly swore:

That he was then residing on said land, and had made a bona fide improvement and settlement thereon; that said settlement was commenced on February 24, 1891; that his improvements consisted of a log house fourteen by sixteen feet in size, containing one door and a window, two acres cleared up, and that the value of the same is \$250; and that owing to the great distance he was unable to appear at the district land office to make this affidavit.

On October 27, 1892, Thomas J. McGrade filed his affidavit of contest against said entry, alleging:

1. That said Edward Murray has wholly abandoned said tract;
2. That he has changed his residence therefrom for more than six months since making said entry;
3. That said tract is not settled upon and cultivated by said party as required by law; and

4. That the said entry was not made in good faith, but fraudulently, and for the purposes of speculation.

This affidavit of contest was corroborated by Frank Hatton and H. G. Swaney.

On the same day the local officers ordered a hearing, and prepared a notice thereof, on the usual printed form, which was signed by the register, and delivered to the contestant for service, in the following words:

(4-345.)

NOTICE.

U. S. LAND OFFICE,
Missoula, Mont., October 27, 1892.

Complaint having been entered at this office by Thomas J. McGrade against Edward Murray for abandoning his homestead entry No. 16, dated April 29, 1891, upon the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 5 & NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ section eight, township 28 north of range 21 west in Missoula county, Montana with a view to the cancellation of said entry, the said parties are hereby summoned to appear at the U. S. Land office Missoula Montana on the 8th day of December, 1892, at 10 o'clock A. M., to respond and furnish testimony concerning said alleged abandonment, the testimony to be used at said hearing will be taken before Andrew W. Swaney a U. S. Commissioner, at Kalispell Montana on December 2, 1892 at 10 o'clock A. M.

ROBERT FISHER, *Register.*

Said notice was duly served on the entryman on November 1, 1892.

On December 2, 1892, the commissioner by consent of both parties adjourned the taking of the testimony until Monday December 5; on which day the entryman by his counsel filed with the commissioner a protest in the following words:

THOS. J. MCGRADE CONTESTANT, }
v.
EDWARD MURRAY CONTESTEE. }

Before U. S. L. O., Missoula, Mont. Involving Hd. E. of the NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ Sec. 8 and SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 5 T. 28 N. R. 21 W.

Now comes the contestee and objects to the taking of any testimony in this contest and moves to dismiss the same upon the ground and for the reason that the court commissioner before whom such testimony is to be taken as well as the said Land Office has no jurisdiction of the matter—in that—

First the commissioner has received no commission for taking the same, and no affidavit of contest upon which to base the same has been filed with U. S. Land Office or received by said commission, A. W. Swaney, as required by the statute and rules of practice.

Second any pretended affidavit of contest that may have been filed with the register and receiver of said Land Office specifies only conclusions of law, and contains no specific charges of abandonment, or any other charge.

EDWARD MURRAY.

The examination of witnesses on both sides, was continued from day to day until December 10, 1892, when it was closed. The commissioner mailed the testimony on December 13, and it was received at the local office on December 15, 1892. (It appears by a receipt filed with the papers that the contestant did not pay all the expenses of taking the testimony; and that Murray did not pay his part thereof, to wit: the sum

of \$33.92, until December 12, 1892. This may account for the retention of the papers by the commissioner). Neither party appeared at the local office on December 8, 1892, the day which was fixed for the hearing; and on December 12th the district officers "dismissed the case without prejudice to the contestant's commencing the case *de novo*."

On appeal by the contestant your office by letter "H" of March 3, 1893, reversed said decision, and instructed the local office to reinstate the case, and consider it on its merits: of which the parties were duly notified.

Consequently on April 4, 1894 the local officers rendered their decision, recommending that the contest be dismissed, and that Murray's entry be held intact.

The contestant appealed; and on September 29, 1894, your office reversed the decision of the local officers, and held Murray's entry for cancellation.

Murray has appealed to this Department.

Each one of the four charges made in the affidavit of contest is sufficiently stated. No question is raised as to the first three. The fourth charge, "that the said entry was not made in good faith, but fraudulently, and for the purpose of speculation," is equivalent to a charge that the "entry was fraudulent in its inception," and is both broad enough and definite enough to let in any legal evidence of any facts and circumstances, tending to prove that the entryman acted in bad faith at the time of making his entry. The contestant is not bound to make in his charge a recital of his testimony. Indeed the rules of correct pleading forbid such incumbrance of the record. Also see rules of practice 36 to 39 inclusive for the duties of local officers taking testimony in relation to such a charge. The entryman's objection to said charge is overruled.

Rule of Practice 35, under which the testimony in this case was taken, does not require a commission to be issued to the officer taking it. The objection of the entryman in this behalf is also overruled.

The entryman further complains, that the notice of the hearing served upon him on November 1, 1892, did not contain a recital of all the grounds of contest contained in the affidavit of contest; and he, in substance, insists, that the pertinency and admissibility of evidence are to be determined, not by the words of the pleading for which the contestant is responsible, but by the words of the summons issued by the officers of the government, requiring the entryman to appear and answer the charges of his adversary. Service of the summons gives the entryman opportunity for thirty days within which to find out the charges made against him. Rule of Practice No. 7 does not require the register and receiver to copy the charges into their summons. It only requires them to "give the name of the contestant; and briefly state the grounds and purpose of the contest." If the entryman and his attorneys at the time of their appearance to take testi-

mony, did not have with them a copy of the affidavit of contest, it was their own fault, the result of their own negligence. It does not appear that the entryman was subjected to any injury or disadvantage by reason of the form of the summons. His objections on this account were properly disregarded, and are hereby overruled.

The evidence in this case, on both sides, by a clear and palpable preponderance, proves that Murray's entry was in its inception grossly and corruptly fraudulent; that it was made in pursuance of an agreement between him and one Frank Hatton, that he should "hold down the ranch," and keep up a pretence of residence upon the land, for the joint benefit of himself and Hatton, until they could find a purchaser; that Murray never was in fact a *bona fide* resident upon the land; and that all his acts in relation to the land were characterized by bad faith.

The foregoing facts are proved by many witnesses.

On page 116 of the testimony, Murray as a witness was asked by his own counsel the following question:

You may state whether or not, there was ever any agreement or understanding between you and Frank Hatton, to the effect that he was to have an interest of any kind in this land; if so what?

His answer as recorded on page 117, is as follows:

Well, when I took the land up, Yes sir. It was to the effect that Mr. Allen and Mr. Hatton were to have a half interest in the land after I had filed on the land.

In this, and in many other particulars, Murray fully corroborated the testimony of Frank Hatton, who was his accomplice in the fraud perpetrated.

Your office decision is hereby affirmed.

OTOE AND MISSOURIA LANDS—DEFERRED PAYMENTS.

INSTRUCTIONS.

The Secretary of the Interior has due authority under the law, and by virtue of his supervisory power, to cancel the entries of such purchasers of Otoe and Missouri lands as are in default in the matter of deferred payments.

Directions given for notice to all such purchasers that opportunity will be given for payment of arrears with a rebate of ten years' interest, (as agreed to by the Indians) and that on failure to settle in such manner their entries will be canceled.

Secretary Smith to the Commissioner of the General Land Office, July 20, 1896. (J. I. P.)

By letter of July 18, 1895 (21 L. D., 55), you were instructed by the Department to direct the register and receiver at Lincoln, Nebraska, to call upon those purchasers of Otoe and Missouri Indian lands in Kansas and Nebraska, who were in default in payment of either principal or interest for such lands, to pay the respective amounts for which they were in arrears, within ninety days from receipt of notice, and to

advise them that in the event of their failure to do so, their respective entries would be canceled.

Subsequently, on November 9, 1895, you were instructed to advise said local officers not to take final action as directed in said instructions of July 18th (*supra*), until further ordered.

In addition to the efforts which I had previously made under the act of March 3, 1893 (27 Stat., 568), to effect a settlement between the Otoe and Missouri Indians and the purchasers of their lands in Kansas and Nebraska, I again, on April 8, 1896, through James G. Dickson, Special Agent, submitted to the Indians, under said act, for their consent thereto, a proposition for such a rebate and adjustment of their differences with said purchasers as in my judgment the principles of equity demanded. That proposition was rejected without reservation by the Indians, but from a conference with the Indians which occurred afterwards, I was authorized by them to allow a rebate of ten years interest to those of said purchasers who would, within ninety days after notice, pay the residue of the purchase money and interest remaining unpaid after the deduction of said ten years interest.

The apparent delay in submitting the above proposition has been occasioned, principally, because of the fact that the jurisdiction or power of the Department to enforce the collection of the deferred payments remaining unpaid by the purchasers of said lands, has been challenged, and a careful investigation of the question presented was deemed advisable before proceeding further in the matter.

It has been held by the Department, in the case of *Fleming v. Bowe*, on review (13 L. D., 78), that the status of an entry of Otoe and Missouri lands under the acts of August 15, 1876 (19 Stat., 208); March 3, 1879 (20 Stat., 471); and March 3, 1881 (21 Stat., 380), was that of a pre-emption entry.

The status of an entry of Osage Indian lands under the act of May 21, 1880 (21 Stat., 143), has also been held to be that of a pre-emption entry. See *Fleming v. Bowe* (*supra*).

In the case of the *United States v. Johnson* (15 L. D. 442)—an Osage entry—the purchasers were called pre-emptors, and it was held that “until all the preliminary acts required by law have been performed by the pre-emptor he has acquired no right as against the government,” citing *Frisbie v. Whitney* (9 Wall., 189); The Yosemite Valley case (15 Wall., 77). In the case of *Hessong v. Burgan* (9 L. D., 353) it was held that “the settler under the Osage act can have no vested right until he has made proof and paid or tendered the required purchase money,” and in the case of *Fleming v. Bowe* (*supra*) it was declared that no good reason could be perceived “why the entries of the Otoe and Missouri lands should be placed in any different category than the Osage entries.” That declaration had special reference, however, to the application of section 7 of the confirmatory act of March 3, 1891 (26 Stat., 1095).

In the case of William R. Sisemore (18 L. D., 44,) it is held:

When a claimant for Osage land under the act of May 28, 1880, submits proof of his qualifications to enter, shows due compliance with law, and makes his first payment for the land, his right thereto is a vested interest, subject only to the lien of the government for the unpaid purchase money; and the receipt then issued is a "final receipt."

And it is insisted that the principle there enunciated must be applied to the purchasers of these Otoe and Missouri lands.

The decision in Sisemore case is based on the proposition that the Osage act provides that after the first payment the land shall be subject to taxation under the laws of Kansas and for the further reason that said act specifically provides how the forfeiture provided therein, on failure to pay the deferred payments, may be enforced and said deferred payments collected. But the Otoe and Missouri act (21 Stat., 380) contains no such provisions. It provides (section 3) that if the settler fails to make the first cash payment he forfeits all his right to the lands which he has applied to purchase, but it provides no forfeiture in case of default in the deferred payments, nor does it make any provision as to how those payments may be collected in case of default. It will be seen then that the provisions of the Osage act which led the Department to make the holding cited in the Sisemore case, are entirely wanting in the Otoe and Missouri act, and that a purchaser under the latter act can not be held to have "performed all the preliminary acts required by law," or to have "paid or tendered the required purchase money, or to have acquired any right as against the government," until the last deferred payment has been made.

The question then presents itself: Has the Department any power to cancel an Otoe and Missouri entry for failure to make the deferred payment? The *right* which the settler forfeits by failure to make the first cash payment is the right to purchase, acquired by his settlement and application. The practice has been that when proof of settlement was duly made within ninety days from date of application to purchase, and cash payment being made, the entry was allowed. As the cash payment is a condition precedent to entry, it follows that failure to make said payment would furnish no grounds for the cancellation of an entry not in existence, but the right to purchase would be gone and the tract be subject to purchase by a subsequent settler.

The right of the Department to cancel an entry any time before patent, where failure to comply with the law, or bad faith on the part of the entryman is shown, has been decided so often by the Department and the courts that it is elemental, and a reference to authority in support thereof will hardly be required.

By the act of March 3, 1885 (23 Stat., 371), Congress granted an extension of time to said purchasers, expressly stating in the last proviso, but the time for the payment of the whole of said purchase money shall not be extended more than two years from the time the said purchase money became due according to the original terms of sale under said act.

The question at once presents itself: Why did Congress grant an extension of time for the payment of said deferred payments if the rights of the purchasers were in nowise jeopardized by the failure to make said payment, or that forfeiture on account of said default would not follow?

By act of August 2, 1886 (24 Stat., 214), Congress granted a second extension of time to said purchasers in which to make said deferred payments. Without quoting in full the provisions of the act last above mentioned, attention is called to the last two provisos thereof, which are as follows:

Provided, That all other provisions in the acts above mentioned, except as changed and modified by this act shall remain in full force: *Provided further*, That no forfeiture shall be deemed to have accrued solely because of a default in payment of principal or interest becoming due April thirtieth, eighteen hundred and eighty-six, if the interest due upon said date shall be paid within sixty days after the passage of this act.

It will be observed that the first of the two provisos above quoted refers specifically to the two acts mentioned in the body of the act of August 2, 1886 (*supra*), namely, the Otoe and the Omaha acts. It may be conceded for the sake of argument that the payment of interest referred to in the last proviso, referred to the purchasers of Omaha lands, but inasmuch as the first proviso quoted referred to the two acts, it must be admitted, by every rule of statutory construction, that the last proviso referred also to said acts, and the logical inference is, that Congress intended that any other default in payment provided for in either of said act, would render the party in default liable to a forfeiture of his entry. This is so clear to my mind that I do not deem a further discussion of it necessary. It is incredible to believe that Congress intended that by making a first payment the purchasers of these Otoe lands should thereafter be granted absolute immunity from any liability because of default in the deferred payments, or that it intended that the Secretary of the Interior should be compelled to bring them into court to enforce the collection of said deferred payments. To so hold would be to hold that, in this instance, Congress had departed from the policy pursued by it in every other instance where it provided for the sale of Indian lands for their benefit.

But it might be further stated that the right of the Secretary of the Interior, under the supervisory power conferred on him by law, to cancel entries independent of or for other reasons than those specifically mentioned in particular statutes, upon a proper showing, has been decided by the supreme court of the United States. See *Hessong v. Burgan* (9 L. D., 353, at 359); *Lee v. Johnson* (116 U. S., 48); *Buena Vista County v. Railroad Co.* (112 U. S., 165).

I am fully persuaded, therefore, of the power of the Secretary of the Interior to cancel the entries of these purchasers of Otoe and Missouri lands who are in default in the deferred payments.

It has been going on twelve years since default of these deferred

payments commenced, including four years of extension granted by Congress, and during that time the two acts extending time of payment and the act of March 3, 1893, are the only legislation of a remedial character that has been passed by Congress. And during all that time the settlers have been in possession of these lands and have received the benefits of the rents and profits thereof without any accounting. Surely they can not complain of a want of considerate treatment, but the Indians have certainly a right to complain of the delay on the part of the government in collecting their money. It is earnestly hoped that the very liberal proposition authorized by the Indians, which practically concedes all the settlers have asked, will be accepted by them and the settlement of this vexed question accomplished.

You are therefore hereby instructed to direct the local officers at Lincoln to notify those purchasers of said lands who are in arrears on the deferred payments therefor, that all those who within ninety days from notice make settlement in full, a rebate of ten years interest on the amount of principal and interest due at the date of settlement, will be allowed them; and to also notify them that on their failure to settle as proposed, within the time prescribed, their entries will be canceled.

BENESH *v.* KALASHEK.

Motion for review of departmental decision of May 13, 1896, 22 L. D., 530, denied by Secretary Smith, July 23, 1896.

STATE SELECTION—ADVERSE SETTLEMENT RIGHT.

KENT *v.* STATE OF IDAHO.

The preferred right of selection conferred upon the State by the act of March 3, 1893, is not operative as against bona fide settlement rights existing at the time the plat of survey is filed in the local office.

Secretary Smith to the Commissioner of the General Land Office, July 23, 1896. (W. F. M.)

On June 30, 1894, the State of Idaho selected, among other lands, the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 9, and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 8, township 39 N., range 2 E., within the land district of Lewiston, under the grant for the support and maintenance of the insane asylum, conferred by section 11 of the act of July 3, 1890, entitled "An act to provide for the admission of the State of Idaho into the Union," (26 Stat. 215). By the act of March 3, 1893 (27 Stat. 572-592), the State was given a preference right over any person or corporation to select such lands for a period of sixty days after they have been surveyed and declared to be subject to entry, such

right not to accrue against bona fide homestead and pre-emption settlers at the date of filing of the plat of survey in the local office. The plat of township 39, *supra*, was received at the local office on May 4, 1894, and was officially filed so that the lands became subject to entry on July 2, 1894.

On July 16, 1894, Mace E. Kent applied to make homestead entry of the above described tracts, alleging settlement in April, 1894, but his application was rejected for conflict with the State's selection. On appeal to your office a hearing was ordered, and duly held, and the State has now appealed from the decision of your office, affirming that of the register and receiver, holding its selection for cancellation.

The testimony shows that Kent settled on the land in the latter part of April, 1894, and took up his residence thereon in the following month, so that he is protected by the proviso of the act of March 3, 1893, *supra*.

The decision of your office is, therefore, affirmed.

CULLOM *v.* HELMER ET AL.

Motion for review of departmental decision of March 27, 1896, 22 L. D., 392, denied by Secretary Smith, July 23, 1896.

SWAMP GRANT—CHARACTER OF LAND—APPROVED LIST.

DREWICKE *v.* STATE OF MINNESOTA.

When the field notes of survey show that land is swamp in character, and it is listed as such, by the State, and the list approved, it will require positive evidence, by witnesses thoroughly cognizant of the condition of the land, at or near the date of the grant, to justify revocation of the approval.

Secretary Smith to the Commissioner of the General Land Office, July 23, 1896. (G. C. R.)

On July 14, 1894, Lorenz Drewicke made homestead entry No. 12,698 for the SE. $\frac{1}{4}$ of Sec. 7, T. 120 N., R. 41 W., Marshall, Minnesota, "subject to the swamp land claim of the State of Minnesota as to NE. $\frac{1}{4}$ SE. $\frac{1}{4}$."

He submitted final proof April 9, 1895, as per advertisement, duly made, and on May 14, 1895, final certificate 7479 was duly issued.

It appears that on January 3, 1896, your office directed a hearing to determine the character of the land. At the hearing the State and the homestead entryman were notified. The State made default; Drewicke appeared and with him two witnesses. After evidence was taken, the register and receiver decided that the land was "never swamp or

subject to selection or claim" by the State, and accordingly recommended that the entry remain intact.

Your office letters of March 9, 1896, addressed to the entryman's resident attorney and to the register and receiver, recalled and rescinded the letter ordering a hearing. This action was taken because it was discovered that the tract was in a list of swamp lands which was approved by the Secretary of the Interior on February 3, 1872.

The tract was omitted from the patent that subsequently issued to the State on the approved list (June 23, 1874), for the reason that it was in certain railroad limits. The company afterwards relinquished its claim to the land, and the same would have been patented to the State under the order of approval but for the conflict with Mr. Drewicke's entry.

Your office letter ("K") of May 25, 1896, transmits a petition from the entryman's attorney, asking for the revocation of departmental approval of February 3, 1873, as to the tract in question.

The petition, which is sworn to, alleges from information and belief that the land was not at date of grant, and is not now, of the character contemplated in the swamp land act. The petition is supported by three affidavits, stating, substantially, that affiants are now and have been "for many years last past," acquainted with the tract in question; that the same is "dry, sandy soil, and fit for cultivation without artificial drainage, and wholly free from periodical overflow" at all seasons; that the greater part of the same has been broken and cultivated to crop; that the same at date of grant (March 12, 1860,) was dry, &c.; that the approval of the land to the State was the result of fraud or mistake.

The Attorney-General of the State of Minnesota insists that the showing made by petitioner is insufficient to justify setting aside the approval of the land to the State, and asks that patent issue upon said approval.

An examination of the plat and field notes of your office shows that the greater part of the tract in question is "*level marsh*."

At the hearing, the order for which was set aside by your office, the entryman (Drewicke) testified that he had known the land two years. The following question was asked him: "What is the nature of this land with regard to swamp; is it wet? A. Before I went there it was a lake; but it is all dry. It is level nice land. The whole quarter is fit for cultivation."

Charley Kathmarek, aged forty years, testified that he lives two miles from the land, and has been well acquainted with it for eight years; that he does not "think" that the land was ever in a swampy condition in past twenty-five years.

John Hanky, aged sixty-five years, swears that he has known the land for seventeen years; that there has been water in wet seasons; but no water on land for ten years. Does not know whether it has

been swampy in last twenty-five years; but it has not been swampy since he knew it.

The three affiants, whose affidavits accompany the motion, failed to state how long they have known the land.

The State of Minnesota obtained its grant of swamp lands by the act of March 12, 1860 (12 Stat., 3).

The provisions of the act approved September 28, 1850 (9 Stat., 519), applicable to the State of Arkansas and other States, were extended to that State.

By the act of 1850 it was made the duty of the Secretary of the Interior to make out an accurate list and plats of the lands described (i. e., "the whole of those swamp and overflowed lands made unfit thereby for cultivation"), and transmit the same to the governor of the State, and at the request of said governor cause patent to be issued to the State therefor.

The State of Minnesota elected to take the field notes of the survey as a basis for selection, and, as above seen, those field notes show the land to be swamp.

The approval of a list of swamp land selections by the Secretary of the Interior is a judgment by the proper tribunal that the land is of the character contemplated in the grant; the certification of the lists after the approval is only a ministerial act, and when this is done, patent issues on the request of the governor. Before patent issues, however, the Secretary of the Interior has jurisdiction over the lands, and may, upon proper showing of fraud or mistake, set aside an approval of swamp land selections. *State of Wisconsin v. Wolf*, 8 L. D., 555.

But when the field notes of the public survey show that the land is swamp, and the same is listed by the State as inuring thereto under the grant, and the list has been approved, it will require positive evidence by witnesses thoroughly cognizant of the condition of the land, at or near the date of the grant, to justify rescinding the order of approval. The testimony must be from personal knowledge and contain such a description of the land as to leave no doubt that the field notes do not correctly describe the land as of the date when the survey was made.

The affidavits accompanying the petition fail in this necessary respect; not one of the affiants gives the date when he first knew the land. It is possible that the land by cultivation and drainage has been reduced to a fair state of cultivation.

The survey (made in 1866) shows the land to be swamp, and if the field notes correctly describe the land, the same belongs to the State.

Petitioner has failed to present such facts as will justify a second hearing for the purpose of impeaching the correctness of the description of the land as given in the field notes.

The petition is, therefore, denied, and the entry will be canceled as to the forty acre tract in question.

PRICE OF LAND—REPAYMENT—ACT OF JUNE 8, 1872.

CLINTON GURNEE (ON REVIEW).

The Secretary of the Interior, by virtue of the discretionary authority conferred by the act of June 8, 1872, having fixed the price of the lands therein referred to at two dollars and fifty cents per acre, and such price having been paid, it will not now be held, on application for repayment, and the showing made thereunder, that the discretion of the Secretary was exercised under a mistaken apprehension as to the true status of said lands.

Secretary Smith to the Commissioner of the General Land Office, July 23, 1896. (J. L. McC.)

Counsel for Clinton Gurnee has filed in his behalf a motion for review of the departmental decision of August 29, 1895 (21 L. D., 118), denying his application for repayment of moneys paid in excess of single minimum, upon five cash entries in T. 31 S., R. 12 E., M. D. M., San Francisco land district, California.

The lands in question were originally located with Chippewa half-breed scrip, issued in supposed accordance with the seventh clause of article 2 of the treaty of September 30, 1854 (10 Stat., 1110). The supreme court of California subsequently decided that said scrip was issued without authority of law, and was void. On June 8, 1872 (17 Stat., 340), Congress passed an act authorizing the purchase of said lands by the locators of said scrip,

at such price per acre as the Secretary of the Interior shall deem equitable and proper, but not at a less price than one dollar and twenty-five cents per acre.

In pursuance of the above act, Clinton Gurnee, upon showing himself to be the "*bona fide* owner" of the lands located with Chippewa half-breed scrip Nos. 30 B, 163 C, 174 C, 222 C, and 235 C, was allowed to purchase the same for cash. He afterward applied for repayment, on the ground that the double-minimum charge was made upon the presumption that the land was within the granted limits of a railroad; but that, inasmuch as such was not the fact, \$1.25 per acre should be refunded.

Your office, however, by letter of February 23, 1894, rejected his application, on the ground that,

at the date of said entries, the price paid was the proper price per acre without regard to the situation of the lands as to railroad limits.

Counsel for Gurnee appealed from said office decision; but the Department, on August 29, 1895, briefly affirmed it. Counsel for Gurnee has now filed a motion for review, contending that Secretary Delano charged the double-minimum price only because of his understanding that the land was within the granted limits of a railroad.

A careful examination of the record does not, in my opinion, show clearly that Secretary Delano was influenced in fixing the price for the lands here in question solely by the supposition that they were

situated within railroad limits. It would seem that he adopted this rule for his guidance when fixing the price of the land so sold in Minnesota; but he states no reason when fixing the price of these lands in California, and may have been controlled by entirely different considerations. Whatever may have been his reasons, it is sufficient to say that he exercised the authority conferred upon him by the act of Congress, and fixed the price of these lands at two dollars and fifty cents per acre; and having done this, and the amount so fixed having been paid, I doubt the propriety, even if the authority be conceded, to hold, at this late day, that he exercised his discretion under a mistake.

The motion for review is accordingly denied.

SOLDIERS' ADDITIONAL HOMESTEAD—CERTIFICATION OF RIGHT.

ELIJAH C. PUTMAN.

There is no statutory authority for the certification of soldiers' additional homestead rights, nor is such action necessary to the exercise of the additional right of entry either by the soldier or his transferee.

Secretary Smith to the Commissioner of the General Land Office, August
(W. A. L.) 4, 1896. (G. C. R.)

On May 19, 1868, Elijah C. Putman made homestead entry, No. 918, for the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 1, T. 5 S., R. 27 W., Washington, Arkansas; final certificate No. 553 (Camden series) was issued February 17, 1875. The entry was patented August 20, 1874.

On May 20, 1878, J. Vance Lewis, of this city, filed in your office an application for the issuance of a certificate of right to Putman, whose military service was alleged to be in Co. D., 4th Arkansas Cavalry.

This application was rejected by your office letter ("C") of July 17, 1878, for the reason that the War Department reported that there was no record of the military service, as alleged.

On April 6, 1894, Messrs. Smith and Shields, attorneys of this city, applied for the certification of Putman's right to make soldier's additional entry under section 2306 of the Revised Statutes.

Your office thereupon called upon the War Department, which, under date of April 12, 1894, verified Putman's alleged military service as follows:

Elijah C. Putman was enrolled November 19, 1863, at Benton, Arkansas, for one year or during the war, and mustered into service as private in Co. 'D' 4th Reg't Ark. Cav. (Col. Fishback's Cav.), January 7, 1864, and discharged as a private, March 28, 1864, by reason of disbandment of regiment.

On consideration of the application, your office, on April 24, 1894, treated the same as a renewal of that filed by Lewis, May 20, 1878; that the first application was properly rejected, and no appeal was taken. As an additional reason for the rejection of the application, your office

held that the practice of certifying to the additional right was discontinued by the circular of February 13, 1883 (1 L. D., 654), and for the further reason that the affidavit upon which the application is based was executed April 27, 1878, and there was then no evidence filed showing that the soldier was then living, and made the application for his own use and benefit.

A motion for review was duly filed, accompanied by the affidavits filed by the soldier (forms 4064 and 4087), executed May 16, 1894, before the county clerk of Montgomery county, Arkansas.

Your office, on June 14, 1894, denied the motion on the grounds that Putman acquiesced in the decision of your office of July 17, 1878, by not appealing therefrom, or taking any steps to have it set aside, that decision having become final.

Your office, however, held that Putman was at liberty to appear in person at any district land office and make a soldier's additional homestead application, under the regulations of the circular of February 13, 1883.

From that judgment Putman appealed to this Department, when, on December 4, 1895, the decision of your office was affirmed, on the grounds that Putman had taken no steps within a reasonable time after the action of your office of January 25, 1883, returning his application to his attorneys. As a further ground, it was held that,

As he has been silent for so many years, it must be considered that he has abandoned his claim. The re-filing of his application, April 6, 1894, comes by far too late to entitle him to an adjudication of his case under the regulations existing prior to February 13, 1883.

A motion for review of that decision was denied May 14, 1896, because the same was not filed within thirty days after notice of the decision.

Your office letter ("C") of June 12, 1896, transmits a communication filed therein June 4, 1896, by W. E. Moses, of Denver, Colorado. This petition is styled, "Petition for review or modification," and calls attention to the decision by the supreme court of the United States, dated May 18, 1896, in the case of *Webster v. Luther et al.*

It sufficiently appears that Putman served for more than ninety days in the army of the United States during the war of the rebellion; also that he is the identical person who, on May 19, 1868, made homestead entry of the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 1, T. 5 S., R. 27 W., Camden, Arkansas, which tract was afterwards patented to him under that entry. He is, therefore, entitled to the benefits conferred by section 2306 of the Revised Statutes. It is true that his application was rejected because the War Department reported that there was no record of the alleged military service. It was subsequently discovered, however, that he was in fact a soldier for the time prescribed in the statute to entitle him to the additional right.

It is unnecessary to discuss the question as to whether he, or the

War Department, was in error when he first applied. The fact that your office or this Department may have erroneously denied to him a certificate entitling him to the additional homestead right, does not preclude him from obtaining the rights which the statute plainly prescribes.

The circular of February 13, 1883, *supra*, directed that:

The practice which has hitherto prevailed of certifying the additional right as information from the records of this office, and permitting the entry to be made by an agent or attorney, is hereby discontinued.

The circular required the party desiring to make the additional entry to present himself at the local land office and make his application as in an original entry; to establish his identity as a soldier; to give the facts respecting his prior entry; and that he had not previously exercised his additional right, by entry, application, or by sale, transfer, or power of attorney.

Since the passage of the act (June 8, 1872, 17 Stat., 333), giving to honorably discharged soldiers the additional homestead right, the Department has refused to recognize or sanction as a principle the assignability of this right.

It was held in the case of John M. Walker (on review), 10 L. D., 354, that the right of entry provided in the statute "is strictly a personal right"; that it is not in itself a right of property, "but merely a right to acquire property in a certain way and upon a given state of facts, which, without the right thus given, could not be so acquired"; the argument being that since the right unexercised can not be transferred to another by will, it could not be transferred to another by the soldier in his lifetime.

These regulations were made for the avowed purpose of protecting the government against fraudulent entries, it being made to appear that a large number of soldiers' additional entries had been made upon forged applications and by genuine applications by parties not entitled thereto; and that the right to make such entries had been the subject of sale and transfer, effected by means of two powers of attorney—one to make the entry and the other to sell the land when entered.

If, as hitherto held by the Department, section 2306 of the Revised Statutes gave to the soldier "merely a right to acquire property in a certain way," and that the right of entry therein prescribed "is not in itself a right of property," the instructions of February 13, 1883 (*supra*), are logical and clearly right.

In the case of Webster *v. Luther et al.* (*supra*), the supreme court of the United States takes an entirely different view of the purposes of Congress in the enactment of the law in question.

In that case the plaintiff, Webster, read in evidence a quitclaim deed to the land from Mary A. Robertson, widow of James A. Robertson, dated October 7, 1890, acknowledged October 17, 1890, and recorded October 22, 1890; also application of Mary A. Robertson, dated April

7, 1887, together with the receipt of the local land office, showing the payment of the fees and commissions prescribed by law to enter the lands in dispute under section 2306 of the Revised Statutes, granting additional lands to soldiers and sailors who served in the war of the rebellion. The receipt of the land office, dated April 7, 1887, showing payment in full of the balance required by law for the entry of lands under section 2291 of the Revised Statutes.

A patent from the United States to Mary A. Robertson for these lands issued September 21, 1888, recorded February 11, 1889, in the office of the register of deeds, in St. Louis county, Minnesota, and reciting that the claim of the patentee to the lands had been established, etc.

The defendants read in evidence a power of attorney, dated April 28, 1880, and duly recorded April 8, 1887, from Mary A. Robertson to James A. Boggs. This instrument authorized and empowered Boggs, as attorney for his principal, "to sell, upon such terms as to him shall seem meet," any lands which the principal then owned, either in law or equity, and obtained by her as "an additional homestead" under the provisions of section 2306 of the Revised Statutes; to sell any such lands as she might thereafter acquire under said acts; to receive the purchase money or other consideration therefor, and to deliver in the name of the principal such deeds or other assurance in the law therefor as to the agent seemed meet and necessary. It contained these additional clauses:

And my said attorney is hereby authorized to sell said lands, or my interest therein, and to make any contract in relation thereto which I might make if present, and to receive for his own use and benefit any moneys or other property the proceeds of the sale of said lands, or any interest therein, or arising from any contract in relation thereto, or received or recovered for any injury thereto, and I hereby release to my said attorney all claims to any of the proceeds of any such sale, lease, contract or damages. And I further authorize my said attorney to appoint a substitute or substitutes to perform any of the foregoing powers, hereby ratifying and confirming all that my said attorney or his substitute may lawfully do or cause to be done by virtue of these presents.

The admission of this power of attorney in evidence was objected to, and the objection overruled by the court below.

The defendants next read in evidence: 1. Two warranty deeds, each for an undivided one-half of these lands, from Mary A. Robertson, by James A. Boggs, her attorney in fact, one to the defendant Louis Rouchleau and the other to the defendant, Milo J. Luther, each dated April 7, 1887, and recorded April 15, 1887. 2. A warranty deed executed subsequently to the above deeds, by Louis Rouchleau to the defendant Luther, for an undivided one-fourth of the lands.

It will be noticed that Boggs, the attorney for Mrs. Robertson, conveyed the land under his power of attorney on the same day that Mrs. Robertson made application for the land in her own right, namely, April 7, 1887.

The court below adjudged the title to the land to be in the defendants, freed from any claim of the plaintiff, thus holding that Mrs. Robertson, by her power of attorney (above set out), executed April 2, 1880, conveyed her interest in the land, the right to which she might have obtained but for said power of attorney.

On appeal, the supreme court, on May 18, 1896, affirmed that judgment, and in doing so concurred in the views expressed by the supreme court of Minnesota by Chief Justice Gilfillan in that case.

Among other things, the supreme court of Minnesota said:

To secure settlers or require residence or cultivation was no part of the end in view in giving the additional right under the section as amended in 1872. No residence on or cultivation of the land as a condition of securing the additional right was intended. It was a mere gratuity. There was no other purpose but to give it as a sort of compensation for the person's failure to get the full quota of one hundred and sixty acres by his first homestead entry. There is no reason to suppose it was intended to hamper the gift with conditions that would lessen its value, nor that it was intended to be made in any but the most advantageous form to the donee. After the right was conferred it was immaterial to the government whether the original donee should continue to hold it, or should transfer it to another. Or, rather, as policy requires the peopling of the vacant public lands, and as it could not be expected or desired that the homesteader should abandon his first entry to settle upon the additional land, it would be more for the interest of the government that he should be able to assign his additional right, so that it might come to be held by some one who would settle upon the lands.

The supreme court also cited with approval the doctrine laid down in the case of *Barnes v. Poirier*, 27 U. S. App., 500 (Circuit Court of Appeals for 8th Circuit), holding that the right given by section 2306 of the Revised Statutes to the soldier was assignable before entry, there being no restriction as in the homestead act. In that case the lower court had made this statement, which the supreme court considered "well said":

The beneficiary was left free to select this additional land from any portion of the vast public domain described in the act, and free to apply it to any beneficial use that he chose. It was an unfettered gift in the nature of compensation for past services. It vested a property right in the donee. The presumption is that Congress intended to make this right as valuable as possible. Its real value was measured by the price that could be obtained by its sale. The prohibition of its sale or disposition would have made it nearly, if not quite, valueless to a beneficiary who had already established his home on the public domain. Any restriction upon its alienation must decrease its value. We are unable to find anything in the acts of Congress or in the dictates of an enlightened public policy that requires the imposition of any such restraint. On the other hand, the general rule of law which discourages all restraints upon alienation, the marked contrast between the purpose and the provisions of the grant of the right to the original homestead, and the purposes and provisions of the grant of the right to the additional land, and the history of the legislation which is codified in the existing homestead law, leave us without doubt that the assignment before entry of the right to this additional land granted by section 2306 of the Revised Statutes contravenes no public policy of the nation, violates no statute, and is valid as against the assignor, his heirs and assigns.

Finally, the supreme court says:

Much stress is placed by the plaintiff in error upon the practice of the land department during a certain period, based upon the idea that the right of entry given by the statute of additional lands was entirely personal, and not assignable or transferable. We cannot give to this practice in the land office the effect claimed for it by the plaintiff in error. The practical construction given to an act of Congress, fairly susceptible of different constructions, by one of the executive departments of the government, is always entitled to the highest respect, and in doubtful cases should be followed by the courts, especially when important interests have grown up under the practice adopted. *Bate Refrigerating Co. v. Salzberger*, 157 U. S. 1, 34; *United States v. Healey*, 160 U. S., 136, 141. But this court has often said that it will not permit the practice of an executive department to defeat the obvious purpose of a statute. In the present case it is our duty to adjudge that the right given by the statute in question to enter "additional" lands was assignable and transferable; consequently the instrument of writing given by Mary J. Robertson to Boggs was not forbidden by any act of Congress.

It results that the judgment below must be and is affirmed.

It is thus seen that the assignment of the soldier's additional right conferred by section 2306 of the Revised Statutes is not only held to be legal, but the practice is commended, the real value of the right being measured "by the price that could be obtained by its sale."

While this right is subject to sale and transfer, there is yet no law which provides that the data in your office and the War Department shall be employed in the certification of that right to those entitled to make additional entries. The certification of the right would doubtless in many cases simplify and facilitate the sale of the right, by furnishing in a tangible form the evidence upon which the additional entries could be perfected. These certificates would amount to so much scrip, which in the hands of purchasers thereof, could be employed in the entry of the public lands.

More than thirty years have passed since the war of the rebellion terminated; thousands of ex-Union soldiers settled in the western states and entered public lands; many of them entered less than one hundred and sixty acres, and have had the benefit of the soldier's additional right; doubtless thousands more are still entitled thereto. In the administration of the law relating to this right numerous frauds have been discovered; entries have been allowed upon forged applications, and other glaring irregularities have been detected; the soldier, for whose benefit the act was passed, was usually the victim of the fraud. All this was made possible by the practice of certifying the right, which for a time obtained in your office. The lapse of time since the war would render the perpetration of the fraud still easier of accomplishment were the practice of issuing the certificates now resumed.

The soldier may obtain this right for himself or sell it to another; it is not necessary to the exercise of either privilege that the right be certified; no statute requires it, and good administration forbids it.

The petition is denied.

CURNUTT *v.* JONES.

Motion for rehearing denied by Secretary Smith, August 4, 1896; see departmental decision of July 6, 1895, 21 L. D., 40.

HOMESTEAD CONTEST—DEATH OF ENTRYMAN—WIDOW.

KEITHLY *v.* RICHARDSON.

Residence is not required on the part of a widow for the maintenance of her rights under an uncompleted homestead entry of her deceased husband, if she cultivates and improves the land, but her failure to thus comply with the law calls for cancellation of the entry.

Secretary Smith to the Commissioner of the General Land Office, August
(W. A. L.) 4, 1896. (W. M. W.)

The case of Benjamin F. Keithly *v.* Mary Richardson has been considered on appeal of the former from your office decision of March 18, 1895, involving lots 1 and 2, and the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 18, T. 16 N., R. 2 W., Guthrie, Oklahoma, land district.

On August 23, 1889, Aurelius Richardson made homestead entry for said land.

On September 7, 1890, he died leaving a widow, Mary Richardson.

On June 4, 1892, Benjamin F. Keithly filed an affidavit of contest against said entry, alleging that the entryman's widow had wholly failed to cultivate or improve the land at all times after the death of the entryman.

On July 12, 1893, the contestant filed an affidavit in the local office making an additional charge, alleging that Mary Richardson on the 19th of December, 1888, made an entry in her own name, for certain lands at Ironton, Missouri, and sold the same in June, 1892, for a valuable consideration.

A hearing was ordered and had before the register and receiver at which both parties appeared by attorneys.

On September 29, 1894, the local officers found from the evidence—

That since the death of said Aurelius Richardson, September 7, 1890, that said Mary Richardson, the wife of said Aurelius Richardson, has wholly abandoned and failed to cultivate said tract of land as required by law.

Richardson appealed.

On March 16, 1895, your office reversed the judgment of the register and receiver and held the entry intact.

Keithly appealed.

The evidence shows, without conflict, that Mrs. Richardson is the widow of Aurelius Richardson, the deceased entryman; that they were not living together as husband and wife at the date the entry was

made, and continued to live apart up to the death of the husband, September 7, 1890. Keithly is a son-in-law of the deceased entryman, who was advanced in years and in feeble health.

Sometime before the death of the entryman, at his request, Keithly moved his family into the entryman's house on the land in question and has continued to reside upon and cultivate the land ever since. Your office found that—

So far as the record shows, the defendant did not in any manner assert her rights to the land prior to the initiation of this contest.

Under date of June 27, 1892, Mary Richardson executed a power of attorney in the State of Missouri to one Thomas P. Bryan, authorizing him to prosecute in her name and stead, before the land department of the United States, to final completion and full possession of any rights and claim to homestead entry made by my husband in Oklahoma.

There is no evidence tending to show that either Mrs. Richardson or her attorney in fact, or any one else for her, or by her request, ever attempted to take possession of, or make any improvements on, the land included in her deceased husband's entry. There is no evidence showing that Keithly misled Mrs. Richardson by any statement or representation concerning her rights to the land in question.

Your office further found—

That the cultivation and improvement of the land by the plaintiff inured to the benefit of the defendant. It is not shown that there was an express contract of tenancy between him and the entryman, but after the latter's death he continued to reside upon the land and to cultivate and improve the same, notwithstanding the fact that he knew the entryman left a widow upon whom the law cast the descent of his rights under the entry. He is, therefore, estopped from charging her with failure to cultivate and improve the land.

In the appeal the judgment of your office is alleged to be erroneous in law on the facts found.

Section 2291 of the Revised Statutes is as follows :

No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry ; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry ; or if he be dead, his widow ; or in case of her death, his heirs or devisee ; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they, will bear true allegiance to the government of the United States ; then, in such case, he, she or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law.

The rights of Mrs. Richardson to the land in question, must be determined by this section. Her husband made entry of the land and before making proof died ; the marriage relation between them existed at the date of his death and by the plain terms of the statute the right

make proof under his entry and receive a patent for the land vested in her to the exclusion of all others.

This right vested; notwithstanding the fact that she and her husband were not actually living together as man and wife when he died. The right is given unconditionally, but in order to preserve it she is required to either reside upon the land, or cultivate the same, for the same length of time her husband would have been required to reside on and cultivate it. She takes it burdened with the same conditions and prerequisites that would have rested on her husband in order to hold it with the bare exception that she may either reside on the land, or she may reside elsewhere, provided she cultivates and improves it for the time named. A failure to comply with the requirements of the statute on the part of a widow of a deceased entryman, must be followed by the same results as would follow from the failure of the entryman to comply with the law. In other words, the law vests the exclusive right in a widow of a deceased homestead entryman subject to contest for failure on her part to comply with its requirements.

In this case there is a clear failure shown on the part of Mrs. Richardson to comply with the requirements of the law. In cases of this character the contestant stands precisely on the same footing as in other homestead entry cases, and under the act of May 14, 1880, must be accorded the full rights of contestants.

The application of the doctrine of estoppel to this case by your office was clearly erroneous.

Keithly's residence on the land could not affect Mrs. Richardson's right in any way. She was neither a party or privy to it and therefore such settlement could not avail her. *Deery v. Craig* (5 Wallace, 795).

In general the doctrine of equitable estoppel applies only when there has been some intentional deception in the conduct or declarations of the person alleged to be estopped, or such gross negligence on his part as amounts to constructive fraud by which another is misled to his injury. *Brant v. Virginia Coal and Iron Co.* (93 U. S., 326).

Your office decision appealed from is accordingly reversed.

By your office letter of October 18, 1895, there was transmitted the application of one Mary Bryan to contest the entry of the deceased entryman, Richardson, filed in the local office on the 10th of May, 1893, which was rejected by the register and receiver and an appeal taken to your office from their decision. No action appears to have been taken by your office on said appeal and therefore no question arises for the Department to pass upon in connection therewith.

As the entry of Aurelius Richardson will be canceled under the foregoing decision, this contest will follow the course pursued in respect to second contests when the first one is successful.

The papers in this second contest and all other papers in the case are herewith returned.

RAILROAD GRANT—WITHDRAWAL—HOMESTEAD ENTRY.

UNION PACIFIC R. R. Co. (ON REVIEW).

No rights are acquired as against a railroad grant by a homestead entry of lands theretofore withdrawn for the benefit of such grant.

The departmental decision of March 7, 1896, 22 L. D., 291, recalled and vacated.

Secretary Smith to the Commissioner of the General Land Office, August
(W. A. L.) 4, 1896. (W. M. W.)

Counsel for the Union Pacific Railroad Company have filed a motion for a review of the departmental decision of the 7th day of March, 1896, denying the application of said railroad company for a patent to the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 25, T. 7 S., R. 7 E., Topeka, Kansas, land district (reported in 22 L. D., 291).

Soon after the departmental decision was made some doubts arose as to the correctness thereof, and *sua sponte* some steps were taken with a view of reconsidering the case.

The grounds of the motion are as follows:

1. That by the granting act of 1862 and 1864, to the Central Branch, Union Pacific Co., it is provided that, upon filing a map of general route, all lands within twenty-five miles of the line of general route shall be withdrawn from settlement and entry.
2. That the map of general route of the Central Branch, Union Pacific Co., from St. Joseph to the Republican River, was filed June 27, 1863, and lands withdrawn thereunder July 9, 1863. A second map of probable route was filed March 16, 1867, and lands withdrawn thereunder March 27, 1867.
3. The land in controversy is included within the termini of both of these maps, and falls under the operation of both withdrawals.
4. The entry of Frederick Abramson, H. E. No. 2626, and which was, in said decision, held to except the said lands from the operation of the grant to the company, was made May 28, 1868, long subsequent to the withdrawals above referred to.
5. That said subsequent entry of Abramson was without any authority of law, and, therefore, cannot operate as against the grant.
6. That said decision is contrary to law.

In response to a letter of inquiry, respecting this case, from the Department, your office, under date of May 19, 1896, stated that:

The records of this office show that the tract in question was included in the limits of the withdrawal ordered by office letter of July 9, 1863, for the benefit of the Central Branch, Union Pacific Railroad Company, along the line of the proposed route of the company's road; but when the road of the company was definitely located the land was situated in the limits of the grant as extended by the act of July 2, 1864, and not within the ten mile limits thereof under the act of 1862, under which the withdrawal was ordered.

This land falls within the overlapping limits of the grants to the Union Pacific Company and the Kansas Pacific Railway Company, and both were made by the same acts of Congress, to wit: July 1, 1862 (12 Stat., 489), and the amendatory act of July 2, 1864 (13 Stat., 356). The line of the Kansas Pacific road was definitely located January 11, 1866, and the line of this road was definitely located May 29, 1868.

The Union Pacific Road is the successor to both lines, and by reason thereof the real party in interest, and no reason is apparent why a patent should not issue to it, if in law the land was included in the grant and passed to either or both of the roads as a whole or as moieties to each of them.

The land in question was included within the withdrawal of July 9, 1863, and within the limits of the grant as extended by the act of July 2, 1864. This withdrawal remained in force until the definite location of the respective roads, when the land in question passed under the grant to them, for at the time Frederick Abramson made his homestead entry, May 28, 1868, the land covered by his entry was included in said withdrawal. His entry was allowed without authority of law, as the land was not subject to entry by reason of being withdrawn for the benefit of the railroad companies under their grants.

It is a well established doctrine in this Department as well as the courts, that no rights, either legal or equitable, as against a railroad grant are acquired by settlement upon lands withdrawn by executive order for the benefit of such grant. *Caldwell v. Missouri, Kansas and Texas R'y et al.*, 8 L. D., 570; *Shire et al. v. Chicago, St. Paul, Minneapolis and Omaha R'y Co.*, 10 L. D., 85; *Ard v. Missouri, Kansas, and Texas R'y Co.*, 14 L. D., 369; *Woolcott v. Des Moines Co.*, 72 U. S., 681; *Woolsey v. Chapman*, 101 U. S., 755; and *United States v. Des Moines Navigation and Railway Co.*, 142 U. S., 510.

The case of *Kansas Pacific Railway Company v. Dunmeyer* (113 U. S., 629), cited in your office decision is not in conflict with the foregoing authorities.

By the third section of the act of 1862, *supra*, there was excepted from the grant all lands which at the time the definite location of the road is fixed had been sold, reserved, or otherwise disposed of, and to which a pre-emption or homestead claim had attached. Abramson's homestead entry was made after the land was reserved for the purposes of the grant and while such reservation was in full force, and was therefore void and could not serve to except the land from the operation of the grant.

It follows that the departmental decision heretofore rendered in this case was erroneous. It is accordingly recalled and set aside, and your office decision appealed from is reversed.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

CASTELLO *v.* BONNIE.

The cancellation of an entry without notice to the entryman is void for the want of jurisdiction, and an entry so canceled at the passage of the act of March 3, 1891, is in law an existing entry, and confirmed by section 7, of said act, if otherwise within the provisions of said act.

Secretary Smith to the Commissioner of the General Land Office, August
(W. A. L.) 4, 1896. (J. L. McC.)

Your office, by letter of April 29, 1896, transmitted the papers in the case of Patrick Castello *v.* William Bonnie, and the Boston Safe Deposit and Trust Company, transferee, involving Bonnie's pre-emption cash entry for the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 30, and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{2}$, of Sec. 29, T. 59 N., R. 17 W., Duluth land district, Minnesota.

The entry in question was canceled upon the report of a special agent, without notice to the entryman. After such cancellation, Castello was allowed to make homestead entry of the land. On October 23, 1891, your office reinstated Bonnie's entry—deciding further that as two entries of the same land at the same time were not permissible, and as Bonnie's entry had been reinstated because of having been canceled illegally, Castello's entry must be canceled.

On June 16, 1891, the Boston Safe Deposit and Trust Company filed an application to intervene, and asked for the confirmation of Bonnie's entry under section 7 of the act of March 3, 1891, alleging that, after the issuance of the receiver's receipt (March 21, 1885), and prior to March 1, 1888, it became a *bona fide* incumbrancer of said land for a valuable consideration. Your office, on June 17, 1891, granted the application; and on October 23, 1891, your office held that the case came within the provisions of said act. From said decision Castello appealed to the Department, which, on October 11, 1892 (15 L. D., 354), held that the cancellation of Bonnie's entry was an error, and its reinstatement was proper; nevertheless Castello's entry ought not to have been canceled without notice to him, and an opportunity being afforded him to be heard in its defense; and inasmuch as no such opportunity had been afforded him, he should be allowed sixty days after notice of the decision to show cause why his entry should not be canceled. You were further directed that 'if, in your judgment, sufficient cause be shown, you should re-adjudicate the case accordingly; if he failed to make such showing, the decision of your office holding that the case came within the provisions of said section 7 should be affirmed, and the entry confirmed.

Your office issued a rule as above directed upon Castello, who thereupon filed an affidavit alleging that Bonnie's entry was not made in good faith, but in the interest of the C. N. Nelson Lumber Company, and that said company was not therefore a *bona fide* purchaser; also that the Boston Safe Deposit and Trust Company was not a *bona fide* incumbrancer, and he asked for a hearing at which to prove such to be the facts. This application your office denied, on February 10, 1893. Castello appealed to the Department, which, on August 7, 1894, directed that the case

be remanded to the local officers for a hearing upon the allegation that Bonnie's entry was made in the interest of the C. N. Nelson Lumber Company, and upon any

other charge that may be then presented tending to show that Bonnie's entry was properly canceled.

A motion for review of the above departmental decision was filed, but denied on April 12, 1895 (20 L. D., 311).

Your office decision of April 29, 1896 (*supra*), in adjudicating the case upon the basis of the testimony taken at the hearing ordered in accordance with the departmental directions above referred to, found as a fact "that Bonnie had never complied with the law in any respect. The facts stated in his final proof must have been untrue, and his entry, therefore, fraudulent and invalid;" and adds that,

inasmuch as Bonnie's entry has not been reinstated, and no reason appearing why it should be, it would be useless, as well as a disregard of said departmental ruling, to further consider the case. Said entry will therefore remain canceled.

The above conclusion was correct, in view of the departmental rulings then subsisting. Recently, however—to wit, on February 17, 1896—the Department has decided the case of *Drew v. Comisky* (22 L. D., 174), which is in all essential respects similar to the one under consideration. In that case the departmental decision of *Castello v. Bonnie*, on review (20 L. D., 311, *supra*), was discussed. The statement in said last named decision that—

Such cancellation, without giving such notice (that is, cancellation on report of a government agent, without giving the entryman his day in court), was improper, and to all intents and purposes, so far as the transferee is concerned, it may be considered as an existing entry,

was quoted, and re-affirmed as being correct doctrine. The further statement in said decision that—

The reinstatement of the entry on the record would give the transferee only such right as he would have had in case notice had been given,

was quoted, but declared to be erroneous. It was further decided regarding Bonnie's entry that, "inasmuch as it had already been held therein that so far as the transferee is concerned, it may be considered an existing entry," and that, if existing, it was protected under the law, and should be confirmed. Finally said departmental decision in *Castello v. Bonnie* was explicitly overruled, in so far as it conflicted with the ruling in said case of *Drew v. Comisky*.

The case now under consideration was thus explicitly decided in advance. The entry was an existing entry at the date of the passage of the act of March 3, 1891, and was of a character to be confirmed thereunder.

Your office decision of February 25, 1896, to the effect that Bonnie's entry should remain canceled, is therefore reversed. Your office decision of October 23, 1891, holding that the case comes within the provisions of said act, is hereby affirmed, and the entry will pass to patent accordingly.

PATENT—JURISDICTION—CONFLICTING ENTRIES.

FIELDS *v.* KENEDY.

The inadvertent issuance of a patent on an entry that is in partial conflict with a prior entry deprives the Department of further jurisdiction over the tract in controversy; and a final certificate therefor, subsequently issued on the earlier entry, must be canceled, though the original entry on which such certificate rests may be permitted to remain of record.

Secretary Smith to the Commissioner of the General Land Office, August
(W. A. L.) 4, 1896. (C. W. P.)

On February 16, 1880, Nelson Fields made homestead entry 5391, of the W. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of section 24, township 8 S., range 14 E., St. Helena meridian, New Orleans land district, Louisiana.

On May 18, 1880, Samuel Kenedy made homestead entry 5486 of the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 13, the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 24, and the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 14, of the same township and range, on which final proof was made and final certificate 2015 issued July 5, 1887, patent issuing thereon June 25, 1890.

On August 3, 1891, Nelson Fields made final proof on his homestead entry, and final certificate issued thereon August 7, 1893.

On February 20, 1894, your office notified Fields that his entry was held for cancellation as to the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 24, for the reason that it conflicts to that extent with Kenedy's patent.

Nelson Fields appeals to the Department.

The record shows that Kenedy made his entry of the land in question more than three months subsequent to Fields' entry which segregated the land, and Kenedy's entry was improperly allowed. But patent having issued to Kenedy, the Department cannot now determine the conflicting claims of the parties respecting the land. If the patent issued to Kenedy is invalid, and Fields has been injured by the action of the Land Department, the courts are the proper tribunals to adjudicate the matter.

But it appearing that Fields' final proof was made and final certificate issued thereon subsequent to the issuance of patent to Kenedy, the final certificate issued to Fields should be canceled, but his entry will be allowed to remain of record.

Your office decision is modified accordingly.

DAWSON ET AL. *v.* HIGGINS.

Motion for review of departmental decision of May 13, 1896, 22 L. D., 544, denied by Secretary Smith, August 4, 1896.

DONATION CLAIM—HEIRS—FINAL PROOF—ADVERSE CLAIM.

STONE ET AL. *v.* CONNELL'S HEIRS.

On the death of a qualified donation claimant who has complied with all the requirements of the law in the initiation of his claim, and subsequent maintenance thereof, up to the date of his death, the heirs of such claimant become qualified grantees irrespective of any question as to their citizenship.

Under section 8, act of September 27, 1850, proof of compliance with law up to the date of the donee's death is all that is required in the matter of final proof on the part of the heirs, and it is not material in such case by whom said proof is submitted.

A plea of equitable estoppel set up by intervening adverse claimants, as against the rights of heirs under a donation claim, on account of their alleged failure to assert their rights in due season, and thereafter prosecute their claims with diligence, cannot be considered by the Department, if it finds that under the donation law said heirs are entitled to a patent; and especially is the Department limited to such course, in view of the fact that said law prescribes no limit of time within which final proof may be made by the claimant or his heirs at law.

The provisions of the act of July 26, 1894, are not applicable to a donation claim pending before the Land Department at the passage of said act, and in which final proof had been submitted prior thereto.

Secretary Smith to the Commissioner of the General Land Office, August
(W. A. L.) 4, 1896. (A. B. P.)

The land involved in this case consists of parts of sections 25 and 26, T. 20 N., R. 5 E., Olympia land district, Washington, known as the Michael Connell donation claim, and contains three hundred and twenty acres.

It is shown by the record that on December 12, 1853, Michael Connell filed with the proper officer his notification, No. 518, claiming the land in question under the donation act of September 27, 1850 (9 Stat., 496). By that act, after providing, among other things, for the appointment of a surveyor-general for the Territory of Oregon, then embracing this land, it was (section 4) declared:

That there shall be, and hereby is, granted to every white settler or occupant of the public lands, . . . above the age of eighteen years, being a citizen of the United States, or having made a declaration according to law, of his intention to become a citizen, . . . now residing in said Territory, or who shall become a resident thereof on or before the first day of December, eighteen hundred and fifty, and who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act, the quantity of one half section, or three hundred and twenty acres of land, if a single man, and if a married man, or if he shall become married within one year from the first day of December, eighteen hundred and fifty, the quantity of one section, or six hundred and forty acres, one half to himself and the other half to his wife, to be held by her in her own right.

It was further provided (sections 6 and 7) that the settler, within certain prescribed periods, respectively, should notify the surveyor-general of the tract claimed under the act, and submit proof of the fact and time of commencement of his settlement and cultivation; and also, that

he should prove, in the manner prescribed, "at any time after the expiration of four years from the date of such settlement," the continued residence and cultivation required by the act: whereupon certificate for the land should issue from the proper officers, which, if found free from objection, would entitle him to a patent.

By section 8 of the act it was further provided:

That upon the death of any settler before the expiration of the four years' continued possession required by this act, all the rights of the deceased under this act shall descend to the heirs at law of such settler, including the widow, where one is left, in equal parts; and proof of compliance with the conditions of this act up to the time of the death of such settler shall be sufficient to entitle them to the patent.

Connell appears to have been a qualified settler under the act. He was a single man over eighteen years of age, had declared his intention to become a citizen of the United States, and had become a resident of the Territory of Oregon prior to December 1, 1850. He met all the requirements of the act as to settlement and notice, and proof thereof, and as to residence and cultivation from the date of his settlement, August 15, 1853, until the date of his death, which occurred within the boundaries of his claim, about the last of October, 1855, at the hands of hostile Indians. Having thus occupied the land continuously for over two years prior to his death, he was qualified to purchase under the amendatory act of February 14, 1853 (10 Stat., 158), if he had sought to do so. True, he failed to file his notification within the time prescribed by the sixth section of said amendatory act, but no adverse rights having intervened, the claim was protected from forfeiture by the subsequent act of June 25, 1864 (13 Stat., 184).

It is thus shown that Connell had all the qualifications necessary to enable him to take and hold under the act, and that he fully complied with all its provisions while he lived; but he died, still unmarried, before completing the four years of residence and cultivation required to perfect title in him. It is further shown that he left surviving him his father Patrick Connell, then a resident of Ireland, and also several brothers and sisters, among whom was a sister Margaret, now Margaret Rose, a party to these proceedings, who appears to be a citizen of the United States living in the State of Colorado. Under the laws of the Territory at the time of Connell's death his father became his sole heir at law.

At that time and for many years subsequently thereto, it was considered and held by the local Territorial courts, that the heirs at law of a claimant under said donation act, who died before completing the four years' residence and cultivation required, took by descent from the claimant; and as a consequence thereof, many attempts were made to devise such uncompleted claims by will, and not infrequently the probate courts assumed jurisdiction and undertook to dispose of such claims in the winding up of the estates of deceased settlers.

This case appears to be one of the latter class. On December 11,

1855, one James E. Williamson, claiming to be a creditor, qualified as administrator of the deceased claimant. In his application for letters of administration he refers to the father of the decedent residing in Ireland, as his only known heir. On December 12, 1857, there appears to have been filed before the register of the local office two affidavits, conforming in all respects to the final proof required by the said donation act, and showing compliance with its conditions by the claimant Connell up to the time of his death. Another and similar affidavit was filed October 16, 1873. It does not appear certainly by whom these affidavits were filed, though presumably they were filed by Williamson, the administrator, on behalf of the said father, and heir at law. Considerable correspondence appears to have been carried on prior thereto between Williamson and Patrick Connell relative to the property, and in one of the latter's letters, dated November 15, 1856, he says to Williamson: "I am entirely in your hands and shall be guided by you in any manner you will suggest."

The personal property having proved insufficient for the payment of the debts against the estate, proceedings were instituted in the local probate court for the sale of the land in question as a part of the decedent's estate, liable for his debts. Said proceedings resulted in the sale of the land in the year 1866, to one John Swan, at the price of \$550. The sale was confirmed by the court and the land conveyed to Swan, and as there remained in the hands of the administrator, after the payment of debts, a balance of \$231.18, he was ordered by the court to pay the same over to Patrick Connell of Ireland, "who has identified himself as the father of said Michael Connell dec'd, and legal heir to the said estate." This balance was never paid over as directed, but was deposited by the administrator, under a special statute, in the local county treasury, for the benefit of Michael Connell's heirs, where, presumably, it still remains. Certain it is that Patrick Connell, who has been dead many for years, never received it.

It further appears that about the year 1869 Swan died, leaving the land by will to his brother James Swan, who in 1871 conveyed the same to James G. Williams. In 1878 Williams conveyed the land, together with an adjoining claim, to William M. White, one of the appellants here, for the price of \$2500, whereof the sum of \$100 was paid in cash and the balance secured by mortgage given by White on the two tracts of land.

Such was the condition of affairs in January 1880, when in the case of *Hall v. Russell* (101 U. S., 503) the supreme court held in effect that a claimant under the said donation act, prior to the completion of his four years' residence and cultivation, and the performance of other prescribed conditions, obtained no title to the land such as could be devised by will or inherited by his heirs at law; and that in case of the death of the claimant before the performance of the required conditions, his heirs, under section 8 of the act, took title, not by inheritance from

the deceased claimant, but as grantees under the act, directly from the United States.

In view of this decision it is clear that the proceedings in the probate court relative to the claim in question were and are absolutely null and void, and that no title to the land passed by the sale and conveyance made under the orders of that court. Indeed this seems to be practically conceded by all the parties.

It appears, however, that after *Hall v. Russell* was decided the land was sold under the mortgage given by White, and subsequently passed through several hands, until the year 1886, when it was purchased by the appellant Stone, together with the said adjoining claim, at the price of \$6000. Stone is still in possession.

After the decision in *Hall v. Russell* was rendered it was generally considered that the proceedings in the probate court were null and void, and the result was that attempts were made by various parties to obtain title to the lands from the government.

On March 5, 1884, Charles F. Whittlesey and Warren B. Hooker filed homestead applications, respectively, for the east half and the west half of the tract, and sought to contest the donation claim, on the alleged ground that the deceased claimant left no heirs at law, or if he did, that they had wholly abandoned all claim to the land. They asked that a hearing be had, the notification of Connell canceled, and the lands opened to their homestead applications. The applications were rejected by your office, but upon appeal to this Department that action was reversed October 28, 1884 (3 L. D., 469), and a hearing was ordered for the purpose of determining the exact status of the land. Two days later, however, the order was suspended and the suspension was not removed until December 26, 1888. In the meantime the following proceedings took place:

On January 21, 1885, White applied to enter part of the land as a homestead, and to purchase part under the act of June 15, 1880. His application was rejected and he appealed. On December 1, 1886, Stone applied for patent certificate for the entire claim as successor to the rights of the claimant Connell, by virtue of the administrator's sale and the said several mean conveyances; but your office rejected his application and he appealed. On January 5, 1888, James Beardsley and Millard Kirtley applied to file pre-emption declaratory statements, respectively, for the east half and west half of the tract. Your office rejected their applications and they appealed.

Such was the confused condition of things when on December 6, 1888, this Department, on the appeal by Stone, without determining the rights of any party to the record, revoked the order of suspension and directed that the hearing be proceeded with. The other appeals were thereupon severally dismissed without prejudice to any rights asserted, and all the parties were remanded to the hearing as the proper place to present their claims, the same to be finally determined upon the record there made up.

The hearing was finally had March 25, 1891; upon notice to all the parties to the record, but no notice was given by publication, or otherwise, to the "heirs at law" of the deceased donation claimant. The parties notified all appeared. White and Stone submitted evidence, relative chiefly to the improvements made on the land by them, respectively, which appear to be extensive and valuable. A copy of the record of the proceedings in the probate court was also filed.

Upon the record thus made up the local officers on January 11, 1892, recommended that the Connell notification be canceled, the lands subdivided, and the respective homestead applications of Whittlesey and Hooker allowed. White and Stone appealed.

Up to this time there had been no appearance on behalf of the heirs of the deceased claimant. On February 23, 1893, however, Margaret Rose, by her counsel, filed in the local office an application on behalf of herself and other heirs of Michael Connell, deceased, asking that patent certificate issue for the land to the "heirs at law" of said decedent. The application is supported by affidavits showing that Patrick Connell, the father, died long since, and that the only remaining heirs of said deceased claimant are the said Margaret Rose, a citizen of the United States living in Colorado, and Thomas Connell, Catharine Heffernun and Sr. M. De Pazzi, all residents of Ireland. The local officers rejected this application because not made within a reasonable time after the death of the donation claimant, and for the further reason that the land had passed to other parties under their decision upon the record of the said hearing.

Margaret Rose appealed. On June 14, 1894, your office proceeded to consider her appeal, together with the several appeals of White and Stone, and reversed the rulings below, dismissed the applications of Whittlesey, Hooker, White, Stone, Beardsley and Kirtley, and directed that final certificate be issued for the land to the heirs at law of Michael Connell, deceased, upon payment of the legal fees. From this decision Whittlesey, Stone and White have severally appealed.

The first question presented by the record is whether, after the death of the claimant Michael Connell, the land in question passed to his "heirs at law" under section 8 of said donation act. If this question be answered in the affirmative it will be unnecessary to consider any matters relative to the respective rights of the several appellants, as between themselves.

The uncontroverted facts on this subject are, (1) that Connell was a qualified settler under the act; (2) that he filed his notification in writing, properly describing the land, and supplied the proof required of the fact and time of commencement of his settlement and cultivation; (3) that he resided upon and cultivated the land continuously from the date of his settlement to the date of his death; (4) that he died unmarried before the expiration of the four years' continued possession required; and (5) that he left surviving him his father Patrick Connell, a resident of Ireland, as his sole heir at law.

Under a similar state of facts it was held by the supreme court in *Hall v. Russell* (*supra*) that upon the death of the claimant his heirs became qualified grantees; but whether they took immediately upon his death, or after proof of his compliance with the provisions of the act while in life, was a question suggested by the court, but not decided, because not necessary in that case.

In view of the two affidavits of December 12, 1857, and the one of October 16, 1873, as already shown, it is not deemed necessary to pass upon that question in this case. These affidavits, in form and substance, appear to be in strict accord with the character of final proof required by the act, and when taken in connection with the notification and original first proofs filed by the claimant, to which they were attached, they contain substantially all that is required to be shown by said section 8 of the donation act. They also speak of the land in question as "land claimed as a donation by Michael Connell's heirs." It is very evident that they were obtained and filed by some one on behalf of the heirs of the deceased claimant, and it matters not by whom, though I think it is fair to presume, in view of the correspondence between Patrick Connell and the administrator Williamson, as shown, that they were filed by the latter for the benefit of the former—he being the sole heir.

Objection is made to these affidavits being treated or considered as the final proof required by said section 8, because not shown to have been presented by the heir himself, or by some one thereunto specially authorized by him. This objection I think wholly untenable. Said section merely requires proof of compliance with the conditions of the act up to the time of the settler's death, and does not specify by whom such proof shall be furnished. The fact is that the proof *was furnished*, and thereby the requirements of the statute were fully met.

It is further objected that the proofs submitted could not inure to the benefit of Patrick Connell because he was an alien, and for that reason patent could not issue to him under the act.

It will be observed that there is no question of inheritance involved. The heirs took not by inheritance but as grantees under the act. As was said in *Hall v. Russell* (*supra*): "Their title to the land was to come, not from their deceased ancestors, but from the United States."

No attempt by the settler to dispose of the land before perfecting his title, could in any way affect the heirs. Their rights were fixed by the statutes and are not to be restricted, as to qualification to take or otherwise, to narrower limits than are therein prescribed. There is no provision requiring them to make proof of citizenship before becoming qualified grantees. As was further said, in substance, in *Hall v. Russell*, the heirs became qualified grantees under the act upon the death of the claimant before completing title in himself. The fact that the party for whose benefit the final proofs in this case were submitted, was not a citizen of the United States, is therefore not material. Being the

sole heir at law of the deceased claimant, he was, as such, a qualified grantee under the act.

Again, it is objected, and with considerable earnestness, that in view of the great lapse of time, and because of the alleged conduct of Patrick Connell and those now claiming through him, in remaining quiet and failing to assert their rights at an earlier date, and of their consequent apparent acquiescence in the legality of the probate court proceedings, they are estopped from asserting any claim to the land.

With the question thus raised, however, this Department has nothing to do. Its duty is discharged when patent has been issued to the parties entitled under the statute. The courts are the proper tribunals in which to settle all questions of equitable rights, acquired independently of the statute, either before or after the issue of patent. The plea of estoppel necessarily implies the fact of the existence of title antagonistic to the pleader, and is predicated upon the theory that because of certain alleged conduct inconsistent therewith, the party holding the title is precluded from asserting it as against certain acquired rights of the pleader, based upon such conduct. It presents, therefore, no question which this Department can determine. All such questions must be left to the courts. The government can issue its patent only to those in a position to call for the legal title. Moreover, the said donation act prescribes no limit of time within which final proof shall be made, either by the original claimant or by his "heirs at law." (*Veatch v. Park*, 16 L. D., 490.) As we have seen, however, the final proof in this case was submitted about two years after the settler's death.

It is further contended by counsel for appellant Stone, that his claim as successor to the rights of the original purchaser at the sale made under the probate court proceedings should be recognized, and that in view thereof patent should issue to him under provisions of the act of July 26, 1894 (28 Stat., 122).

By the first section of that act it is provided that in all cases arising under the said donation act of 1850, where claimants

have made proof of settlement on tracts of land . . . and given notice, as required by law, that they claimed such lands as donations, but have failed to execute and file in the proper land offices proof of their continued residence on and cultivation of the land so settled upon and claimed, so as to entitle them to patents therefor, such claimants, their heirs, devisees and grantees shall have, and they are hereby given, until the first day of January, eighteen hundred and ninety-six, the right to make and file final proofs and fully establish their rights to donations of lands under the aforesaid act of Congress, and no longer.

By the second proviso of said section it is further declared:

That where any such donation claims or any part thereof are claimed by descent, devise, judicial sale, grant, or conveyance, in good faith, under the original claimant, and are, at the date of this act and for twenty years prior thereto have been, in the quiet adverse possession of such heir, devisee, grantee, or purchaser, or those under whom they claim, such heirs, devisees, grantees, or purchasers, upon making proof of their claims and adverse possession as aforesaid shall be entitled to patents for the land so claimed and occupied by them.

This case, however, does not appear to come within the purview of that act. True, the proof of settlement was made and the notice of the claim given as required by law, but there was not the failure contemplated by the act, to execute and file in the proper land office, proof of continued residence on and cultivation of the land.

The proof here referred to was furnished in this case, as we have seen. Moreover, it is further provided in the second section of said act that:

This act shall not be construed to affect any case now pending before the Land Department in which final proof has been furnished.

This case was pending before the Land Department when said act was passed, and the final proof referred to was furnished by the affidavits of December 12, 1857, and October 16, 1873. It is clear that the act does not apply, and the claim of Stone can not be passed to patent under it.

My conclusion therefore is that upon the death of the claimant Michael Connell, his father and sole heir at law, Patrick Connell, became qualified to take the land as grantee under the eighth section of said donation act, and that upon the proof required by said section being furnished, as was done, the equitable title to the land vested in him, and he became at once entitled to a patent conveying the legal title.

The applications of the appellants White, Stone and Whittlesey, are therefore rejected, the decision appealed from is affirmed, and you are directed to issue patent for the land to "the heirs at law of Michael Connell, deceased," upon payment of the proper fees.

MINING CLAIM—AGRICULTURAL CLAIM—ADVERSE PROCEEDINGS.

POWELL *v.* FERGUSON.

The adverse proceedings provided for in section 2325 R. S., contemplate only suits between adverse mineral claimants, and does not have in view adjudications respecting the character of land as between agricultural and mineral claimants.

Secretary Smith to the Commissioner of the General Land Office, August 4, 1896. (P. J. C.)

A motion for review of departmental decision of May 13, 1896, wherein was formally affirmed the concurring decisions below, has been filed by counsel for W. R. Powell.

The first assignment, or, rather, suggestion of error is that

a very able brief and argument prepared by local counsel for mineral claimant was on file in the local land office (filed July 25, 1895), which was inadvertently held instead of being transmitted before said case was reached for examination and decision by your honor, which brief, had it been considered, we are confident would have reached a decision favorable to the mineral claimant.

The brief is enclosed.

The other alleged errors do not raise any question that was not heretofore considered.

The brief referred to seems to have been filed in the local office in time and should have been forwarded, but was, in some unexplained way, detained there.

There is but one point suggested by this brief that it is now necessary to discuss, the others having been given proper consideration. To a proper understanding of the point of law raised it is necessary to say that in August, 1887, Powell filed an application for patent under the placer mining law for a large tract of land, including the NW. $\frac{1}{4}$ of Sec. 33, T. 1 N., R. 1 E., M. D. M., San Francisco, California, land district, being the land in controversy. Entry was not made under this application, probably for the reason that a number of protests were filed against it. There is not found in the files, however, any protest involving, directly, the land in controversy. Without going into all the details it is sufficient to state that Andrew C. Ferguson was, as against the Western Pacific Railroad Company, within which grant the land is located, by your office decision of August 6, 1892, which became final, adjudged to have the superior right to the land. His homestead entry was allowed and final certificate issued on final proof which showed settlement in 1885. A hearing was ordered on the protest of Powell, to determine the character of land, with the result of concurring decisions all along that it was not valuable for mineral.

It is contended by counsel that, inasmuch as Ferguson did not file his *adverse claim*, as required by section 2325 R. S., that he is forever barred from questioning the character of the land.

This position is wholly untenable. The statute referred to only contemplates adverse suits as between rival mineral claimants to the land, and does not have in view a settlement of the character of the land as between agricultural and mineral claimants. The Department having jurisdiction over all public lands until patent issues, may at any time, either on its own motion or on an application made by others, order a hearing for the purpose of determining its character, and there is no other tribunal provided by law for that purpose, whose judgment would necessarily be binding on the Department. (Alice Placer Mine, 4 L. D., 314.)

The authorities cited by counsel in support of his position are not in print. In each of them the rights between rival mineral claimants was the question involved.

It may be well to say that the claim of counsel, that the mineral character of the land at the date of the mineral application was not shown by the testimony, is erroneous. The evidence went back to 1885, the date of Ferguson's settlement, and included the intervening time.

The motion is therefore overruled.

JURISDICTION—NOTICE—TRANSFEREE—CONFIRMATION.

FRANCIS H. FLUENT.

The cancellation of an entry without notice to a transferee, whose interest appears of record, while irregular, is not void for want of jurisdiction, if the entryman was duly notified of the adverse proceeding; and an entry thus canceled prior to the passage of the act of March 3, 1891, is not confirmed by section 7 thereof, as the provisions of said section are only applicable to entries subsisting at the passage of the act.

The case of *Fleming v. Bowe*, 13 L. D., 78, overruled.

Secretary Smith to the Commissioner of the General Land Office, August
(W. A. L.) 4, 1896. (A. B. P.)

This is a petition for certiorari filed by William P. Winn, transferee, in the matter of pre-emption entry made January 15, 1884, by Francis H. Fluent, for the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 10, T. 154 N., R. 64 W., Devil's Lake (Creelburg series), North Dakota.

The petition sets forth that after making his entry, to wit, on May 9, 1885, Fluent transferred the land to one W. S. Graham, who, on July 13, 1885, transferred to Nellie Jenkins; that Nellie Jenkins subsequently intermarried with one E. D. Graham, and, on April 17, 1886, said E. D. Graham and wife transferred the land to the petitioner William P. Winn.

On July 17, 1886, Fluent's entry was held for cancellation by your office upon the report of Special Agent Rowe, charging that the entryman had not complied with the law in the matters of residence and improvements. The report disclosed the fact of the transfer to W. S. Graham.

Fluent was notified of the action taken, by registered letter mailed to his last known address. This letter was returned uncalled for, and no notice was given to any of the transferees. On February 17, 1888, the entry was finally canceled, but no notice thereof was given to any of the parties interested. On March 2, 1889, one John Vanderlinder made timber culture entry for the land.

It being subsequently discovered that Fluent's entry had been canceled without notice to the transferees, your office, on January 8, 1895, directed that Vanderlinder be notified of the irregularity and allowed sixty days within which to show cause why the order of cancellation should not be set aside, his entry canceled, and that of Fluent reinstated. Vanderlinder responded by filing his corroborated affidavit, to the effect that his entry had been made in good faith and that all legal requirements had been complied with.

On May 15, 1895, Winn filed a motion for review of the proceedings of your office, especially the action canceling Fluent's entry (practically a motion for reinstatement of the entry), setting forth that he is a purchaser of the land in good faith, without knowledge of any facts justifying the cancellation or of any adverse proceedings against the entry;

and that neither he nor any of the intermediate transferees had ever been notified of such proceedings or of the result thereof, for which reasons it was urged that the judgment of cancellation was without jurisdiction of the parties in interest and therefore null and void. Accompanying this motion was an application by Winn that the entry be passed to patent under the confirmatory provisions of section 7 of the act of March 3, 1891 (26 Stat., 1095).

Under date of June 8, 1895, your office held, in effect, that the entry could not be reinstated on the ground of want of notice to the transferee; that while the order of cancellation without such notice was irregular, yet as jurisdiction had been obtained by notice to the entryman, given in the regular way, the order was not a nullity but effectively operated to cancel the entry. The motion and application was therefore both denied, but in view of the stated irregularity Winn was allowed sixty days to apply for a hearing, at which the government would be required to sustain the special agent's report by competent proof or in default thereof the entry would be reinstated.

A motion for review of said decision was filed but denied, and subsequently, upon the application of Winn, a hearing was ordered for the purpose above stated.

On March 26, 1896, Winn filed a motion for the recall of the order for a hearing, and asked that the entry be reinstated and passed to patent under said section 7 of the act of March 3, 1891, in view of the recent ruling of the Department in the case of *Drew v. Comisky* (22 L. D., 174). This motion was denied May 8, 1896. Winn filed an appeal which your office declined to entertain. Hence his present petition.

Said act of March 3, 1891 (section 7), provides that:

All entries made under the pre-emption, homestead, desert-land, or timber-culture laws, in which final proof and payment may have been made and certificate issued, and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry, to bona fide purchasers, or incumbrancers, for a valuable consideration, shall, unless upon an investigation by a government agent fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the land department of such sale or incumbrance.

This act can apply only to entries in existence at its date, and the first question presented, therefore, is whether Fluent's entry was an existing entry at that date. This gives rise to the further and controlling question: Did your office have jurisdiction to make the order canceling his entry?

If by notice to the entryman alone such jurisdiction was obtained, the order, however irregular, was not a nullity but was an effective exercise of the authority possessed by the land department in such matters. If, on the other hand, to obtain jurisdiction, notice to the transferees or any of them was necessary, then the order was without

jurisdiction and consequently null and void, as no such notice was given. In the latter event only could it be held that there was a subsisting entry of the land at the date of the passage of said act such as comes within its confirmatory provisions.

The Drew-Comisky case, relied upon by petitioner, was a case where the entry was canceled without notice to the entryman. Here it appears that legal notice, under the rules of practice, was given to the entryman. The cases, therefore, are not parallel.

In *Ex parte* John C. Featherspil (4 L. D., 570), a case involving the question of notice of proceedings against an entry, it was held that notice to the entryman "was sufficient in law to bind him and those claiming under him, whether mortgagees or vendees, if such notice was properly given."

And in that case it was further said:

In determining this case the fact that there is a mortgagee now interested in maintaining the validity of the entry brings no new element into the consideration thereof, inasmuch as he can have no better right than the entryman would have if present, and with whose rights the government deals only, regardless of any sale, assignment or lien made by him to third parties, recognizing, however, the right of said third parties, where their interests have been acquired subsequent to the issue of final certificate, to appear and protect the same by showing proper compliance with the requirements of the law on the part of the entryman.

It thus appears that while the land department obtains jurisdiction by notice to the entryman alone, and deals only with his rights, the transferee is allowed to intervene to protect the entry if he can, as a matter of grace rather than because of any legal right in him to demand that he shall be notified of the proceedings against the entry.

In giving effect to this doctrine this Department has frequently held in cases wherein entries have been attacked, that notice should be given to the transferee whenever the fact of transfer is disclosed by the record, or the transferee has in the proper manner made himself known. *United States v. Copeland et al.* (5 L. D., 170); *Manitoba Mortgage and Investment Company* (10 L. D., 566); *United States v. Newman et al.* (15 L. D., 224), and other similar cases. In all such cases the notice required was for the purpose of enabling the transferee to intervene and protect the entry by showing compliance with the law by the entryman, and for that purpose only. None of the cases is predicated upon the theory that notice to the transferee is necessary as the basis of departmental jurisdiction to deal with the entry, and I know of no ruling or regulation establishing such a doctrine.

The case of *Ex parte* H. B. Ketcham (18 L. D., 93), cited and relied upon by the petitioner, differs from this in that the entry in that case had never been actually canceled, and it was therefore an existing entry at the date of the act in question.

In the case at bar the entry was actually canceled upon legal notice to the entryman, and however irregular or erroneous such cancellation may have been in other respects, it was an act done strictly within

the jurisdiction of the land department and therefore operated as effectively to cancel the entry as though regularly and properly done in all respects.

There was therefore, at the date of the passage of said act of March 3, 1891, no subsisting entry of the land such as came within the operation of that act. For this reason, taking as true all that is alleged in the petition for certiorari, no sufficient grounds are shown for the granting of the writ, and the same is therefore denied. The hearing ordered by your office is the petitioner's remedy.

The case of *Fleming v. Bowe* (13 L. D., 78) appears to be in conflict with the views herein expressed, and to that extent the same is overruled.

SWAMP LANDS—CANCELED LIST OF SELECTIONS.

STATE OF OREGON.

The true effect and meaning of the departmental decision of December 19, 1893, in the case of *Morrow et al. v. State of Oregon et al.*, 17 L. D., 571, was to cancel swamp lists 30 and 31, and to reject and annul all claims of the State, and its alleged assignees, to any and all of the tracts therein described, for the reason that said lands were, at the date of the grant, covered by an apparently permanent body of water.

Secretary Smith to the Commissioner of the General Land Office, August
(W. A. L.) 4, 1896. (J. L.)

On December 13, 1894, your office transmitted to me for approval a list, No. 39, of swamp and overflowed lands, aggregating 794.02 acres, alleged to have been selected by the State of Oregon under the swamp land act of March 12, 1860 (12 Stat., 3). The tracts or subdivisions embraced therein are situated in Lakeview land district, Oregon, and are described as follows:

Lots Nos. 1 and 2, of section 27, T. 39 S., R. 24 E.....	67.40
The SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the W. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 27, T. 39 S., R. 24 E	280.00
The SE. $\frac{1}{4}$ of Sec. 28, T. 39 S., R. 24 E.....	160.00
Lots Nos. 1 and 2 of Sec. 29, T. 39 S., R. 24 E.....	54.91
Lots Nos. 1, 2, 3, and 4 of Sec. 33, T. 39 S., R. 24 E	44.90
Lots Nos. 1, 2, and 3 of Sec. 34, T. 39 S., R. 24 E.....	66.81
The N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 10, T. 33 S., R. 26 E..	120.00
Aggregate	794.02

All of said tracts were included in the lists 30 and 31 heretofore disposed of by this Department.

On December 19, 1894, by request of your office, this Department returned said list for revision.

On January 11, 1895, the attorneys for Jesse Morrow, Alexander Cameron, Robert Beaty, S. E. Sloan, Charles Tonningsen, Nes P. Tonningsen and Walter Poindexter, respectively, filed written protests

against the approval of said list, No. 39, alleging their several interests under the land laws of the United States, in the lands described in said list.

The State of Oregon and her alleged assignees were duly notified of said protests, and the questions involved were argued by counsel on both sides.

On October 4, 1895, by letter addressed to the register and receiver, your office dismissed the protests of Nes P. Tonningsen, Charles Tonningsen, S. E. Sloan, Robert Beaty, and Alexander Cameron; and directed hearings to be had in the case of Jesse Morrow to determine the character of lots 1, 2, 3, and 4, of section 33, and in the case of Walter Poindexter to determine the character of the SE. $\frac{1}{4}$ of section 28, of T. 39 S., R. 24 E.

From said decision Morrow, Sloan, Beaty, Cameron, Poindexter, N. P. Tonningsen and Charles Tonningsen have appealed to this Department.

On October 21, 1895, the attorneys for R. F. McConnaughy *et al.*, grantees of the State of Oregon, filed a petition under rules of practice 83 and 84 for an order directing the Commissioner to certify the proceedings and to suspend action, until the Secretary shall pass upon your letter "K" of January 5, 1895, referred to in your office decision aforesaid. Said letter "K" of January 5, 1895, is the letter in which you transmitted to the register and receiver the departmental decision of December 19, 1893, in the case of Morrow *et al. v. State of Oregon et al.*, reported in 17 L. D., 571; and in which you indicated your construction of said decision, and instructed the local officers how to carry into effect and execute the same.

I have determined to consider said appeals and said application for *certiorari*, together.

The true effect and meaning of the decision of December 19, 1893, in the case of Morrow *et al. v. State of Oregon et al.*, above referred to, was to cancel lists 30 and 31, and to reject and annul all claims of the State of Oregon and its alleged assignees to any and all of the tracts of land therein described. On page 574 of Volume 17, Land Decisions, you will find the following words:

A careful review of the testimony in this case shows beyond all question that the lands involved in this controversy were once covered by a large body of water, known as Lake Warner; and that, at the date of the grant and of the survey, all the lands embraced in lists 30 and 31 were covered by this lake—which, according to the testimony of some of the witnesses, was too deep to be forded; and that between 1874 and 1877 the water began to recede, so that now almost the entire tract which was formerly the bed of the lake is comparatively dry; and that the recession was quite rapid during the last two years prior to March 30, 1889.

The ruling of the Department is, that the lands covered by an apparently permanent body of water at the date of the swamp grant are not of the character contemplated by the grant. (State of California, 14 L. D., 253.) If this ruling be adhered to in this case, and I see no reason to depart from it, the lands embraced in said list are clearly not of the character contemplated by the grant, and the State has no claim to them as swamp and overflowed lands.

These words embrace not only "the areas disclosed by the surveys of Neale," (as you describe them), but also all of the adjacent subdivisions, whether whole or fractional, described in said lists 30 and 31; and especially the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 10, T. 33 S., R. 26 E., Willamette meridian, which were not touched by Neale's surveys, and which were first surveyed by James L. Rumsey in June 1883, as shown by the map on file in your office. It was error for your office to assume that said decision was limited to "the areas disclosed by the surveys of Neale."

Therefore the list No. 39, embracing 794.02 acres of land in twenty-five subdivisions, compiled by your office division "K" from the rejected lists 30 and 31 aforesaid, and submitted for my approval, is hereby rejected and canceled. The lands embraced in said lists 30, 31 and 39 were not on March 12, 1860, swamp and overflowed lands made unfit thereby for cultivation, and the State of Oregon has no right, title, interest or estate therein.

Your office decision of October 4, 1895, is hereby reversed. And you will modify the instructions contained in your letter "K" of January 5, 1895, in accordance with the views herein expressed.

HAMILTON v. GREENHOOT ET AL.

Motion for review of departmental decision of March 26, 1896, 22 L. D., 360, denied by Secretary Smith, August 4, 1896.

RAILROAD LANDS—SETTLEMENT—SECTION 5, ACT OF MARCH 3, 1887.

HUNT v. MAXWELL.

A settler who successfully contests the adverse claim of a railroad company by showing that the land was in fact excepted from the grant, does not thereby acquire a right of entry as against the privilege of a prior bona fide purchaser from the company, who is in open possession of the land, to perfect title under section 5, act of March 3, 1887.

Secretary Smith to the Commissioner of the General Land Office, August 4, 1896. (W. A. L.) (G. C. R.)

This case involves the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 9, T. 14 N., R. 6 E., Marysville land district, California.

The land is within the limits of the grant to the Central Pacific Railroad Company under the acts of Congress approved July 1, 1862 (12 Stat., 489), and July 2, 1864 (13 Stat., 356), the right of which attached to its granted lands in this district at the date of the latter granting act, the road having been definitely located March 26, 1864.

For the purposes of this decision it is important to give a history of the litigation over this land.

It appears that the withdrawal for the benefit of the grant became effective in said land district October 3, 1864, and that the township plat was filed September 18, 1868.

On December 17, 1868, one William G. Pettigrew filed his declaratory statement for the land, alleging settlement thereon November 1, 1857, and on May 7, 1884, one Ezra B. Wright filed his declaratory statement therefor, alleging settlement thereon November, 1867.

These claims were never perfected.

On March 19, 1894, one Felix G. Hendrix filed declaratory statement for the land, and after due publication he submitted pre-emption final proof, which proof was contested by the Central Pacific Railroad Company. The register and receiver decided in favor of the company, and your office on February 3, 1887, affirmed that action.

Maxwell's connection with the land began in 1891, when, on October 20th of that year, the local officers transmitted to your office a prima facie showing, made by him, to the effect that the land was excepted from the grant. Thereupon, your office ordered a hearing; upon this hearing the register and receiver again decided in favor of the company. On appeal, your office, on August 18, 1892, reversed that action, thus holding the land excepted from the grant.

On appeal, the Department, on April 16, 1894 (18 L. D., 454), affirmed that action, and in doing so held that the land was excepted from the grant by reason of Pettigrew's claim of settlement and residence prior to the definite location of the road.

On September 28, 1894, Maxwell made homestead entry of the land. After due publication of notice, he submitted final proof before the register and receiver on November 10, 1894. The final proof shows that he and his family settled on the land October 22, 1888, and thereafter maintained their residence thereon; that he has plowed and fenced about a quarter of an acre and raised thereon "garden crops." In an affidavit accompanying the final proof, he states as a reason for not making more extensive improvements and cultivation that he was deterred from doing so by one Francis Hunt and his employes; that said Hunt owned the land on all sides of the land in question, and claimed to own the land embraced in his homestead entry; that Hunt had him arrested for going through the gate on to the land, and also had his wife arrested for driving his sheep away from the house, and at another time Hunt had both himself and wife arrested for trying to prevent Hunt's employes from plowing the land.

On September 3, 1894, Anna Hunt, assignee of Francis Hunt (deceased), applied to purchase the land; she alleged that she was the widow of Francis Hunt, who died March 25, 1894, the surviving heirs being herself and eight minor children; that she had been appointed administratrix of said Hunt's estate (copy of letters of administration

annexed); that on May 2, 1893, deceased conveyed to her by deed all his estate, personal and real; that in the year 1881 the said Hunt began to use and occupy the land in question, and in 1882 cultivated and raised grain on ten acres thereof; in 1883, he enclosed the land with other lands belonging to him, and the same was in his possession until his death in March, 1894, and since that date the land was in her possession; recites the fact of the land being within the limits of the railroad company's grant; also the decision of your office of February 3, 1887, awarding the land to the company; that relying on that decision the said Hunt purchased one hundred and twenty acres of the land (described) from the railroad company, on May 26, 1890, for the sum of \$600, and at that time paid \$120, balance payable May 26, 1895, with added interest at seven per cent; that said Hunt purchased the remaining forty acre tract (described) on November 12, 1890, for the sum of \$200, paid in hand \$40, and agreed to pay the balance with interest on November 12, 1895; that Maxwell began his contest against the company October 20, 1891, long after Hunt was in possession of the land and after Hunt had purchased the same from the company. Exhibits purporting to be copies of the contract of sale by the company, and copy of deed from her husband, accompanied her application to purchase, and the right of purchase was claimed under the 5th section of the act of March 3, 1887 (24 Stat., 556). The statements made in her application were corroborated.

The register and receiver denied Mrs. Hunt's application to purchase, and held Maxwell's final proof to await the final disposition of the case.

On appeal, your office, by decision dated May 21, 1895, affirmed the action of the register and receiver, and in doing so held, as a reason therefor,

that an original purchaser, after the passage of the act (March 3, 1887), in cases where the purchase was not otherwise shown to be bona fide, is not protected thereby.

A further appeal brings the case here.

The 5th section of the act of March 3, 1887 (*supra*), under which Mrs. Hunt claims the right of purchase, reads as follows:

That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption

and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same shall be entitled to prove up and enter as in other like cases.

The fact that Hunt purchased the land from the railroad company subsequent to the date of the passage of the act of March 3, 1887, does not, as held by your office, preclude him or his heirs or assigns from the benefits of said act. *Sethman v. Clise*, 17 L. D., 307; *Stephan et al. v. Morris*, 21 L. D., 557.

The land was, 1: Of the numbered sections prescribed in the grant; 2: It is coterminous with constructed parts of said road; 3: It was excepted from the operation of the grant.

The applicant to purchase makes a *prima facie* showing that the land was sold by the company to her immediate grantor; that the sale was made in good faith, and that at date of the sale the land was not in the bona fide occupancy of an adverse claimant under any of the land laws.

From this showing it also appears that the company sold the land to Hunt, who was in possession of the same at the date of Maxwell's alleged settlement on the land; that the latter was cognizant of Hunt's claim and possession when he made settlement and brought his contest against the company. Maxwell's settlement, therefore, although made after December 1, 1882, would not, even under the second proviso to the 5th section of the act of 1887 (*supra*) defeat Hunt's right of purchase. *Chicago, St. Paul, Minneapolis and Omaha Railway Company*, 11 L. D., 607; *Holton v. Rutledge*, 20 L. D., 227.

The act of May 14, 1880 (21 Stat., 140), gives thirty days preference right of entry to a successful contestant, and Maxwell by his contest defeated the right of the company to the land, and under ordinary circumstances would be allowed the preference right. But if Hunt purchased the land in good faith from the company, and was in possession of the land under that purchase prior to Maxwell's settlement, and all other conditions referred to in said section 5 were in Hunt's favor, the preference right would not be awarded to Maxwell, for in such case he would be charged with notice and information of the open possession of the land by the purchaser from the company. *Austin v. Luey*, 21 L. D., 507.

A sufficient *prima facie* showing having been made of Hunt's right of purchase under the act of 1887 (*supra*), the case will be returned for a hearing, when evidence of Hunt's purchase, its good faith, etc., will be taken, and the case adjudicated in conformity with the principles hereinabove given.

The decision appealed from is accordingly modified.

SWAMP LANDS—INDEMNITY--WAIVER.

JEFFERSON COUNTY, ILLINOIS.

A claim for swamp indemnity must be rejected where it appears that the tracts of land employed as a basis therefor are included within a prior waiver of all claims thereto executed by a duly authorized agent of the county.

Secretary Smith to the Commissioner of the General Land Office, August 4, 1896. (G. C. R.)

Your office decision ("K") of June 26, 1895, holds for rejection the claim of the county of Jefferson, State of Illinois, for swamp land indemnity under the acts of March 2, 1855, and March 3, 1857.

The tracts of land employed as a basis for the claim are in number three hundred and seventeen, and fully described in the decision appealed from.

The reason given for rejecting the claim is, that Green P. Garner, the duly authorized agent of the county, on December 12, 1891, waived and abandoned "all right, title and interest to the same forever," and on the same day duly acknowledged the waiver to be "his free act and deed."

Mr. Garner, the agent of the county, has appealed from your said office decision, and while he admits that he signed the waiver, he insists in avoidance of the same that the special agent representing the government did not act fairly with him, and refused to adjust the claim of the county as to certain tracts then under consideration, and admittedly swamp, unless Mr. Garner would waive the claim of the county to said three hundred and seventeen tracts.

It is rather strange that Mr. Garner should thus surrender the bulk of his claim for the sake of possible cash indemnity to about eighty-eight tracts. He appears to have been acting for and on behalf of the county, whose agent he was. As such agent, he had full power to waive the claim of the county to the tracts in question, in order that there might be a complete adjustment of all the claims growing out of the swamp land act.

The waiver seems to have been a complete abandonment of the claim of the county to cash indemnity on the tracts waived, and Mr. Garner's reasons for asking that the same be disregarded can not be accepted. Nor does the fact that a few of the tracts were reported to your office by the United States surveyor-general in 1853 and 1854 as swamp lands confirm Mr. Garner in his right to indemnity therefor. Before cash indemnity can be allowed, "due proof" would still have to be made of their actual swampy condition at date of the grant; and Mr. Garner by his waiver acknowledges in behalf of the county that the tracts were not of the character contemplated in the swamp land act, and are, therefore, not the proper bases upon which to claim cash indemnity.

The decision appealed from is affirmed.

PENDING APPLICATION—MILITARY RESERVATION.

SPENCER v. STATE OF FLORIDA.

The departmental decision of June 22, 1893, refusing to recognize the private land claim of Jesse Fish, and directing that appropriate action be taken upon all pending claims to the lands embraced therein under the public land laws, did not contemplate final action thereon, until due opportunity had been given for the assertion of rights thereunder.

It is within the scope of executive authority to reduce the area of a military reservation, created by executive order, so as to exclude lands on which improvements had been made prior to the establishment of said reservation.

Secretary Smith to the Commissioner of the General Land Office, August
(W. A. L.) 4, 1896. (A. E.)

This is an appeal by Spencer from your office decision of July 27, 1895, rejecting his application to make homestead entry of lot 9 of Sec. 27 and the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 28, Tp. 7 S., R. 30 E., Gainesville, Florida.

The records relating to this land show that on July 28, 1888, the State of Florida filed an application to locate the SE. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 28, with Palatka scrip. This application was rejected because the land was claimed as a private land grant from Spain made prior to 1763 to one Jesse Fish (see case of Jesse Fish, 16 L. D., 550). From this rejection the State appealed.

On June 22, 1893, (16 L. D., 550,) the Department declared the private land grant to be barred, because not asserted within the period specified by Congress, and directed your office to take such action upon the applications pending as might be right and proper. At that time there was pending the application, among others, of George H. Spencer. Spencer claims to have made settlement and built a house and improved the lands in controversy, and to have made an application to enter the same as early as August, 1888; and again on January 24, 1890, and still again on May 14, 1895.

Your office does not appear to have passed upon the claims of Spencer until July 27, 1895, on which date you rejected his last application because the State had been allowed to select the SE. $\frac{1}{4}$ of Sec. 28 on May 18, 1895, and because lot 9 of Sec. 27 was included in a military reservation set aside by the Executive on May 14, 1893.

Spencer does not appear to have ever been given an opportunity to assert his claims to this land, and in not affording him this opportunity, the directions of this Department, in the Jesse Fish case, *supra*, were not carried out by your office.

You will order a hearing in this case, affording all parties an opportunity to be heard, with a view to determining who has the prior right to that portion of the land in controversy which lies without the military reservation, at the same time getting the status of Mr. Spencer's claim at the date when the military reservation was extended over it,

as it is quite clear that if he had improvements which were included within the military reservation, at the date when it was made, that it is within the power of the executive to reduce that reservation so as to exclude them.

Your office decision is thus modified.

RHODES ET AL. *v.* TREAS

Motion for review of departmental decision of December 28, 1895, 21 L. D., 502, denied by Acting Secretary Reynolds, August 8, 1896.

HOMESTEAD CONTEST—OKLAHOMA LANDS.

TIPTON *v.* MALONEY.

One who assists another to procure an entry, by furnishing the money for the requisite fees, will not be permitted to attack the good faith of said entry in his own interest.

Entry within the territory during the prohibited period by passing through the country over a public highway does not operate to disqualify an applicant for land within the Sac and Fox country.

Secretary Smith to the Commissioner of the General Land Office, August 4, 1896. (C. W. P.)

On September 29, 1891, Landon P. Tipton made homestead entry, No. 8096, of lots 3 and 4 and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 2, township 17 N., range 4 E., Guthrie land district, Oklahoma Territory.

On January 29, 1892, Tipton applied to enter the NE. $\frac{1}{4}$ of section 11, township 17 N., range 5 E., which was rejected by the local officers.

From this rejection Tipton appealed, and Thomas Maloney having made homestead entry, No. 10,531, on February 3, 1892, of said land, your office, on August 11, 1892, ordered a hearing, which was had on May 15, 1894, both parties appearing and submitting testimony; and on September 25, 1894, the local officers considered the case, and found (1) that Tipton had never established a residence on the land; (2) that Tipton entered into the lands embraced in the act of Congress of February 13, 1891, subsequent to the passage of said act and prior to twelve o'clock, noon, September 22, 1891, and is therefore disqualified to make homestead entry upon said land. Therefore they recommended that Maloney's homestead entry, No. 10,531, remain intact.

Tipton appealed.

Your office held as follows:

If (Maloney's) entry was made at the request of Tipton and for the purpose of protecting the land for him, he should not be permitted to say that Maloney was not a bona fide entryman, but a mere dummy, who had made an entry at his (Tipton's) instance. He should be estopped from so doing, so long as Maloney contends that it was made for his own use and benefit.

I further find from the evidence that Tipton entered the Sac and Fox country on July 1, 1891, during the prohibited period. Tipton, on being asked "When was the first time you were on this claim?" replied, "The first time I was on that land was the first days of July, 1891, on a trip through that country into the Creek Nation."

For the reason above assigned, together with the fact that Tipton is a disqualified homesteader as regards any land in the Sac and Fox country, by reason of having entered the country after the passage of the act of February 13, 1891, and before noon of September 22, 1891, your said decision is affirmed, Tipton's application for the land is dismissed, and Maloney's entry is left intact.

The evidence shows that Tipton is entitled to a restoration of his homestead right, and while a restoration of right is usually given upon the allowance of an application to enter a specified tract, I think Tipton is entitled to a judgment on the record now submitted, and it is ordered that his homestead right be restored, excepting, however, any land in the Sac and Fox country, by reason of his disqualification in respect to these lands.

Tipton appeals to the Department.

The evidence shows that Tipton relinquished his entry No. 8096, made September 29, 1891, because the land embraced therein was covered by the settlement right of one Pyburn, a prior settler; and Tipton received as a consideration for his relinquishment the sum of \$200, from Pyburn, but that this was in payment for Tipton's improvements, and was also understood to be a compromise of Pyburn's contest against Tipton's entry.

The evidence further shows that Tipton purchased the relinquishment of the land in dispute of one Dr. Goss, paying therefor the sum of \$180; that he also paid to a contestant who filed a contest against Goss's entry the sum of \$35; that he filed Goss's relinquishment and after his application was rejected induced Maloney to enter the said land, paying Maloney's fees for making entry, the sum of \$14. Tipton's contention is that he got Maloney to apply to enter the land as his friend, for the purpose of preventing any other person from entering the land. This Maloney denies. But it is not shown that Maloney had any understanding with Tipton to pay any money for the privilege of entering the land. Maloney says he had not. Upon this evidence your view seems to be correct, that the object of Tipton was to get Maloney to enter the land to protect the land from entry by any other person, pending his application (which had been rejected), and his application for a restoration of his homestead right subsequently filed; that otherwise the transaction would be a gratuity from Tipton to Maloney of about \$200, which is altogether unexplained.

I concur in your office decision that Tipton having assisted Maloney to make his entry, furnishing him with the money to pay the entry fees, cannot now be permitted to question that entry. But I do not think that Tipton is disqualified to enter land in the Sac and Fox country by reason of his having passed over the public highway from Oklahoma to the Creek Nation in July, 1891, during the prohibited period, thereby crossing the land which he first entered and relinquished.

Your office decision is thus modified.

TUSTIN *v.* ADAMS.

Motion for review of departmental decision of March 6, 1896, 22 L. D., 266, denied by Acting Secretary Reynolds, August 8, 1896.

HOMESTEAD SETTLEMENT—ENTRY—DEVISEE.

BRYANT *v.* BEGLEY.

Under the act of May 14, 1880, the right of a homestead settler relates back to the date of his settlement, and if at the date of his application to enter he has prior thereto lived on the land and complied with the law for the statutory period, his interest therein, in the absence of any intervening adverse claim, becomes at once a vested and devisable right.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 8, 1896. (C. J. G.)

Charles W. Bryant has appealed from your office decision of February 4, 1896, denying a hearing upon the protest filed by him against the final proof offered by John Begley, devisee of Martin Crow, on lots 3 and 4, Sec. 30, T. 25 S., R. 5 W., Dodge City land district, Kansas.

The ground for said denial was that the plaintiff, in his affidavit of protest, failed to allege a cause of action.

The plaintiff in his affidavit admits that the deceased entryman, Martin Crow, occupied the land in question for grazing purposes and improved the same for a period of eighteen years prior to his death. But as the entryman failed to make homestead entry until June 23, 1892, two years and three months prior to his death, the plaintiff urges that the five years of residence and improvements required by law from date of entry were not completed, and that the deceased entryman's devisee has not shown good faith in the matter of cultivation since the devisor's death. The plaintiff likewise alleges that the settlement and occupancy of the entryman prior to entry can avail him nothing unless residence and cultivation are shown for five years since date of entry.

This point does not seem to be well taken. The third section of the act of May 14, 1880 (21 Stat., 140) provides—

That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the pre-emption laws to put their claims of record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws.

The proof submitted shows that the deceased entryman resided on this land prior to date of making entry, and that he resided thereon almost continuously from date of entry to the time of his death. Thus according to protestant's own admissions the entryman was qualified to submit final proof at the date he made entry, after due publication of notice, he having been a settler on the land for a period of

eighteen years. As soon as he filed his application to enter the entryman had a vested right to this land which related back to the date of settlement. There is no question, too, that under the rulings of the Department this was a devisable right. It does not appear why Martin Crow deferred perfecting his entry for so long a time; but at the same time it does not appear that there was any adverse claimant. It is sufficient to know that he was qualified to submit proof at the date of making entry by reason of his prior settlement and residence.

This being true there would seem to be no occasion for the Department to enter into an investigation of the devisee's good faith in the matter of cultivation since his devisor's death. The devisor's qualifications descended to the devisee, and it is not incumbent upon him to make a showing as to cultivation. Hence it was properly held that plaintiff has failed to allege a cause of action.

The plaintiff attempts to raise the question as to the sufficiency of the will of entryman Crow to pass the full estate, for the purpose designated therein, under section 2288 of the Revised Statutes, and that the said will is void for uncertainty. The interpretation of this will, either as to its definiteness, or the legality of the estate it passes, or the purposes of the devise, is not a matter coming properly within the jurisdiction of this Department. The will appears to have been duly admitted to probate.

Your office decision is hereby affirmed.

MAKEMSON v. SNIDER'S HEIRS.

Motion for review of departmental decision of April 28, 1896, 22 L. D., 511, denied by Acting Secretary Reynolds, August 8, 1896.

FINAL PROOF—REPUBLICATION—PRE-EMPTION CLAIM.

SILVA v. GONZALES.

On the submission of pre-emption final proof, under an order of republication, the proof as originally made, should not be accepted in the presence of a protest against such action by an adverse claimant.

In the case of a pre-emption filing made after the repeal of the pre-emption law the burden of proof rests with the pre-emptor, as against an adverse claimant, to show settlement prior to said repeal and residence as required by law.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 8, 1896. (P. J. C.)

The land involved in this controversy is the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ of Sec. 33, and N. $\frac{1}{2}$ NW. $\frac{1}{4}$ of Sec. 34, T. 10 S., R. 15 E., Roswell, New Mexico, land district, and the plat of said township was filed in the local office March 2, 1891. On March 6, following, Florencio Gonzales filed declaratory statement for the N. $\frac{1}{2}$ NW. $\frac{1}{4}$ Sec. 27, NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ Sec. 28, and

the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Sec. 22 of the same township and range, alleging settlement October 15, 1885. On April 27, following, Felipe Silva made homestead entry of the E. $\frac{1}{2}$ NE. $\frac{1}{4}$ of Sec. 33, and N. $\frac{1}{2}$ NW. $\frac{1}{4}$ Sec. 34 of said township and range, alleging settlement October 4, 1887.

On May 16, 1891, Gonzales filed his application supported by a corroborated affidavit for an amendment of his filing to cover the N. $\frac{1}{2}$ NW. $\frac{1}{4}$ of Sec. 34, the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ of 33, and SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ of 27 of said township, said tracts, except the last named, being covered by the homestead entry of Silva.

Your office by letter of October 11, 1891, directed the local officers to advise Silva of the application of Gonzales for amendment of his filing, and to allow him (Silva) sixty days to show cause why it should not be granted. Silva subsequently filed an affidavit corroborated by several witnesses, setting forth that he settled on the land October 4, 1887; that at that date said tract was unoccupied; that he has resided upon and cultivated the described land continuously, and that Gonzales did not reside upon the said tract or any part thereof; that he has never occupied or used any part of said tract since affiant settled there, except when his fence was broken or his possession invaded without his consent.

A hearing was thereupon ordered by your office on this question. As a result thereof, the local officers filed dissenting opinions. On appeal, by your office letter of May 27, 1893, the amendment of Gonzales was allowed, and it was also ordered that "the homestead entry of Silva will be allowed to remain intact until one of said parties submits his proof."

After publication of notice, Gonzales, on September 22, 1893, submitted final proof before probate clerk of Lincoln county, which was rejected by the local officers January 6, 1894, "for failure to comply with Section 2274 of Revised Statutes."

From this action Gonzales appealed, and with the papers transmitted was a protest of Silva against said proof, on the ground that the publication was made in a paper not of general circulation in the vicinity of the land. Your office by letter of May 7, 1894, held that the proof should not have been rejected for the reason assigned by the local officers, because Silva had made no application for joint entry. The protest of Silva was sustained, and Gonzales was ordered to make new publication in a newspaper nearest the land, "when if no protest or objection is filed, you will, upon payment of purchase price, issue final papers thereon." New publication was made, fixing the time for submitting said proof before the probate clerk of Lincoln county December 22, 1894, and the same witnesses who testified to the first final proof are mentioned as witnesses in the second publication.

At the time and place mentioned Gonzales appeared, and formally tendered the final proof made under the first publication, stating that he "hereby submits the final proof heretofore made by him in this case,

and now on file in said Roswell land office." Silva being present formally objected to receiving the proof thus tendered, setting forth his objections at length.

Prior to this, on February 24, 1894, Silva submitted his final proof under his homestead entry before the same officer, the testimony being taken under objection by Gonzales.

Both parties submitted testimony on the protest offered by each, on the dates their proof was offered, and Gonzales offered himself and both of his final proof witnesses for cross-examination, but Silva declined to cross-examine them, for the reason that

the final proof in the first instance having been rejected, the testimony then given is in no wise a part of this case. [Further, that] the contestee has not furnished a copy of the testimony referred to by him, and we cannot therefore cross-examine the witnesses without seeing the original or a certified copy thereof. [Further,] that any testimony that may have been given in the former application for final proof has no bearing directly or indirectly on subsequent hearing for final proof that was begun anew.

Without taking any formal action on the proof submitted by the parties, the local officers forwarded to your office the proof of Gonzales, and stated that,

the proof of Silva was held to await decision in the proof of Gonzales, which had been forwarded to your office for your decision.

Your office, by letter of March 3, 1895, considered the matter and held that under the evidence submitted at the several hearings, Gonzales had the prior right to the land, and awarded him the tract in controversy. The question as to the manner of submission of final proof by Gonzales was not considered by your office.

Silva has appealed from your said office decision, assigning two grounds of error. The first is to the effect that the decision is contrary to the evidence as to prior settlement and occupancy of the land; and the second raises the question as to the regularity of the proof submitted by Gonzales, and it is contended that the first proof having been rejected by your office and a new publication ordered, new proof should have been submitted

for the reason that the testimony taken in the former could not under any rule of evidence be construed as applicable to or a part of the record in the case at bar, unless the person offering such testimony should allege and prove, that the witnesses testifying at the former hearing were at this time removed from the country, or for some other equally good reason it was impossible to secure their testimony, and that the facts in their knowledge could not be proven by other parties;

that the proceedings under the first publication were void *ab initio*

for if the first step was taken in the wrong direction all further progress in the same line only increased the difficulty. We therefore take the position that the first publication being improper and not as required by law (as held by the Honorable Commissioner) that all proceedings toward submitting final proof that were had in pursuance with said illegal notice was necessarily illegal.

I am impressed with the force of Silva's objection to the reception of

the final proof submitted by Gonzales in 1893 under the republication made in 1894. It seems to have been contemplated by your office order requiring new publication that the former proof submitted might be received, "if no protest or objection is filed." As a matter of fact, however, there was a protest and objection filed to its reception, upon grounds sufficient in themselves to have excluded such testimony in a trial of a cause in the courts. The further reason that neither the proof nor a copy thereof was presented before the probate clerk, where the hearing was had, so that counsel for Silva could inspect the same to enable him to make an intelligent examination of the witnesses, was, in my judgment, a sufficient reason for him to refuse to cross-examine them upon the facts testified to in the final proof. It would seem also that it was necessary for Gonzales to show in said final proof a compliance with the law between the date of the first submission thereof and the last. As the record stands now, the proof submitted in 1893 is presented under an advertisement made more than a year subsequent, and in the presence of an adverse claim and objection to the manner in which the proof was submitted. It would appear as if this proof was not sufficient.

In view of this conclusion, it is deemed advisable to remand the case, with instructions to require Gonzales to submit final proof as of the date of his second publication. Notice of this should be served on Silva that he may appear and protest against the same and offer such evidence as he may desire.

It may be well to add that all pre-emption laws were repealed by section 4 of the act of March 3, 1891 (26 Stat., 1095), with, however, this provision:

But all *bona fide* claims lawfully initiated before the passage of this act under any of said provisions of law so repealed may be perfected upon due compliance with law, etc.

Gonzales' pre-emption declaratory statement, alleging settlement in 1885, was not filed until March 6, 1891, subsequent to the repeal above mentioned. The burden is therefore upon him to prove settlement prior to said repeal and as alleged. There is no law in existence permitting pre-emption filings on March 6, 1891, unless the claim had been lawfully initiated prior to March 3, 1891, and if a settlement on the land was sufficient to bring the present filing within the terms of the proviso of said act, it must be shown by a clear preponderance of the evidence that there was a *bona fide* settlement, and that residence was maintained thereunder as contemplated by law. This is especially true as applied to the case at bar, because at the time Silva made homestead entry the records of the local office were clear as to the fact in controversy; his entry segregated the land, and any one attempting to impeach it by a pre-emption filing based solely upon prior settlement has the *onus* cast upon him to establish that fact.

The case is therefore remanded for further proceedings, as indicated herein.

- PETER DHALIN.

Motion for review of departmental decision of April 24, 1896, 22 L. D., 496, denied by Acting Secretary Reynolds, August 8, 1896.

PRIVATE LAND CLAIM—HOMESTEAD ENTRY.

CONFIRMEES OF DURAN DE CHAVEZ GRANT *v.* SAABEDRA.

By the terms of section 14, act of March 3, 1891, a claim of ownership, asserted under a Mexican private land grant, cannot be considered as against a homestead entry on which final certificate has issued prior to the confirmation of said grant.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 8, 1896. (E. B., Jr.)

The confirmees of the Nicholas Duran de Chavez grant, a Mexican land grant, appeal from the decision of your office of September 16, 1895, dismissing their protest, filed August 13, 1895, against the homestead entry of Roman Saabedra, No. 3042, made March 24, 1888, for the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of section 30, and the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 19, T. 6 N., R. 2 E., Santa Fe, New Mexico, land district, upon which final certificate No. 1987 issued June 27, 1893.

Appellants assert ownership of the tract covered by Saabedra's entry, under the above named grant, which was made in June, 1739, and within the limits of which said tract lies, and under a decree of the court of private land claims rendered August 22, 1893, confirming the grant to the heirs and legal representatives of the grantee, said Chavez. This claim of ownership, together with the contention that all the lands embraced within said grant were reserved from governmental disposal by the eighth section of the act of July 22, 1854 (10 Stat., 308), and by withdrawal in pursuance thereof in June, 1890, by direction of the Commissioner of the General Land Office, is the basis of said protest. The ground of your office decision is that final homestead certificate having issued to Saabedra prior to the confirmatory decree aforesaid, his entry is validated by the fourteenth section of the act of March 3, 1891 (26 Stat., 854). The appeal insists that it was error to hold the entry valid under said section, reasserts the contention of the protest as above stated, and urges that therefore the final certificate issued to Saabedra is null and void.

Section fourteen of the act of March 3, 1891 (*supra*) provides, among other things:

That if in any case it shall appear that the lands or any part thereof decreed to any claimant under the provisions of this act shall have been sold or granted by the United States to any other person, such title from the United States to such other person shall remain valid, notwithstanding such decree.

The issuance of final certificate to Saabedra for said tract amounted to a sale or grant thereof within the meaning and intent of the

language quoted. Such certificate vested a right to patent, or in other words, an equitable title, in him for all the interest of the United States in the said tract (*Simmons v. Wagner*, 101 U. S., 260; *Deffenbach v. Hawke*, 115 U. S., 392; and *Cornelius v. Kessel*, 128 U. S., 456).

It is unnecessary under the view the Department takes of the effect of said fourteenth section, as applied to the facts of this case, to consider any claim of ownership under said Mexican grant, or the reservation contained in the eighth section of the act of July 22, 1854 (*supra*), and the said withdrawal thereunder. Furthermore, said eighth section was expressly repealed by the fifteenth section of the said act of March 3, 1891, thus terminating whatever jurisdiction this Department had thereunder relative to Spanish and Mexican land grants. It is not incumbent upon the Department to go behind the language above quoted from the act last mentioned to inquire whether the tract in question was public land, or into the title of the United States thereto at the time Saabedra made his final entry. That title, upon the payment by him of the lawful fees, and the issuing of the receiver's receipt and the register's final certificate prior to the decree of the court of private land claims, vested equitably in him and is validated by the express terms of the act.

The question whether Saabedra has complied with the provisions of the homestead law otherwise than as alleged in said protest is not before the Department. Subject to such question, his final certificate entitles him to patent for the said tract. The decision of your office is affirmed.

ALASKA—FINAL PROOF.

GEORGE W. GRAYSON.

The territory of Alaska is constituted a land district by statute, and final proof on entries therein must be made within said district.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 12, 1896. (P. J. C.)

By the record it is shown that George W. Grayson made application to enter a tract of land, described as survey No. 53, on Wood Island, in Sitka, Alaska, land district, containing 4.88 acres. Notice of publication was published in a paper nearest the land, the first insertion being on July 22, 1893, and "the 21st day of December, 1893, at 10 o'clock A. M., is appointed for such proceedings before this (the local) office." The period of publication expired September 9th. On September 26, following, an affidavit, dated and executed at San Francisco, California, was forwarded to the local office, setting forth that all of the witnesses reside out of Alaska and at or near San Francisco, a

distance of about 1,784 miles from the land, "and it is apprehended that said witnesses may be unable or will refuse to attend before said land office." On this affidavit, the local officers, on October 13, 1893, issued a commission

to the United States Commissioner for the Northern district of California, and the clerk of the United States circuit court of appeals for the ninth circuit, at San Francisco, California, to take the testimony

of the witnesses named. The testimony of the witnesses was taken before this commissioner, etc., November 23, 24 and 25, and, it is stated, "cash papers No. 5 issued December 27, 1893."

On consideration of this matter, your office by letter of April 8, 1895, directed the local officers to—

require the claimant Grayson to re-advertise, post and publish notice of his intention to submit final proof, and to submit the same at the time and place advertised, and as required by said regulations, and if said final proof shall show that he is entitled to a cash entry, the certificate and receipt, which are herewith returned, will be corrected so as to describe the land by metes and bounds.

A motion for review of this decision was overruled, whereupon the claimant prosecutes this appeal, assigning errors as follows:

1. That such proof shows the *bona fide* occupation of said tract for trading purposes.

2. That the taking of final proof at San Francisco under a commission issued by the register and receiver at Sitka is in pursuance of the practice of all courts and tribunals, for the taking of testimony of witnesses at a distance.

3. That the officer before whom such testimony was taken, and who administered the oaths therefor, was and is authorized by law as clerk of the circuit court of appeals to administer oaths in the district of Alaska.

4. That the date mentioned in the published notice of intention to make final proof was notice to all contestants, protestants and adverse claimants, to appear before said land office at the date advertised; that in the event of any such adverse claimants appearing, of course such person would be entitled to cross-examine the witnesses, whose testimony is returned with the commission; that such testimony taken without such appearance of an adverse claimant should be received as evidence in the case; that the fact of no adverse claimant appearing, renders it immaterial what competent officer took the same, so that it was in pursuance of the order of the register and receiver of the Land Office.

5. That it is impracticable for claimants at the westward in Alaska to make a trip of 1500 miles to Sitka land office to submit their final proofs, especially as the parties interested and the witnesses to be examined are mostly residents of the City of San Francisco, and make their summer occupations on the coast of Alaska, by direct trips to and from said City of San Francisco.

6. That it appears from the affidavits filed with the said proof that the notice of intention was posted on the land long prior to the date advertised for taking the same and remained so posted long subsequent to the taking of said proof.

7. That the act of March 3, 1891, allows the Hon. Secretary to establish such regulations with reference to taking final proofs under said act as he may deem proper; that the regulations of June 3rd, 1891, can be modified, if necessary, by said Secretary, the officer promulgating the same, to conform to the necessities of claimants making proof.

8. That the readvertisement and posting of notice of intention would be an onerous and unnecessary expense, as shown by the fact that no opposition was made by

any contestant, protestant or adverse claimant to the acceptance of such proof on behalf of claimant at said land office, at the date named in the published notice of intention, or since filed therein.

By section 8, act of May 17, 1884 (23 Stat., 24), the district of Alaska is "created a land district, and a United States land office for said district is hereby located at Sitka." There is no law by which final proof on entries in that Territory may be made outside of the land district thus created. The universal rule has been that final proof must be made in the land district where the land is situated, and at the time and place, and before the officers, named in the notice. This is specifically contemplated by rule 22 (12 L. D., 591), of the circular of "non-mineral entries in Alaska," which provides that:

If upon the day appointed for making proof and payment for any tract of land by a person, association or corporation, any other person or the representative of any association or corporation, should appear and protest against the allowance of the entry, such protestant should be heard and permitted to cross-examine the claimant and his witnesses, and the complaint and the facts thus developed will be duly considered by the *ex officio* register and surveyor-general and such action taken as they may deem proper. Should the protestant desire to carry his action into a contest so as to introduce the testimony of witnesses either for the government or in his own behalf, he should be required by said officers to file a sworn and corroborated statement of his grounds of action, and that the contest is not initiated for the purpose of harassing the claimant and extorting money from him under a compromise, but in good faith to prosecute the same to a final determination; and this affidavit being filed, the said officers will immediately proceed to determine the controversy, fixing a time and place for the hearing of the respective claims of the interested parties, giving each the usual notice thereof and a fair opportunity to present their interests, in accordance with the principles of law and equity applicable to the case, as prescribed by the rules for the conduct of such cases before registers and receivers of other local offices.

It is difficult to conceive how any one claiming an adverse right to the land sought to be entered could protect himself when the witnesses appeared at a different time and place, outside the land district and gave their evidence. Such a method would be doing violence to the law and regulations, and is without authority or precedent.

Your office judgment is, therefore, affirmed.

TOWN LOT—OCCUPANCY—MUNICIPAL RIGHTS.

HANCE ET AL. v. CITY OF GUTHRIE.

Occupancy of a town lot as the tenant of another, at the date of a townsite entry, confers no right to a deed upon such occupant.

Occupancy of a town lot as the basis of a claim thereto, to be effective, must be maintained up to the date of the townsite entry.

The municipality may become a party to a contest between applicants for a town lot with a view to the assertion of its own rights under section 4, act of May 14, 1890.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 12, 1896. (E. B., Jr.)

This is a contest for a deed to lot 6, block 55, in the city of Guthrie, Oklahoma Territory, under the provisions of the act of May 14, 1890 (26 Stat., 109). Of the numerous parties heretofore contesting for title to said lot all but two, Thomas D. Hance, and Andrew Frink and William Lowe (jointly), have dropped out of the case by default before the local townsite board or by failure to appeal from adverse decisions. The city of Guthrie appears as a party pursuant to paragraph 13 of departmental regulations of November 30, 1894, 19 L. D., 334, to protect its interests in the premises under the fourth section of said act. The case comes before the Department on appeal by Hance, and Frink and Lowe, from your office decision of November 7, 1895, denying the former a deed on the ground of his abandonment of the lot, and the latter on the ground that they asserted no claim thereto prior to the entry of the townsite of Guthrie, and holding that the lot should be disposed of according to the provisions of section four above mentioned. This decision, as to Frink and Lowe, was adhered to by your office January 24, 1896, upon review at the motion of this party.

The record history of the case is fully set out in these decisions, and further recital here, in detail, is therefore unnecessary. The evidence is very voluminous and conflicting, but therefrom the following pertinent facts sufficiently appear:

The lot in question forms part of the land opened to settlement at twelve o'clock, noon, on April 22, 1889, under the act of March 2, 1889 (25 Stat., 1005), and the President's proclamation of March 23, 1889, pursuant thereto, and of the townsite of Guthrie, which was entered August 5, 1890. The first actual occupant of the lot was William C. Jones, then United States marshal for the district of Kansas, which included the country opened for settlement as above, whose tent was erected on the front part of the lot by his deputies prior to or very soon after the hour of the opening. Jones soon afterward erected a frame building on the site of the tent, which he leased to different parties until about October first, 1889. May 17, 1889, Jones was awarded a warranty certificate for the lot by the town authorities.

On October 9, 1889, Frink and Lowe became tenants of the Jones building under a lease executed through Jones' agents, and continued to occupy the same as such tenants, renewing their lease in March, 1891, and to pay rent therefor, until shortly before the second trial before the townsite board to determine the right to possession, in November, 1894. Frink and Lowe now contend that they have claimed said lot in their own right since about December, 1889, when they first learned that Jones was their landlord. This contention is utterly inconsistent with the established facts in the premises. After the entry of said townsite the townsite board on August 23d gave notice for all claimants for lots in Guthrie to present their claims within thirty days. Prior to the first

trial between claimants for this lot, January 26, 1891, seven persons had filed claims therefor. Frink and Lowe, although then residents of Guthrie, and engaged in keeping a restaurant on said lot, made no response to this notice. Not until June 9, 1891, some time after a decision by the local board, adverse to Jones and the other claimants and favorable to the city of Guthrie, and after appeal to your office, did Frink and Lowe file an application for a deed for the lot. At, prior and for a long time subsequent to the townsite entry they were occupying the premises only as the tenants of Jones, and had asserted no claim hostile to him. Jones had been properly decided, both by the townsite board and your office, to have been disqualified as an applicant for a deed to said lot by reason of his "soonerism." But this fact is immaterial so far as the claim of Frink and Lowe is concerned. They entered upon the premises as tenants and continued there as tenants without claiming or asserting any other interest therein until June 9, 1891. They evidently did not intend to deny Jones' title when they entered. The first distinct claim they set up to the lot was when they filed their application with the townsite board. They were not occupants in their own right within the meaning of the law at the date of the townsite entry, and this fact is conclusive against them in their present claim (*Benson v. Hunter*, 19 L. D., 290, and *Bowie v. Graff*, 21 L. D., 522).

Hance's occupancy of said lot commenced about 2:30 P. M. April 22, 1889, was continued, as shown by the evidence and more fully stated in your office decision, by residence, until the latter part of May, following, and by improvements until about the last of November, 1889, when the remnant of a building he had placed thereon was thrown off by the agent of Jones. He was not thereafter in any sense an occupant of the lot. He took no legal steps to regain possession other than to bring his claim before the townsite board. His contention that he removed from the lot in May, 1889, because his business as a restaurant keeper was rendered unprofitable and the health of himself and family jeopardized by the proximity of several privies, and that he feared to return to its former place on the lot the lumber that was thrown off, or attempt to maintain any improvements thereon, lest he become liable as trespasser, and that therefore his failure to retain any possession of the lot is excusable, is not sound. No force or threats were used to eject him or to frighten him away. He left of his own accord, taking up his residence shortly afterward on a claim near the city upon which he continued to reside at the date of the townsite entry. The lumber he used to build sidewalks in front of the Capital Hotel, then owned or leased by him in the same city.

It is in evidence that when asked why he hauled his lumber away, he stated that it was of no use to keep it there, as "Jones will beat me anyway." He must be regarded as having abandoned his possession or right to possession of said lot when he acquiesced in the removal of

his improvements by hauling away the last vestige thereof without protest to Jones or his agent or making any apparent effort to have it restored, or in any other way to maintain an occupation of the lot.

Section four of the act referred to above is as follows:

That all lots not disposed of as hereinbefore provided for shall be sold under the direction of the Secretary of the Interior for the benefit of the municipal government of any such town, or the same or any part thereof may be reserved for public use as sites for public buildings, or for the purpose of parks, if in the judgment of the Secretary such reservation would be for the public interest, and the Secretary shall execute proper conveyances to carry out the provisions of this section.

Your office decision is affirmed. Said lot will be disposed of under the provisions of the section set forth above.

TIMBER TRESPASS—SETTLEMENT.

JOSEPH CLIFFORD.

There is no authority in the Department to accept in settlement of a timber trespass an amount less than that found due the government.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. P.) *August 13, 1896.* (A. M.)

On the 16th ultimo you submitted the report of a timber trespass on certain unsurveyed non-mineral public lands in Montana by Joseph Clifford, together with his propositions to settle for the wood involved in the trespass.

It appears that Clifford cut three hundred and thirteen cords of wood from the lands, knowing them to be of the above character; that he sold fifty-five cords and that two hundred and fifty-eight cords remain on the ground where cut.

The trespass was a wilful one and under the decision of the U. S. supreme court in the Wooden-ware case—106 U. S. 432—the government is entitled to damages in settlement thereof in the sum of \$644. This total includes \$192.50 the amount received by the trespasser for the wood sold by him and \$451.50 the reported value of the remainder of the wood where found.

In order to effect a settlement Clifford has submitted, one after the other, three propositions. The latest and best of these contains the offer to pay \$313 for the wood at \$1 per cord.

In summing up the case your letter states that this proposition does not cover the full amount of his liability for the enhanced value of said timber and under a strict construction of the law, the proposition would have to be rejected.

Doubts are also expressed in your letter as to the recovery of any amount in case of suit and that it is not probable that judgment would be rendered for an amount in excess of that offered and you have

accordingly recommended that this last proposition be accepted in full of his liability.

I do not agree with this recommendation.

In stating the case, and in referring to one of Clifford's propositions, you used this language:

the proposition was rejected, in view of the decision—5 L. D. 240—that there is no authority in this Department for accepting in settlement for trespass an amount less than that due the government.

The ruling in the decision cited is that which governs in all cases of timber trespass and was properly applied by you in rejecting the proposition then before you. It is equally applicable to the proposition that I am asked to accept, for in both propositions the offer is below the amount ascertained to be due the government.

The only course open to this Department is to submit the case to the Department of Justice for civil suit. With that end in view the original papers submitted by you are returned herewith that you may supply copies of them for transmission to the Attorney General.

WOOD *v.* BEACH.

Motions for review and rehearing in the case above entitled denied by Acting Secretary Reynolds, August 15, 1896. See departmental decision of March 26, 1896, 22 L. D., 382.

LEAVE OF ABSENCE—EFFECT OF APPLICATION.

ESTHER L. WILSON.

On a proper showing a second year's leave of absence may be granted without requiring an intervening period of personal presence on the land.

Where an application for leave of absence is wrongfully denied, and afterwards allowed on appeal, the applicant will be protected as to any absence during the period covered by the application.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 15, 1896. (J. L. McC.)

Esther L. Wilson has appealed from the decision of your office, dated November 16, 1895, rejecting her application for leave of absence for one year from October 1, 1894, from her homestead claim, to wit, the SW. $\frac{1}{4}$ of Sec. 29, T. 15 N., R. 14 W., Kingfisher land district, Oklahoma Territory.

Mrs. Wilson had been absent from her claim for one year, because of a failure of crops. When the year of her absence had nearly expired she was taken sick with asthma, with which she was confined to her room and her bed (in Lawrence, Kansas). She thereupon applied for another year's leave of absence.

Your office decision quotes the law of March 2, 1889 (25 Stat., 854), providing for leave of absence, for certain reasons specified, "for a period not exceeding one year at any one time"; and it holds that,

in view of the fact that said party has been granted a leave of absence for one year, under section 3 of said act, she cannot be granted an additional leave of absence for one year without any period of time intervening.

The Department has held that

when the condition named in section 3, act of March 2, 1889, are made to appear to the local office, leave of absence should not be denied for the reason alone that no period of personal presence on the land has intervened between the expiration of a formal leave and the application for a second or subsequent leave. (May Lockhart, syllabus, 22 L. D., 706.)

In my opinion, in view of the showing made by Mrs. Wilson in the case at bar, a second year's leave of absence should have been granted without requiring her to return to the claim. But inasmuch as nearly two years have elapsed since the application the case will be treated as though said application had been granted, and any absence on her part from the land during the period designated in said application will be protected under the provisions of the law.

The decision of your office is reversed.

HOMESTEAD CONTEST—PRIORITY OF SETTLEMENT.

SUMNER v. ROBERTS.

In case of a contest against an entry on the ground of a prior settlement right, the burden of proof is upon the contestant to show that his settlement antedates both the entry and settlement of the contestee, and if he fails to thus show such priority the entry must stand.

In a contest of such character, doubt as to the fact of priority, or a finding of simultaneous settlement, does not justify an arbitrary division of the land between the parties, or an award thereof to the highest bidder.

Secretary Smith to the Commissioner of the General Land Office, August
(W. A. L.) 24, 1896. (C. J. W.)

On September 28, 1893, Albert M. Roberts made homestead entry of the NE. $\frac{1}{4}$ of Sec. 22, T. 25 N., R. 1 W., Perry, Oklahoma. This land is in the Cherokee Outlet, and was opened to settlement September 16, 1893.

On October 27, 1893, William M. Sumner filed a contest against said entry, alleging settlement prior to said entry and prior to Roberts' settlement.

The case was heard on November 30, 1894, and the local officers found that both parties arrived on the land on the evening of the 16th of September, 1893, and performed certain initial acts of settlement which were followed by more valuable and permanent improvements, within

a reasonable time, and that each had established a residence on the land. They say that—

while there is a conflict in the testimony on this point, we think there is a preponderance going to establish the fact that contestant was the first of these parties to reach the land on the day of the opening and claim the same as a homestead.

From this decision Roberts appealed. On May 24, 1895, your office, passing upon the case, said:

The testimony is conflicting as to whether the plaintiff or defendant reached the land first.

The plaintiff introduced fifteen witnesses and the defendant nine witnesses. From an examination of all the evidence on the question of prior settlement, a preponderance shows that the plaintiff was the first to reach the land and make settlement.

Sumner built a house and established residence on the land, October 3, 1893. Roberts built a house and established residence on the land December 16, 1893. Both parties seem to have manifested good faith. Their respective rights clearly hinge upon the question of fact as to which arrived first upon the land and staked it. In some almost similar cases, the settlement of the question of fact has been evaded and the practice resorted to of dividing the land between the parties. The Department has had occasion to consider the soundness and propriety of this policy, which seems to have been adopted to some extent without the careful consideration it should have received. It is believed that there is no express authority of law for the Department of its own motion to cut up and divide the lands which constitute a homestead as applied for by the parties. If the authority to do so is to be found in the supervisory powers lodged in the Secretary, it should be used only in cases where it manifestly furthers justice, and denies no legal right to either of the parties.

In cases where entries have been made and contests thereafter instituted upon the ground of prior settlement, unless the contestant shall successfully carry the burden of showing by proof that his settlement antedates the entry, and the settlement of the entryman, the rule that the entry will stand will be adhered to. The cases in which this rule would seem to have been disregarded will no longer be regarded as precedents to be followed. The fact of prior settlement is lawful authority for the cancellation of an entry of record, but evidence which leaves the question in doubt as to which settled first, the entryman or the contestant, and is without some degree of preponderance in favor of the contestant, will leave the entry intact. Even if the evidence should show that settlement was made simultaneously by a contestant and an entryman, this will not authorize the cancellation of an entry properly of record as was held in the recent case of *Perry et al. v. Haskins* (23 L. D., 50). Your office in the case of *Heatherton v. Montgomery*, in which you reversed the local officers, held that if, under an allegation of prior settlement, simultaneous settlement was shown instead, that it would authorize the cancellation of the entry and the

division of the land. There seems to have been no appeal from that decision. In the case of *O'Toole v. Spicer* (20 L. D., 392), the same principle seems to have been announced by your office, and acquiesced in here, and in some other cases the principle is to some extent recognized. The result is apparently to multiply conflicting decisions and to afford facilities for evading the responsibility of deciding at all, in difficult cases, by simply classifying them as doubtful, and making doubt the basis for a division of the land. It is believed that the legal rights of parties will be best secured and greater uniformity in decisions reached, by following the law, and abandoning the practice of forced division of homestead lands. In cases where parties themselves regard their rights, as so nearly equal and so difficult of demonstration, as to induce them to voluntarily agree to a division of the land, there is no objection to their doing so; but there is no lawful authority in the Department to compel, compromise, and force a division of a homestead by an alternate judgment of sale, unless division is agreed upon. In cases of simultaneous applications to enter, the regulations of the Department provide, that where neither party has improvements on the land the right of entry should be awarded to the highest bidder, as between the applicants (Circular G. L. O., 1895, p. 14). This can hardly be construed into authority for either dividing the land, or for offering it to the highest bidder, after entry and after settlement, upon the theory that the settlements were simultaneously made, since the rule does not apply to cases where either party is a settler. The decisions in which it has been said that in contests in cases based on prior settlement, the record entry is without significance, go too far, and are misleading, since the assertion of priority of settlement is an affirmative declaration that the contestant was the first settler, and denies the right of the entryman, both by virtue of his entry and by virtue of his settlement. It follows that the assertion of a right based on priority of settlement, where an entry of record is in the way, puts the burden on the contestant of showing that he not only made settlement before the entryman made entry, but before he made settlement also, and failing to do this the entry will stand. It may be said that as settlers have three months within which to make entry, after settlement no entry made and allowed within that time ought to have any significance as against him. This law was not intended to encourage delay in making applications to enter upon the part of settlers, but simply to fix the limitation beyond which delay could not go, without terminating such settlement rights as to third parties. There is no reason why, as between contesting settlers, the one first making application to enter and getting his application on record, should not have the benefit of his diligence. It is a general rule that the law favors the diligent, and it is upon this the rule rests, that the first qualified applicant in order of time, to enter land subject to entry, shall be awarded the right to make such entry, over others who make application later. An entry of record which is not fraudulent cannot be treated as a

nullity signifying nothing at all. It follows that where a contest is based on priority of settlement, and the defendant has an entry of record, and the plaintiff fails to show prior settlement, and only shows simultaneous settlement, that he fails to show a lawful cause for the cancellation of the entry. The decisions in which the questions herein discussed may seem to be in conflict with this decision may stand as the law of the cases wherein they were rendered, but will not hereafter be followed as precedents. Having discussed the rules applicable to contests generally based on prior settlement, it remains to apply the principles to the case under consideration.

The local officers and your office have concurred in finding that contestant made settlement prior to defendant, and prior to his entry. The record seems to support this conclusion. Your office decision is accordingly approved, and the entry of the defendant will be canceled.

NORTH PERRY TOWNSITE ET AL. *v.* MALONE.

Motion for review of departmental decision of July 9, 1896, 23 L. D., 87, denied by Secretary Smith, August 27, 1896.

RAILROAD GRANT—TERMINAL LIMITS—ADJUSTMENT.

NORTHERN PACIFIC R. R. Co.

The arrangement made between the Northern Pacific, and the Lake Superior and Mississippi companies with respect to the latter company's line of road from Thomson's Junction to Duluth, was such a consolidation, confederation, and association of the two companies as was contemplated by the grant to the former company, by means of which said company effected its connection with Lake Superior, and thereby fixed the eastern terminus of its grant at Duluth, the point of said connection.

In the adjustment of the grant to the Northern Pacific between Thomson's Junction and Duluth the land covered by the prior grant to the Lake Superior company must be deducted, so that between said points the Northern Pacific company will take only the granted lands within the lateral limits of its own grant, which fall outside the limits of the former grant, and will be entitled to indemnity only for losses sustained outside the limits of the former grant.

Secretary Smith to the Commissioner of the General Land Office, August 27, 1896. (A. B. P.)

On November 13, 1895, this Department had before it for consideration list No. 21, embracing certain selections of lands for indemnity purposes, by the Northern Pacific Railroad Company, the bases whereof were alleged losses within what were claimed to be the primary limits of its grant in the State of Wisconsin east of Superior City. See 21 L. D., 412.

It was decided in that case that said company had no land grant on account of constructed road within the State of Wisconsin east of

Superior City, and the list submitted, for that reason, was not approved. Whether said company had any land grant east of Thomson's Junction in the State of Minnesota was a question suggested but not decided, because not properly an issue in the case, and for the further reason that certain necessary evidence was not in the record. In view thereof, however, you were directed to suspend action upon all cases involving the question of the company's right to a grant between Thomson's Junction and Superior City until that question could be determined in a case properly presenting it.

On May 14, 1896, you transmitted to this Department a letter addressed to your office by Messrs. Britton and Gray, local counsel for the Northern Pacific Railroad Company, under date of May 8, 1896, inclosing certain documentary evidence bearing upon the question, and asking that the same be referred to this Department for final action thereon. By said letter and accompanying papers the question of the company's rights under its grant east of Thomson's Junction is presented and asked to be determined without further delay, in order that the company may be speedily relieved from the effect of said suspension.

The documentary evidence now furnished by said company consists chiefly of certain written agreements made between the Northern Pacific Railroad Company and the Lake Superior and Mississippi Railroad Company, and various other parties, relative to the future use, occupancy and ownership, by said railroad companies, of that portion of the railroad previously constructed by the Lake Superior and Mississippi Company, running from Thomson's Junction to Duluth on Lake Superior. As far as material to the question under consideration, this evidence will be more particularly referred to later on.

In order to determine the question presented it is necessary to refer briefly to some of the provisions of the act of Congress by which the Northern Pacific Railroad Company was incorporated. That act was passed July 2, 1864 (13 Stat. 365), and by the first section thereof the Northern Pacific Railroad Company was—

Authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin; thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget Sound, with a branch, via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon, etc.

The company was invested with all the powers, privileges and immunities necessary to carry into effect the purposes of its incorporation.

By the third section of the act there was granted to said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, etc., over its said line of railway—

Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad

line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office, etc.

Provision was also made in said third section for the selection by the company of indemnity lands in lieu of those lost in place because granted, sold, reserved, etc., or otherwise disposed of prior to the definite location of its line of road. Then follow two provisos in these words:

Provided, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act:

Provided, further, That the railroad company receiving the previous grant of land may assign their interest to said "Northern Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act.

By the fourth section it was provided that whenever said company should have twenty-five consecutive miles of said railroad and telegraph line ready for the service contemplated, the President should appoint three commissioners to examine the same, upon whose report, if favorable, patents were to issue for the lands as far as earned; and, from time to time, as every additional twenty-five miles were ready for service, and verified by said commissioners in the manner prescribed, patents should issue for the lands earned, etc., and so on until the road was completed.

By the eighth section it was provided, as one of the conditions of the grant, that the whole road should be completed by July 4, 1876. This limitation was extended, however, for the period of two years, by the act of May 7, 1866 (14 Stat., 355).

It is not deemed necessary to refer specifically to the several plats or maps of general route filed by the company at different times prior to the definite location of its road, presumably under section six of the granting act. For a detailed statement of the transactions of the company in this regard, reference is made to the decision reported in 21 L. D., 412, hereinbefore mentioned.

On November 20, 1871, the company filed its first map of definite location. The road as located by that map started at the point of its junction with the Lake Superior and Mississippi Railroad, at Thomson, in Minnesota, and extended westward to the Red River of the North at Fargo, Dakota.

By act of May 5, 1864 (13 Stat., 64), Congress had made a land grant to the State of Minnesota for the purpose of aiding in the construction of a railroad in said State from the city of St. Paul to the head of Lake Superior. This grant was for the amount of five alternate sections per mile, on each side of said railroad, on the line thereof, within said

State. The Lake Superior and Mississippi Railroad Company became the grantee of the State of Minnesota under that act, and had constructed the road in aid of which the grant was made prior to the filing by the Northern Pacific Company of its said first map of definite location. The latter company had, however, on March 6, 1865, filed in your office a plat or map on which was designated the general route of the entire line of its road from Lake Superior to Puget Sound, making Duluth, on said lake, the initial or starting point. From Thomson, in Minnesota, eastward to Duluth, in said State, the route of the former company's road, and the designated general route of the latter company's road, were found to be upon the same general line.

This was the condition of things on July 9, 1870, at which time, as appears from the evidence submitted and forwarded with your said letter of transmittal, an agreement was entered into between the Northern Pacific Railroad Company, the Lake Superior and Mississippi Railroad Company, the Lake Superior and Puget Sound Company, and the Western Land Association, whereby it was stipulated and agreed, among other things, that the Northern Pacific Company should connect its road with the road of the Lake Superior and Mississippi Company at or near the Dalles of the St. Louis River, in Minnesota (a point practically the same as Thomson), in order to open direct communication by rail with the town of Duluth, and to maintain such connection so as to make Duluth "one of its principal points of trade and transshipment on Lake Superior;" and to accomplish that object it was further agreed that said two railroad companies should enter into just and equitable running arrangements. It was also agreed that the Northern Pacific Company should make its first connection east from said point of intersection by way of the line of the Lake Superior and Mississippi Company, and that it would not build any other road for the purpose of forming such eastern connection prior to the completion of its road to the Missouri River. Under what authority this agreement was made does not appear. It is hardly such an agreement as was contemplated by the fifth section of the granting act, wherein it was provided that:

It shall be the duty of the Northern Pacific Railroad Company to permit any other railroad which shall be authorized to be built by the United States, or by the legislature of any Territory or State in which the same may be situated, to form running connections with it, of fair and equitable terms,

though probably made in view of that provision.

Running arrangements were entered into between the two railroad companies in accordance with said agreement, and, presumably, the same were continued until January 1, 1872. On that date an agreement in writing between the Lake Superior and Mississippi Railroad Company and the Northern Pacific Railroad Company was made, whereby the former company agreed to sell and does sell to the latter company an undivided one half interest in, and the right to jointly

use and operate, that portion of the former company's main line of railroad between Thomson's Junction, in Minnesota, and the city of Duluth, on Lake Superior, in said State. The consideration for the sale was the sum of \$500,000 which was to be paid by the Northern Pacific Company on the first day of January, 1896, if the premises on that date should be unincumbered of certain existing mortgages, or as soon thereafter as they should become free from said mortgages; and until said sum of \$500,000 should so become due and payable the Northern Pacific Company was to pay semi-annually, as interest thereon, on the first days of January and July of each year, the sum of \$17,500, to be applied to the payment of the semi-annual interest accruing upon certain mortgage bonds of the said Lake Superior and Mississippi Railroad Company, and certain taxes against the same. Provisions were made for the joint occupation, use, and operation of the road by the contracting companies; and at the same time a deed was made and executed by the Lake Superior and Mississippi Company, conveying to the Northern Pacific Company an undivided one half interest in all that portion of the grantor's said main line of railroad between Thomson's Junction, in Minnesota, and Duluth, on Lake Superior, and in all and singular the appurtenances thereto belonging, in accordance with the terms of said agreement. By this arrangement the Northern Pacific Railroad Company was enabled to connect and did connect its road with Lake Superior at Duluth, in Minnesota, from Thomson's Junction, in said State, a distance of about twenty-five miles, over the line of a railroad to aid in the construction of which lands had been previously granted by the United States (act of May 5, 1854, *supra*).

A third agreement is filed in the record, dated August 9, 1876, which was made between the Northern Pacific Railroad Company, as party of the first part, the Lake Superior and Mississippi Railroad Company, as party of the second part, and certain persons representing the holders of the first mortgage bonds of the latter company, as parties of the third part. It is not deemed material to refer to the matters contained in this last agreement further than to say that it expressly confirms to the Northern Pacific Company all the rights acquired by that company under the aforesaid agreement and deed of conveyance of January 1, 1872.

After having continued thus for a number of years to operate its railroad, from Lake Superior to Thomson's Junction under the said agreement and contract of purchase of January 1, 1872, and westward from the latter point over the line of road constructed by itself, the Northern Pacific Company, in July, 1882, filed what purports to be a map of definite location eastward from Thomson's Junction to Superior City, near the western end of Lake Superior, in Wisconsin, and thence further eastward to a point on Bad River, off Lake Superior, in said State. A railroad was finally constructed by said company, over the route thus located, as far east as Ashland, Wisconsin, but no road has ever been constructed beyond that point.

The claim of the company is that under its granting act, it is entitled to the full amount of ten alternate sections per mile on each side of the road thus constructed by it, between Thomson's Junction, in the State of Minnesota, and Ashland, in the State of Wisconsin. The Department having already held (21 L. D., *supra*,) that the company had no land grant east of Superior City, it remains to be determined what its rights are, if any it has under said grant, between Thomson's Junction and Superior City. The solution of this question involves also the determination and final settlement of the eastern terminus or initial point of said railroad as contemplated by the granting act.

The road was to begin "at a point on Lake Superior in the State of Minnesota or Wisconsin," and was to run from that point westerly, by the most eligible railroad route within certain prescribed lateral limits, "to some point on Puget's Sound." We have seen that the first connection with Lake Superior made by the company was at Duluth, which is situated slightly north of the western end of said lake, in Minnesota; that a second connection with said lake was made by the company some ten years later, at Superior City, in Wisconsin, slightly southeast of the western end of said lake; and that a third connection was made still later at Ashland, in the latter State. It necessarily follows from the decision that the company has no land grant east of Superior City, that Ashland can not be considered the eastern terminus of the road under the grant. Either Duluth or Superior City, therefore, must be established as such terminus or initial point.

It is evident that Congress had in mind the securing of a line of railway transportation, connecting the waters of Lake Superior on the east and those of Puget's Sound on the west. To secure that connection, and the consequent advantages which would accrue to the government in many ways, and especially from the opening and development of the immense territory through which the road was to pass, a very large grant of lands was made. But it was not the intention of Congress, in my judgment, that the grant could be enlarged by extending the road to a greater length than was necessary "by the most eligible railroad route" to accomplish the end desired, or that the company, when it had once effected a connection of its road with Lake Superior, within the terms of the grant, should be allowed, subsequently, to make another and different connection, and thus increase the amount of its grant.

The road was to be constructed from "a point" on Lake Superior to "some point" on Puget's Sound, and two ways were prescribed in the granting act whereby this could be accomplished:

First: The company might construct its own road upon the entire route between said two points, or

Second: If said route should be found to be upon the line of any other and prior land grant railroad route, as far as the two routes were upon the same general line (that is, as far as the route or general line selected was common to both roads), the company receiving the previous grant might assign its interest to the Northern Pacific Company, or

might "consolidate, confederate and associate" with said company for the construction and operation of the road along such common route. In any event, however, so far as the two roads were upon the same general line, the amount of land previously granted was to be deducted from the amount granted by the Northern Pacific act.

There can be no doubt that, westward from Thomson's Junction, the company adopted the former plan, and constructed its own road. But the question here presented is, whether or not the arrangement effected between said company and the Lake Superior and Mississippi Company by the agreement and contract of purchase of Jan'y. 1, 1872, was such a consolidation, confederation or association of the two roads as was contemplated by the granting act. If it was, then the rights of the Northern Pacific Company east of Thomson's Junction are to be measured and determined by the aforesaid two provisos of the third section of the act, and the city of Duluth, on Lake Superior in Minnesota, must be recognized and established as the eastern terminus, or initial point, of the company's road.

Upon this question the facts appear to be, (1) that the routes of the two roads were found to be upon the same general line between Thomson's Junction and Lake Superior; (2) that by the said agreement and contract of purchase the Northern Pacific Company became the absolute owner of the one half interest of the main line of railroad between these two points, which had been constructed by the Lake Superior and Mississippi Company under a previous congressional land grant; (3) that by said agreement running arrangements were formed and entered into, and the two companies became associated together in the ownership, use and operation of the said main line railroad between said points; (4) that the Northern Pacific Company thus effected the connection of its own constructed road with Lake Superior, the eastern terminal limit of its grant; and (5) that said company continued thus for nearly ten years (and the arrangement still continues for aught the record shows), and until after the time limited by the grant for the completion of its road had elapsed, to use and operate the line of road it had thus acquired, in all respects as though it were a part of its own main line of road from Lake Superior to Puget Sound, required to be constructed by its grant.

In view of these facts it is difficult to arrive at any other conclusion than that the said arrangement was a consolidation, confederation and association of the two roads, such as it was the intention of Congress to provide for. The circumstances which led up to the contract of association and the results accomplished by it seem to have been, in all respects, just such as were contemplated by Congress when it adopted the said two provisos. The routes of the two land grant roads were found to be upon the same general line between the points named, and by means of the said association and confederation the two railroad companies were enabled, together, to aid, and did aid, to that extent,

in the accomplishment of the object of the grant, namely, the construction of a "continuous railroad" from Lake Superior to Puget's Sound.

That there was a consolidation and confederation of the two roads between said points there cannot be any reasonable doubt. By the arrangement the companies became the joint owners of that part of the road. What power or authority had the Northern Pacific Company to enter into such an arrangement? Certainly none whatever, except as conferred by its charter—the granting act. The powers of corporations organized under legislative statutes are such only as those statutes confer. (*Thomas v. Railroad Company*, 101 U. S., 71–82.) Power to consolidate is not implied, but must be expressly given in the charter (2 Morawetz, Sec. 940–1; Cook on Stock and Stockholders, Sec. 668). In the present case the granting act authorized the Northern Pacific Company "to consolidate, confederate and associate" with any other and prior land grant railroad, as far as the routes of the two roads were found to be upon the same general line, upon the terms named in the first section, namely, for the construction of a "continuous railroad" from Lake Superior to Puget's Sound; and no authority was given for such consolidation, confederation or association, upon any other terms. The company's charter is the measure of its powers, and the enumeration of those powers necessarily implies the exclusion of all others (*Thomas v. Railroad Company*, *supra*). It necessarily follows, therefore, that the Northern Pacific Company had no power or authority to effect the arrangement it did effect with the Lake Superior and Mississippi Company—whether it be called a consolidation, a confederation, or an association, of the two companies it matters not—except upon the terms prescribed in the granting act, and it will not be presumed that said company undertook to violate the terms of its charter, or, on the other hand, to do a vain thing.

True it appears that the Board of Directors of the Northern Pacific Company, on February 14, 1873, adopted certain resolutions denying that it was the purpose of the company by said agreement and contract of purchase of January 1, 1872, to fix the eastern terminus of its road at Duluth, and asserting that said arrangement was effected for the sole purpose of making the city of Duluth "one of its principal points of trade and trans-shipment on Lake Superior," and claiming the right under its grant to extend its road further eastward to the mouth of the Montreal River, the most easterly point on Lake Superior in the State of Wisconsin. By what authority the company would have the right to establish more than one "principal point of trade and trans-shipment on Lake Superior," under its grant, the resolutions do not undertake to show. Evidently, only one such point was contemplated by the grant. The road was to begin at "a point on Lake Superior," and, when once "a point" of beginning had been established on Lake Superior, which was done, as we have seen, by the consolidation and association aforesaid, the requirements of the grant were fully met.

and its demands satisfied, so far as they relate to the initial point of the road. Therefore any other point of connection with Lake Superior, subsequently established by the company, must necessarily have been effected outside the terms of its charter. It is the settled law that where power is given a chartered company to do an act, that power becomes exhausted when once exercised, unless it clearly appears from the charter that a continuous exercise of the power was intended (East Tenn., etc., R. R. Co. v. Frasier, 139 U. S., 288). I do not think any such intention is to be gathered from the company's charter in this case.

It is scarcely conceivable that Congress could ever have designed that the grant company, when it had once made its connection with Lake Superior within the terms and conditions prescribed, should afterwards be allowed to form other connections, and finally designate and establish the one most advantageous to its interests and which would secure to it the largest amount of lands under its grant; or that it should be allowed to use and operate such first connection as a compliance, to that extent, with the terms of the grant, and afterwards waive such compliance and establish another connection; or that it was contemplated that the company could, under its grant, establish more than one principal point "of trade and trans-shipment on Lake Superior." No such powers are given in express terms, and I do not think they are fairly inferable from any reasonable construction of the grant. And the company could not establish such rights, or confer such powers upon itself, by resolution of its Board of Directors or otherwise.

It is also the settled law that all grants like the one under consideration are to be construed most strongly against the grantees. In the case of Fertilizing Co. v. Hyde Park (97 U. S., 659-666) the supreme court said:

The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court.

See also Pearsall v. Great Northern Railway, 161 U. S., 664.

Hence, the right of the Northern Pacific Company, after having once effected a connection of its road with Lake Superior, under the terms of the grant, by means of the consolidation and association aforesaid, to effect another and different connection under the grant with said lake, can not be recognized unless such right is given in clear and unambiguous terms. The same is true of the right of the company, under its grant, to establish several "principal points of trade and trans-shipment" on Lake Superior as claimed. In neither case do I find such authority given by the granting act.

As furnishing additional light upon the question under consideration reference is made to Smalley's "History of the Northern Pacific Railroad," published in 1883, a work which purports to give a detailed statement of all the facts and circumstances which led up to the making of the grant by Congress for the purpose of "connecting the waters of the Great Lakes with those of the Columbia River and Puget Sound," together with a complete history of the organization of the company under the grant, and of all its transactions relative to the construction and operation of the road from the beginning down to 1883. The work appears to have been written and published from the standpoint of entire friendliness toward the company, if not, in fact, for the purpose of promoting its interests. It may not be amiss, therefore, to quote a few extracts from it bearing upon the question, and as showing some of the current historical facts connected with the selection by the company of the eastern or lake terminus of its road.

On page 145 the author, after speaking of the election of a new board of directors in May, 1867, says:

The new board appointed Edwin F. Johnson chief engineer, and ordered him, under direction of the President (of the company), to commence surveys and locate a line between Lake Superior and the Red River of the North; also to explore the western end of Lake Superior, with a view to the location of the eastern terminus of the road.

On page 151, the author, speaking of the work of the engineers and the report of Johnson, their chief, says:

The search for a good harbor for a lake terminus was confined to three points—Chegwamigon Bay and the Lake Shore behind the Apostle Islands (the same as Ashland); Superior Bay at Superior City, Wisconsin, and Superior Bay at Duluth, Minnesota.

On pages 186-7 it is said:

In June, 1870, a contract was made for the construction of the Minnesota division of the road, and ground was broken in July, at Thomson's Junction, where the line left the Lake Superior and Mississippi Railroad. A half interest in the road of the latter company from the Junction to Duluth was purchased, and an artificial harbor was created at Duluth by cutting a canal across the low sandy peninsula through which vessels could enter the waters of the bay. The town of Superior, lying in sight from Duluth across the bay, had a natural harbor, and had been waiting for a quarter of a century for the railroad to give it prosperity. Great disappointment was felt in that town at the determination of the Northern Pacific to make its terminus at Jay Cooke's new speculative city of Duluth, and the governor of Wisconsin was induced to bring suit against the company on account of a dyke constructed in Superior Bay, within the limits of Minnesota, which it was alleged was detrimental to the harbor of Superior. This suit was withdrawn on the promise of the company to build a line to Superior and to put that place on an equal footing with Duluth for lake traffic; a promise which the company was not able to redeem until 1882.

The large banking house of which Jay Cooke was the head was at that time the financial agent of the Northern Pacific Company, which doubtless explains the reference to his name. It would thus seem that of the three points considered, Duluth was finally selected and deter-

mined upon as the eastern or lake terminus of the road; and only a promise was made "to build a line" to Superior, not for terminal purposes, but in order "to put that place on an equal footing with Duluth for lake traffic."

On page 205 the road is spoken of as having been built, prior to the panic of 1873, "westward from Lake Superior to the Missouri River, a distance of about 450 miles." At that time the only road the company had east of Thomson's Junction was the road owned and operated by it together with the Lake Superior and Mississippi Company, under the arrangement aforesaid, and yet the road is spoken of as having been built from Lake Superior 450 miles westward.

On page 382 the author continues:

The Lake Superior and Mississippi Railroad was opened through from St. Paul to Lake Superior in the summer of 1870, and became the supply line for the transportation of construction materials for the Northern Pacific. The purchase of a half interest in its track east of the junction fixed Duluth as the lake terminus of the Northern Pacific line, and caused the remote and almost unknown hamlet bearing that name to develop, with great rapidity, into an active town.

From another part of the work (Ch. 28) it appears that during the years 1877-80 the company made repeated but unsuccessful efforts to secure additional aid from Congress for the building of the road, and an extension of the time prescribed for its completion, the last effort in that direction having been made in 1880, at which time it is stated that:

The company was energetically pushing the road from both ends. The gap remaining to be built June 25, 1880, was at that time about one thousand miles.

It thus seems that as late as 1880 the company still regarded and relied upon the arrangement effected with the Lake Superior and Mississippi Company as a compliance with the terms of its grant relative to that part of the road between Thomson's Junction and Lake Superior; otherwise it could not have been said that the road was being pushed forward "from both ends," or that the only part remaining to be built was "the gap" of about one thousand miles. This gap must necessarily have been west of the western boundary of the State of Minnesota.

In the annual report of the President and Directors of said company to its stockholders, made September 27, 1876, the following statements are found:

The twenty-five miles of railroad used by this Company between Thomson Junction and Duluth, was built by the Lake Superior and Mississippi Railroad Company, and is a part of their road from Duluth to St. Paul. The line of the Northern Pacific extends on the southerly side of Lake Superior to the easterly border of Wisconsin, at Montreal River. But to save a duplication of expenditure, its original managers contracted for the purchase of a half interest in the Lake Superior and Mississippi Road, between Thomson and Duluth, agreeing to pay therefor half a million of dollars, in installments. . . .

The bondholders of the Lake Superior and Mississippi Road having indicated their intention to commence foreclosure proceedings under their mortgage, it was deemed

important to conclude prior arrangements for securing the permanent use of this piece of road, . . .

After a long and tedious negotiation, an arrangement has at length been made, by which the use of the road is secured," . . .

It thus appears that it was "to save a duplication of expenditure" that the "original managers" purchased a half interest in the Lake Superior and Mississippi road, and secured the "permanent use" thereof to the Northern Pacific Company. It may be pertinently asked how the expenditure thus sought to be avoided could be saved to said companies by the arrangement, if the same was not a consolidation, confederation and association of the two roads, such as the Northern Pacific grant authorized.

These brief references to some of the historical facts connected with the construction of the road will serve to illustrate the real purposes of the company in effecting the aforesaid arrangement with the Lake Superior and Mississippi Company. In my judgment, they point irresistibly to the conclusion that the company's object at that time was to thus connect its road with Lake Superior within the terms of its grant under the provision allowing it, for that purpose, to "consolidate, confederate and associate" with any prior land grant company, so far as both roads were upon the same general line.

In view of all the foregoing, my conclusions are:

1. That the arrangement made between the Northern Pacific Railroad Company and the Lake Superior and Mississippi Company, as shown, was such a consolidation, confederation and association of the two companies, as was contemplated by the grant, and that thereby a connection was affected with Lake Superior at the city of Duluth, in Minnesota, in the manner prescribed in the granting act, of the company's line of railroad to secure which the grant was made; and

2. That under the grant the eastern terminus or beginning point of said railroad on Lake Superior, must be established at said city of Duluth, and the company's rights east of Thomson's Junction must be determined accordingly.

In the adjustment of the company's grant for that part of the road from Thomson's Junction eastward to Duluth, on Lake Superior, therefore, the amount of land previously granted to the Lake Superior and Mississippi Railroad Company, namely, "the amount of five alternate sections per mile on each side of the said railroad on the line thereof, within the State of Minnesota," must be deducted from the amount of land granted to the Northern Pacific Company. The Northern Pacific Company will not be entitled to any of the granted lands within the common limits, nor can it have indemnity for the same, as lands lost in place. The amount of the prior grant is to be deducted from the amount of the Northern Pacific grant. Between the points named, therefore, the Northern Pacific Company will take only the granted lands within the lateral limits of its own grant, which fall outside the limits of the

former grant, and will be entitled to indemnity only for losses sustained outside the limits of the former grant.

It does not appear that said company has ever filed in your office, under section 3 of the granting act, a plat of the line of its road as definitely fixed between those points; nor does that part of the road appear to have been examined and verified to the President under section 4 of the act. I do not think it necessary, however, that these things should be done as to this particular part of the company's road—the same having been located and constructed by a prior land grant company, and accepted by the government under the prior grant. The authority given the Northern Pacific Company in its grant to effect a consolidation and confederation with a prior land grant road for the purposes stated, necessarily implies, I think, the acceptance by the government, under the Northern Pacific grant, of such prior road as constructed and accepted under the prior grant; and there would seem to be no necessity for filing a plat of definite location, because that has been done under the prior grant and the line of road definitely fixed thereby. To hold otherwise would be to require a duplication of work and expenditure with no resultant benefit either to the government or the company.

I see no reason, therefore, why you may not proceed at once with the adjustment of the company's grant eastward from Thomson's Junction to Duluth on Lake Superior, in accordance with the principles announced in this opinion.

RAILROAD LANDS—RES JUDICATA—ACT OF MARCH 3, 1887.

OSBORN ET AL. *v.* KNIGHT (ON REVIEW).

The doctrine of *res judicata* will not prevent departmental action where such course is the only one by which substantial justice can be secured, and the subject matter remains within the jurisdiction of the Department.

Under an application to perfect title in accordance with section 5, act of March 3 1887, to land excepted from a railroad grant on account of pre-emption filings, the good faith of the applicant's purchase from the company is not impugned by the fact that prior to said purchase he had been register of the land district in which the lands were situated, and must therefore have known that said lands were excepted from the grant by said filings, where it appears that during said period the Department did not recognize a pre-emption filing as sufficient in itself to work an exception under the grant.

The fact that the transfer from the company is by quit claim deed cannot of itself affect the right of purchase under said section; nor will the speculative value of the land be considered in determining the bona fides of the purchaser, especially where such point is raised by a stranger to the original transaction.

The right of purchase under said section is not affected by a settlement claim initiated after the passage of said act.

The case of *Balch v. Andrus*, 22 L. D., 238, cited and distinguished.

Secretary Smith to the Commissioner of the General Land Office, August 27, 1896. (W. A. L.) (F. W. C.)

I have considered the motion, filed in behalf of A. R. Osborn *et al.*, for review of departmental decision of April 10, 1896 (22 L. D., 459), in the case of A. R. Osborn *et al. v. John H. Knight*, involving certain lands in Sec. 35, T. 48 N., R. 4 W., and Sec. 3, T. 47 N., R. 4 W., Ashland land district, Wisconsin, in which departmental decision of March 3, 1893, not reported, was disregarded and the application by Knight to purchase under the provisions of section 5 of the Act of March 3, 1887 (24 Stat., 556), as to certain lands, was reinstated.

A brief recitation from the decision under review will aid the consideration of the motion:

This land is within the limits of the indemnity withdrawal made under the grant of June 3, 1856 (11 Stat., 20), to aid in the construction of the Bayfield branch of the road now known as the Chicago, St. Paul, Minneapolis and Omaha railroad.

By the act of May 5, 1864 (13 Stat., 66), the grant of 1856, before referred to, was increased from six to ten sections per mile, and a new grant was also made of ten sections per mile to aid in the construction of a road afterwards known as the Wisconsin Central railroad. Upon the location of the last mentioned road the land in question was included within the primary limits of said grant and was also found to be within the four miles additional grant for the Omaha road, so that it is within the common ten miles limit of the two grants under the act of 1864.

Under the rulings of this Department, made prior to the decision of the supreme court in the case of the Wisconsin Central railroad company *v. Forsyth* (159 U. S., 46), it was held that lands within the indemnity limits under the act of 1856 were excepted from the grant made by the act of 1864, so far as the Central company is concerned. This was the ruling which prevailed at the time of the adjustment of the Omaha grant, and the land in question was held to have been excepted from the Central grant, because of said reservation for indemnity purposes under the act of 1856.

On October 25, 1889, Knight filed an application to purchase land within the sections first described, under the provisions of section five of the act of March 3, 1887 (24 Stat., 556), alleging that he had purchased the land from the Wisconsin Central railroad company for a valuable consideration. Protests were filed against the acceptance of Knight's proof, by A. R. Osborn *et al.*, and upon the record made in said controversy your office found that Knight was not a *bona fide* purchaser for the reason that it was shown that he had been register of the local office at Bayfield, and was, therefore, apprised of the condition existing between the two grants and must have had knowledge of the fact that these lands had been reserved for the Omaha grant prior to the date of the passage of the act making the grant for the Central company and the location thereunder, which decision was sustained by this Department in the decision of March 3, 1893 (not reported).

A review of this decision was denied March 3, 1894, not reported. Following the decision of the supreme court in the case of the Wisconsin Central railroad *v. Forsyth*, *supra*, in which it was held that the reservation for indemnity purposes on account of the Omaha grant did not prevent the attachment of rights under the Central grant, a motion for re-review was filed on behalf of John H. Knight, which was considered in departmental decision of October 1, 1895 (not reported).

In said decision it was held:

"As before stated, Knight's application to purchase was denied, and the supreme court having held that the title to said land is not in the United States, a review of that part of the decision can avail nothing.

"But in view of the fact, that the recent decision of the court reversed the previous decision of this Department as to the rights of the Wisconsin Central R. R. Company within the conflict before referred to, and of the further fact that entries have been allowed to the lands under the previous ruling, I have to direct that these entrymen be called upon to show cause why their entries should not be canceled, to the end that in case there is no reason shown for holding the lands to have been excepted from the Wisconsin Central grant, otherwise than the fact that they were within the indemnity withdrawal under the act of 1856, the conflicts may be cleared from the record. The previous holding of the Department that the withdrawal under the act of 1856 served to defeat the grant under the act of 1864, for the Wisconsin Central railroad company, in view of the decision of the supreme court in the case before referred to, must be recalled and vacated, and the rights of the Wisconsin Central railroad company, within said conflict, must be adjudicated in accordance with the decision of the supreme court before referred to."

Acting under the directions given, it appears that those who had been permitted to make homestead entries of the lands covered by the former application by Knight were called upon to show cause why their entries should not be canceled, to which, all except one, it appears, responded.

In considering the showings made your office decision of February 12, 1896, found that the lands in question are opposite and coterminous to the constructed part of the Wisconsin Central railroad, but that certain of the lands were excepted from said grant by reason of the existence of pre-emption filings at the date of the attachment of rights under said grant. As to the land not so included, it is held that the same passed to the Central grant, but as to those tracts covered by filings, it is held that the same are excepted from the Central grant. In the matter of the latter class the question of the respective rights of the entryman and Knight, under his application to purchase made in 1889, as before stated, is further considered, and it is held that in the light of the recent decision of the supreme court, before referred to, the knowledge of which is held to have been apprised by reason of his position as register, cannot be held to affect the *bona fides* of his purchase from the Wisconsin Central railroad company, and said application to purchase is, as to the said lands, re-instated and recommended for allowance, and the conflicting homestead entries held for cancellation.

In the decision under review this recommendation was concurred in, the matter of the respective rights of Knight under his application to purchase, and the conflicting homestead entries being considered under the supervisory power of this Department, the land being still within the jurisdiction of this Department, and the previous adjudication made upon Knight's application to purchase, being based upon a mistaken construction of the law affecting the disposition of the land. This action was taken in order to give full effect to the adjudication made in 159 U. S., 46, which practically reversed the action of the Department on the issues involved. Were the circumstances so that no substantial right of Knight would be jeopardized, I should have hesitated at this late day, under the supervisory powers given to the Secretary by law, to interfere with a ruling made so long ago as to be justly considered as making the issues raised *res adjudicata*, but I was induced to open and reverse the ruling made against the defendant Knight in the decision of March 3, 1893, because it probably affords the only method of doing substantial justice in this particular case.

As thus presented the doctrine of *res adjudicata* can have no application and need not be further considered.

The grounds of error being so numerous, I have considered them collectively; first considering those affecting the question of *bona fides* in Knight's purchase from the company, and, second, those presenting adverse rights under the homestead entries allowed after the rejection of Knight's application to purchase.

As before shown, Knight claimed through the Wisconsin Central railroad company, and after this land was held to have been excepted from the Central grant he made due proof under the act of March 3, 1887.

If the land passed under the grant to that company, or was subject to Knight's application to purchase, this Department was thereafter without jurisdiction to make other disposition of it, and as it was required by the act of March 3, 1887 (*supra*), that all railroad grants be adjusted in accordance with the decision of the supreme court, it became necessary, upon the rendition of the decision in the Forsyth case, to respect the Central grant where it had formerly been held to be defeated by the indemnity reservation for the Omaha company.

Knight had been charged with knowledge of a fact, supposed to be a controlling one in the disposition of the land covered by his application, but which, under the recent decision of the court, was not a material one, and could therefore in no wise affect the *bona fides* of his purchase.

He had been register at the Bayfield office from 1871 to 1883, this land at that time being within the Bayfield district, and he was held to be charged with knowledge of the fact that these lands had been reserved on account of the Omaha grant at the date of the passage of the act making the Central grant and also at the date of the attachment of rights thereunder. This withdrawal the court holds did not defeat the Central grant.

In the recent adjustment of the Central grant, as to the land covered by Knight's application to purchase, it was held that the land passed to the Central grant, except as to certain tracts covered by pre-emption filings, which tracts were held to be excepted from the Central grant, to which extent Knight's application to purchase was reinstated.

It is urged in the motion that Knight is presumed also to have had knowledge of these filings, and must have known that they served to defeat the grant.

A review of the decisions of the Department upon the question as to the effect to be given to pre-emption claims, not perfected, as against a railroad grant, will not support the claim.

As late as 1879 pre-emption claims were held not to be sufficient to defeat the attachment of rights under a railroad grant unless the pre-emptor completed his claim into cash entry, the circular of November 7, 1879, relating to the adjustment of railroad land grants, providing that:

A pre-emption claim which may have existed to a tract of land at the time of the attachment of a railroad grant, if subsequently abandoned and not consummated,

even though in all respects legal and *bona fide*, will not operate to defeat the grant, it being held that upon the failure of such claim the land covered thereby inures to the grant as of the date when such grant became effective.

Under this ruling, therefore, no hearings can be ordered for the purpose of ascertaining the facts respecting the settlement, occupation, improvement of the land, etc., by such pre-emption claimant, for even if such facts were established, still, under the decision, the land inures to the grant.

It is true that in the case of the St. Paul and Pacific R. R. Co. v. Larson (3 L. D., 305), decided October 30, 1884, it was held that a pre-emption filing capable of being perfected, defeated an indemnity withdrawal, but to determine whether the filing was capable of perfection made it necessary to show that the pre-emptor had complied with law.

It was not until the decision in the case of Malone v. Union Pacific R. R. Co. (7 L. D., 13), decided July 9, 1888, that it was held that a filing of record, *prima facie* valid, at the date of attachment of rights under a railroad grant, served to except the land covered thereby from the operation of such grant.

It is further urged that the deed from the Central company was a quit-claim deed and was for an inadequate consideration, viz, \$9,600, while it is claimed the lands are worth \$90,000, and that these facts tend to show that the transaction was not *bona fide*.

The fact that the transfer from the company was by quit-claim cannot of itself affect the right of purchase under the act of 1887 (Stebbins v. Croke, 14 L. D., 498), nor can the speculative value of the land be considered in determining the *bona fides* of the purchaser, especially where the attack is made by a person a stranger to the original transaction.

So far, therefore, as the motion questions the recognition of Knight's *bona fides* in the matter of his purchase from the company the exception to the decision is overruled.

It is further urged that the entrymen were not accorded opportunity to show cause why their entries should not be canceled for the reason that, after the issue of the rule to show cause, the same was withdrawn and their entries held for cancellation; that it was error to hold that their entries were instituted subsequently to Knight's application to purchase, when the fact is that their settlements ante-dated Knight's application to purchase, and that since the decision in the case of Balch v. Andrus (22 L. D., 238), wherein it was held that the fact that purchase was made from the company subsequently to the passage of the act of March 3, 1887, did not affect the right of purchase from the United States under the provisions of section 5 of that act, the rights of settlers under the second proviso of said section should also be construed to include settlements made after the passage of said act.

As to the opportunity afforded the homestead entrymen to show cause why their entries should not be canceled, the Commissioner in his letter of February 12, 1896, reports that:

The local officers were instructed to notify all of said parties except John R. Prince that they will be allowed 60 days in which to show cause why their entries should

not be canceled in so far as they embraced any portion of the tract held not to have been excepted from the operation of the grant to said company, but upon failure to make such showing their entries will be canceled to the extent of the conflict with said grant. Lamal, Snyder, Beaser and R. B. Prince have responded by motions for review of said decision, showing cause why their entries should not be canceled and have also made answer to Knight's motion for review asking that his application to purchase under the act of March 3, 1887, be considered and allowed.

Judd has failed to respond and show cause why his entry should not be canceled, and has also been served with a copy of Knight's motion for review asking that his application to purchase the land embraced in his homestead entry which was held to have been excepted from the grant, be considered and allowed; therefore, I see no reason why the right of said parties to this litigation may not be considered and passed upon from the record now before me.

From the proceedings heretofore had in this case it would appear that full opportunity has been afforded the conflicting homesteaders to present their case.

Under the repeated rulings of the Department, a settlement claim initiated after the passage of the act of March 3, 1887, cannot affect the right of the purchaser from the company to make purchase from the United States under the provisions contained in the body of section five of said act (Chicago, St. Paul, Minneapolis and Omaha Ry. Co., 11 L. D., 607; Union Pacific R. R. Co. *et al.* v. McKinley, 14 L. D., 237; and Swineford *et al.* v. Piper, 19 L. D., 9).

I can see no reason for changing this holding, nor does the decision of this Department in the case of Balch v. Andrus (*supra*) make a change necessary.

The fifth section of the act of March 3, 1887, was remedial in its nature, and should be liberally construed to embrace the remedy, viz: the protection of those who had in good faith brought lands supposed to have passed under a railroad land grant which had, for any reason, been excepted therefrom.

In the case of Balch v. Andrus (*supra*), it was held:

That it can make no difference whether the purchase from the company was made before or after the passage of the act of March 3, 1887, if made in good faith, believing the title to be good and before the land purchased was held to be excepted from the grant.

The second proviso to said section in favor of settlers was a limitation upon the right of purchase and should be strictly construed. To hold that it embraced settlements made after the passage of the act of March 3, 1887, would be to offer an inducement to "jumpers" to settle upon lands held under a title believed to be good, a purpose it cannot be believed was intended by the legislators. Were it otherwise, however, it would not benefit the entries here involved.

The motion urges that while these entries were made subsequently to Knight's application to purchase, yet they are protected because their settlements ante-dated his application to purchase.

This is not borne out by the record. Knight first applied to purchase in October, 1889, and in the notice advertised that proof would be offered in support thereof in January, 1890.

At the hearing held each of the entrymen alleged settlement in the early part of January, 1890, subsequent to the application by Knight but prior to the date set for his offer of proof.

It but remains to consider the 17th exception which raises a question of fact, and is as follows:

It was error to find that the lands in question are beyond and outside of the terminus of the constructed portion of the Wisconsin Central Railroad and are not coterminous with the constructed portion of said railroad; and it was error not to conclude therefrom that the application made by Knight to purchase these lands must be denied and rejected on that ground.

In the decision under review it is stated that:

In considering the showing made your office decision of February 12, 1896, found that the lands in question are opposite and coterminous to the constructed part of the Wisconsin Central railroad.

After thus fully considering the grounds upon which the motion is based and failing to see any good reason to change the conclusion arrived at in the decision under review, the motion is denied and herewith returned for the files of your office.

MINERAL LANDS—MINING CLAIM—DISCOVERY—PETROLEUM.

UNION OIL COMPANY.

In the case of a mineral entry by an association there must be a discovery shown on each twenty acres of the land so entered.

Land containing petroleum does not fall within the contemplation of the mineral laws, and can not be located and entered as a placer mine.

Secretary Smith to the Commissioner of the General Land Office, August 27, 1896. (P. J. C.)

The record before me shows that the Union Oil Company of California, made mineral entry No. 140 of the Central Oil Mine, lot No. 43, Los Angeles, California, land district, consisting of 78.82 acres, January 16, 1894.

When the matter was reached in your office it was, by letter of May 19, 1894, determined, among other things, that the land had been selected by the Southern Pacific Railroad Company, per list No. 25, and that the company should be given sixty days within which to show cause why its selection should not be canceled as to the conflict; also that the applicant was

required to show a discovery of a valuable deposit of mineral for each twenty acre tract or fractional part thereof contained in said Central Oil Placer, the evidence of such discovery to consist of the affidavit of two or more persons.

The oil company has appealed from your office decision, on the ruling above quoted, and in a number of specifications sets forth its objections thereto. The principal objection is "that neither the statute nor the

rulings and regulations in force at the time the location was made" and the entry allowed required a discovery of mineral on each twenty acre tract of a placer mining claim, where, as in this case, five persons locate a placer claim of one hundred acres.

It is strenuously insisted by counsel that the judgment of the Department in the case of *Farrell et al. v. Hoge et al.*, (18 L. D., 81), wherein it is held that there must be a discovery on each twenty acres in a placer of one hundred and sixty acres located by an association, "is a startling departure from the established rulings and precedents which have governed the land department in the adjudications of mining claims." It is asserted by counsel that the "decisions of the supreme court and that of the Department upon this identical question cannot be reconciled," and in support of this proposition counsel cite *Smelting Company v. Kemp*, 104 U. S., 636; *Jackson v. Roby*, 109 Id., 440; and *Chambers v. Harrington*, 111 Id., 350; also *The Good Return Company*, 4 L. D., 221.

An examination of these authorities shows that counsel have fallen into the error of confounding the word "discovery" with "expenditures" or "improvements," or "developments," and use the three latter as synonymous with the first. There is a broad and distinctive difference, as applied to the mining laws, between the word discovery and the other terms named.

Discovery is the initial act upon which all mining rights are based. The right of appropriation and possession rests wholly upon a discovery of minerals (*Waterloo Mining Company v. Doe*, 56 Fed. Rep., 685). Discovery is the source of title. There is no variation in the authorities so far as my research has extended upon this point, and it would seem to be a work of supererogation to again cite adjudicated cases in support thereof.

The terms development, improvements and expenditures, as used in the statute, refer only to work required to be done after the discovery and location. For instance, in section 2323, in relation to tunnel rights, the language is, "where a tunnel is run for the development of a vein or lode." This particular language certainly pre-supposes a discovery.

Again, in section 2324, in regard to annual work, the requirement is that on each claim located after May 10, 1872, "not less than \$100 worth of labor shall be performed or improvements made," and on those located prior to that date, "\$10 worth of labor shall be performed or improvements made" for each 100 feet of the vein, and the section provides how each co-owner may be required to pay his proportion of the "expenditures" thus demanded. This requirement is for each claim located, and as before said, there can be no location until there has been a discovery.

Section 2325 requires a certificate of the surveyor-general before patent can issue, that "\$500 worth of labor has been expended or improvements made" on the claim.

It seems too plain to need argument to convince one that these latter provisions have no reference to the discovery. It is matter of common knowledge, I take it, that discoveries of veins are frequently made on the surface of the ground without any expenditure of labor or money in so doing, except that spent by the prospector in his general search for the treasures of nature. On the other hand, fortunes are expended in explorations for veins of mineral bearing rock. Congress did not fix any amount to be expended, either of money value or labor, in the discovery of mineral. Most of the mining States and Territories have statutes defining what shall be done. For instance, in Colorado, it is necessary before filing the location certificate to sink "a discovery shaft upon the lode to the depth of at least ten feet from the lowest rim of such shaft at the surface, or deeper, if necessary, to show a well defined crevice" (General Statutes of Colorado, Section 2401).

The authorities relied upon by counsel have no reference whatever to discovery, as such. In the case of *Smelting Company v. Kemp*, in so far as the question of expenditure before patent and improvements is concerned, refers wholly to work done for the development of a number of placer claims, and the amount that was necessary to be done in order to secure a patent, where all the locations had been transferred to one person, and he has applied for the consolidated locations. The court below had held that there should be separate applications for patent for each twenty acre location, thereby necessarily requiring \$500 worth of labor or improvements on each location. The supreme court reversed this ruling, and in so doing used the language quoted by counsel as applicable to a discovery, to wit:

It would be absurd to require a shaft to be sunk on each location in a consolidated claim, where one shaft would suffice for all locations; and yet that is seriously argued by counsel, and must be maintained to uphold the judgment below.

Preceding this language of the court is given quite fully the reasons why "it would be absurd to require" such work. The question of discovery was not suggested.

Chambers v. Harrington was wholly on the question of annual expenditures for labor on claims held in common as provided for by section 2324, Revised Statutes, and the court held (syllabus)—

Where several adjoining claims to mineral lands are held in common work for the benefit of all done upon any one of them in a given year to an amount equal to that required to be done upon all in that year meets the requirements of section 2324, Revised Statutes.

This was the issue in *Jackson v. Roby*, wherein the court announced the general doctrine that was followed in the *Chambers-Harrington* case.

In *Good Return Mining Company*, the question, so far as applicable to the case at bar, was similar to those quoted above, and those cases are referred to and followed.

The case of *McDonald et al. v. Montana Wood Company* (35 Fed. Rep.,

668), cited by counsel, was referred to in the decision of the Department, on review, in *Ferrell et al. v. Hoge et al.*, and the Department declined to be controlled by that decision.

The Department is not aware that any different rule has ever prevailed than that announced in *Ferrell v. Hoge*.

Counsel do not cite any authority in support of the assertion and research in this office fails to disclose any such. It seems to me that the official announcement by the Department that there must be a discovery of mineral upon any mining claim before the location thereof is nothing more or less than reiterating the plain and unmistakable intent of the statute.

The mining laws were originally intended, in my judgment, for the purpose of allowing the discoverers of valuable mineral to secure the right of possession and the nation's title thereto, and it makes no difference whether twenty acres is located by one person, forty acres by two persons, and so on, up to one hundred and sixty acres by eight persons; there must be a discovery of mineral in each and every instance on every twenty acres, the amount of acreage which each locator would be entitled to. The labor and improvements for development, after the discovery, may be done in common. The object of the statute in allowing an association of persons to take more than the individual was not, in my judgment, to avoid discovery or annual work, but solely for the purpose of permitting them thus to consolidate and join in one system of development for the convenient working of the land.

The language used by the court in *Smelting Company v. Kemp*, in meeting the objection of counsel to the consolidation of several placer locations in one application, on the ground that it would create a monopoly, is peculiarly applicable to this discussion. It said—

Every one at all familiar with the mineral regions, knows that the great majority of claims, whether on lodes or on placers, can be worked advantageously only by a combination among miners, or by a consolidation of their claims through incorporated companies. Water is essential for the working of mines, and in many instances can be obtained only from great distances, by means of canals, flumes, and aqueducts, requiring for the construction enormous expenditures of money, entirely beyond the means of a single individual. Often, too, for the development of claims, streams must be turned from their beds, dams built, shafts sunk at great depth, and flumes constructed to carry away the debris of the mine. Indeed, successful mining, whether on lode claims, or placer claims, can seldom be prosecuted without an amount of capital beyond the means of the individual miner.

If lands containing petroleum can be taken at all under the mineral laws, the law in all its features must be complied with. It was contemplated by Congress that lands valuable for mineral only should be taken as such, and in order to determine whether they fall within this classification, a discovery must be made.

The railroad company has filed a paper in the nature of an exception to your office ruling against it, claiming that its selection should not be canceled for conflict with the mineral entry, "for the reason that

petroleum is not mineral within the mineral exception to the Southern Pacific Railroad Company's grant."

It would have been better form, perhaps, for the company to have appealed from your office decision, but inasmuch as the applicant here treats the question as if raised by appeal, and inasmuch as it is a question of some importance, that it be determined, I have concluded to consider it on the company's objection.

The railroad company cites and relies on the case of *Dunham and Shortt v. Kirkpatrick*, 101 Penn. St., 36. That was an action of *quare clausum fregit* by Kirkpatrick for entering and boring for petroleum, and for cutting timber. It appears that Kirkpatrick was the owner of a tract of land which he had purchased from Wood *et al.*, by article of agreement by which he took and retained possession. Afterward the legal title was conveyed to him, but with the reservation: "Excepting and reserving all the timber suitable for sawing; also all minerals," etc. Dunham *et al.*, under a lease from the grantors of Kirkpatrick, for oil purposes, had entered upon the land, drilled a well and were taking oil therefrom. The question presented was whether the reservation of "all minerals" would include petroleum.

The defendants (plaintiffs here) who claim under a lease from the vendors, in the agreement above stated, contend that it is their right, under the reservation, to enter upon, and take from, the premises in said agreement described, all the petroleum, or mineral oil, that may be found therein. This contention can be sustained only under the hypothesis that the word "minerals" in the reservation includes petroleum. The court below refused to sustain the interpretation put upon the agreement by the defendants, and entered judgment on the case stated, for the plaintiff. In this we think it was right. The whole argument used for the purpose of convincing us that this decision is not correct is based on the allegation that petroleum is a mineral. It is true that petroleum is a mineral; no discussion is needed to prove this fact. But salt and other waters, impregnated and combined with mineral substances, are minerals; so are rocks, clays, and sand: anything dug from mines or quarries: in fine, all inorganic substances are classed under the general name of minerals: Bou. L. Dic.: Wor. Dic.: Dana's Geology: Grey's Botany. But if the reservation embraces all these things, it is as extensive as the grant, and therefore void. If, then, anything at all is retained for the vendor, we must, by some means, limit the meaning of the word "minerals." But the rule by which this may be done is well stated by Chief Justice Gibson in the case of the Schuylkill Navigation Co. v. Moore, 2 Wh., 477, as follows: "The best construction is that which is made by viewing the subject of the contract as the mass of mankind would view it; for," continues the learned Chief Justice, "it may be safely assumed that such was the aspect in which the parties themselves viewed it." . . . Certainly, in popular estimation, petroleum is not regarded as a mineral substance any more than animal or vegetable oil, and it can, indeed, only be so classified in the most general or scientific sense. How, then, did the parties to the contract under consideration, think and write? As scientists; or as business men, using the language and governed by the ideas of everyday life?

As we have before observed, if this reservation is to have a strictly scientific construction it is as extensive as the grant, hence, works its own destruction: On the other hand, if we adopt the popular understanding we cannot regard petroleum as a mineral. Moreover, we may be very sure that when Wood and Co. made their contract with Kirkpatrick, they did not intend to reserve the mineral oil that might afterward be found in the land, otherwise that intention would have been expressed

in no doubtful terms. They were, doubtless, at that time unaware of the character of the property as oil territory. But if they did entertain such an idea, and expected to reserve oil under the general term "mineral," they were mistaken, and should have known that they were using that word in a manner not sanctioned by the common understanding of mankind, hence, in a manner that could not be approved by the courts of justice.

It is asserted by counsel for applicants that the same court in a later case "squarely overrules the former decision upon the identical question at issue here." The case referred to is that of *Gill v. Webster* (110 Penn. St., 313). I cannot agree with counsel's contention. The cases are not identical in any sense, as I read them. The later case was one of trover and conversion for machinery removed from leasehold premises by the lessee. An act of the legislature of that State, in 1855, provided for the mortgaging of a leasehold of "any colliery, mining lands," etc., and the court held "that the act applied to and authorized a mortgage of a leasehold in oil land, although the act was passed before petroleum was discovered." In discussing the question the court says, as in the *Dunham* case, that petroleum is a mineral product; also that "lands from which it is obtained may with propriety be called mining lands." But this is solely for the purpose of making available the mortgage act, and has no reference to a grant such as contained in the former case, or as in the act of Congress making the grant to the railroad company.

If the decision in the *Dunham* case is to be accepted as an authority, then lands containing petroleum are not excluded from the grant which reserves therefrom all "mineral lands."

In my opinion, Congress did not have in contemplation at the time of the passage of the act the reservation of lands containing petroleum under the designation of mineral lands. In my view of the statute, it was only contemplated that lands containing the more precious metals enumerated in section 2320, Revised Statutes, gold, silver, cinnabar, etc., that should be excluded. In the case of *Tucker et al. v. Florida Railway and Navigation Co.* (19 L. D., 414), the question was as to whether land containing phosphates were excluded from the selection by the railroad company under the act of June 22, 1874 (18 Stat., 194), which gave it the right to select "from any public lands not mineral," etc. It was said in reference to previous railroad grants which contain the exception of mineral lands—

It would seem, therefore, that the word mineral is given a limited construction, and when this fact is taken into consideration with what has been before stated on the subject of mineral legislation, it would seem that the purpose of the word mineral, as used in the act of June 22, 1874, *supra*, was to except from selection, on account of said act, those lands containing valuable metals, such as gold, silver, cinnabar and copper. The word was not used in its broader sense, for the greater part of the earth contains mineral in some form, the value of which often depends on its location, or the date or advancement of science which makes known its uses.

I am clearly of the opinion that the word mineral, as employed in the act of June 22, 1874, *supra*, cannot be construed to include lands containing deposits of phosphate.

But it seems to me that the more serious question presented by this discussion is whether lands containing petroleum can be taken under the placer mining law. It would appear that if the lands are not to be excluded from the grant because they do not come within the classification of mineral lands as used in the granting statutes, as a corollary, they should be excluded from location and entry under the mining laws. If this question were an original proposition, I should have no hesitancy in determining that this class of lands should not be so taken. But the subject has been, indirectly, at least, before the Department several times, and while it has never been definitely decided, so far as I can ascertain, yet there seems to have grown up the idea that the rule prevails. An examination of the cases, however, will demonstrate the fact, I think, that there is no precedent for such belief.

The first mention of petroleum in connection with the mineral laws that I am able to find is in the case of *Maxwell v. Brierly* (9 C. L. O., 50), decided April 16, 1883, where the land sought to be taken was valuable for limestone. In discussing this question, after referring to *W. H. Hooper* (1 L. D., 560), Mr. Secretary Teller said that

limestone so found subjected the tract to the operation of the mining laws, as has been held under other rulings with respect to asphaltum . . . petroleum, slate and other substances, under like conditions.

The emphasis is mine, and this language would seem to imply that petroleum had been the subject of consideration previous to that case.

The next case is that of *Downey v. Rogers* (2 L. D., 707), decided December 8, 1883, which was an application by Rogers to enter four oil claims of one hundred and sixty acres each, against which Downey filed an adverse, alleging prior ownership and possession; that Rogers' publication was defective and that there was an error in one of the courses of survey. Mr. Teller, in deciding the matter, after referring to his former letter of January 30, 1883 (1 L. D., 56), wherein was allowed entries of land containing borax, etc., in certain named States and Territories, adds: "Whether or not the same ruling should apply to oil lands, is an undetermined question," and a hearing was ordered to determine the character and value of the land.

Thus it will be seen that the later expression of Mr. Teller seems to negative the expression in the former case that I have italicised.

This same application came before Mr. Secretary Lamar, and a decision was rendered by him December 16, 1885. (*Samuel E. Rogers*, 4 L. D., 284.) It came in the shape of a request for a patent which was based upon a report of a special agent to the effect "that the land is only fit for extracting petroleum." Mr. Lamar declined to direct the allowance of the entry, or to pass upon the question of good faith "and of the value of the improvements raised by the report of your special agent," and the case was returned to your office. It is stated in the opinion that the investigation was ordered for the purpose of determining 'whether or not the same ruling as in letter of January 30, 1883, should apply to oil lands.'

So that it would seem, as far as this case is concerned, it was still an undetermined question at the date of the Rogers decision whether oil lands could thus be taken.

Prior to the rendition of this judgment, however, July 22, 1885, the case of *Rogers v. Jepson* (4 L. D., 60), was considered by Mr. Lamar. This case was a contest between an agricultural claimant and an oil location, and as a result of the hearing it was decided in favor of the former. After deciding that the burden of proof was on the contestant and that he had failed to make out his case, the opinion says:

A careful examination of the testimony shows that the contestant has failed to establish the character of the land as oil land, and, therefore, subject to location under the mineral laws.

The inference would be, perhaps, from the expression I have italicised, that if he had established the oil character of the land it might have been subject to a mineral location. But this negative statement of such a proposition which is purely *obiter* is not in itself sufficient to be treated as a precedent.

The only other case that I have found bearing upon the question is that of *Piru Oil Company* (16 L. D., 117). It is not stated in the opinion whether the mining claims were taken and held on account of oil or not, and the only indication that they were is derived from the names applied to the several claims. But the direct question as to whether oil lands could be taken under the mineral laws was not discussed or decided. It was an *ex parte* case, and the only question involved was whether a subsequent homestead entry irregularly allowed for part of the land should impair the rights of the mineral claimant, and the decision was that a hearing be ordered for the purpose of permitting the agricultural claimant to show why his entry should not be canceled.

After a diligent search among the reported cases these are all the decisions I have found bearing upon this question, and I do not think it can be seriously claimed that either of these can be accepted as an authority for the proposition that lands containing oil can be taken under the mineral laws. It is true, scientifically speaking, that petroleum is a mineral. But the same may be said of salt and of phosphates, and of clay containing alumina, and other substances in the earth. Yet it does not follow that they come within the meaning of the mineral statutes, and it has been decided that they do not. (See *Salt Bluff Placer*, 7 L. D., 549; *Southwestern Mining Company*, 14 Id., 596; *Jordan v. Idaho Aluminium M. & M. Co.*, 20 Id., 500.) It would seem as if oil was regarded by science as a mineral only because of its inorganic character, as a sort of distinction from a vegetable product.

But be that as it may, I am unable to agree that it falls within the contemplation of the mineral laws, and that it may be located and entered as a placer mine.

For these reasons I think the entry of the *Union Oil Company of California* should be canceled, and to this extent your office judgment is modified, but in all others is affirmed.

SWAMP LANDS—SURVEYOR'S RETURN—SECTION 2488 R. S.

STATE OF CALIFORNIA (ON REVIEW).

The approved formula "swamp and overflowed lands unfit for cultivation" employed in the returns of the surveyor-general, follows the words of the statute, and must be taken as sufficiently indicating the character of the land, without the additional statement that the lands were swamp and overflowed at the date of the swamp grant.

The acceptance by the Commissioner of the General Land Office of a survey, as returned by the surveyor-general, with directions that the plat shall be filed in the local office, amounts to an approval of such survey.

Under the first paragraph of section 2488 R. S., the return of land as swamp and overflowed, by the U. S. surveyor-general for the State of California, is conclusive evidence as to the character of the land so returned and represented as such on the approved township surveys and plats; and lands thus returned must be certified to the State as inuring thereto under the swamp grant.

The decision of March 17, 1892, 14 L. D., 253, vacated.

Secretary Smith to the Commissioner of the General Land Office, August 27, 1896. (W. C. P.)

I have considered the motion filed in behalf of the State of California for review of departmental decision of March 17, 1892 (14 L. D., 253), rejecting the application of said State to have the lands embraced in what is known as the Norway survey on the borders of Lake Tulare, certified to it as swamp and overflowed lands.

Surveys of townships and plats of townships in the neighborhood of Lake Tulare were made prior to 1880, and certain lands adjacent to the margin of the lake, as shown upon the plats of those surveys were returned as "swamp and overflowed" and were held to have passed to the State under the swamp land grant. In 1880 upon request of the governor of California, another survey was made by deputy surveyor Creighton, which showed a different line as the margin of said lake. The lands within this survey were returned as "swamp and overflowed" and were awarded to the State (1 L. D., 320). Afterwards, in 1884, upon the request of purchasers or intending purchasers from the State, still another survey was made in this neighborhood, by which the line marking the margin of the lake was given another location and the lands between the Creighton line and the line shown by this last survey (made by deputy surveyor Norway) were returned as "swamp and overflowed."

The application of the State to have these lands certified as passing to the State under the swamp land grant was refused (14 L. D., 253). The history of this matter is given quite at length in that decision, and it is unnecessary to repeat it here.

Many errors in said decision are alleged in support of the motion for review, but the main objection presented is as to the jurisdiction of this Department. It is contended by oral argument and by printed briefs, that the law vests in the United States surveyor general for the State

of California full jurisdiction to determine what lands are swamp and overflowed, and that this Department is by the act of July 23, 1866 (14 Stat., 218), relieved of all duties and all responsibilities connected with the adjustment of the swamp land grant to that State.

The provisions of said act of 1866 which relate to the swamp land grant are incorporated in section 2488, Revised Statutes, which reads as follows:

It shall be the duty of the Commissioner of the General Land Office, to certify over to the State of California as swamp and overflowed lands, all the lands represented as such upon the approved township surveys and plats, whether made before or after the 23d day of July, 1866, under the authority of the United States.

The surveyor-general of the United States for California, shall under the direction of the Commissioner of the General Land Office, examine the segregation maps and surveys of the swamp and overflowed lands, made by said State; and where he shall find them to conform to the system of surveys adopted by the United States, he shall construct and approve township plats accordingly, and forward to the General Land Office for approval.

In segregating large bodies of land, notoriously and obviously swamp and overflowed, it shall not be necessary to subdivide the same, but to run the exterior lines of such body of land.

In case such State surveys are not found to be in accordance with the system of United States surveys, and in such other townships as no survey has been made by the United States, the Commissioner shall direct the surveyor-general, to make segregation surveys, upon application to the surveyor-general, by the governor of said State, within one year of such application, of all the swamp and overflowed land in such townships, and to report the same to the General Land Office, representing and describing what land was swamp and overflowed, under the grant, according to the best evidence he can obtain.

If the authorities of said State, shall claim as swamp and overflowed, any land not represented as such upon the map or in the returns of the surveyors, the character of such land at the date of the grant September twenty-eight, eighteen hundred and fifty, and the right to the same shall be determined by testimony, to be taken before the surveyor-general, who shall decide the same, subject to the approval of the Commissioner of the General Land Office.

The purpose and effect of this legislation was considered by the supreme court of the United States in the case of *Tubbs v. Wilhoit* (138 U. S., 134). Speaking of section four of the act of 1866, it was said:

By this section, rules and methods were established for the identification of swamp and overflowed lands in California, which superseded all previous rules or methods for that purpose.

Farther on in the same decision it was said as to the duties of your office under said law:

Whether the township plat be considered as approved by the action of the surveyor-general or by the subsequent recognition of its correctness by the Commissioner of the General Land Office, when approved, the duty of the Commissioner to certify over to the State the lands represented thereon as swamp and overflowed, was purely ministerial. He could not defeat the title of the State by withholding such certificate, nor could he add to the title by giving it. Its only effect would have been to facilitate the proof of the vesting of the title in the State by its additional recognition of the land as that covered by the congressional grant of 1850. It would not have added to the completeness of the title.

In *Heath v. Wallace* (138 U. S., 573), the court referring to the fourth section of the act of 1866, used the following language:

As held in *Tubbs v. Wilhoit*, *supra*, this section of the statute established rules or methods for the identification of swamp and overflowed lands in California, which superseded all previous rules or methods for that purpose. The several rules or methods provided for were intended to meet any emergency that might arise, and thus give to the State all the swamp and overflowed lands within her limits. The method provided in the first clause was but one of several specified in the section. But one thing was required to be shown under this clause—only one kind of evidence as to the character of the lands was necessary—in order to give the State the right to demand the certification of them over to her as swamp and overflowed lands; and that evidence the United States furnished in the plat of the survey of the township in which the lands were situated. An inspection of the township plat would show whether or not any lands in the township were returned as swamp and overflowed. If they were, that designation was sufficient and conclusive evidence, under the first clause of section 4 of the act, to establish the title of the State to them.

In many cases decided both before and since these decisions of the supreme court, this Department has announced practically the same views, as to the effect of the returns of the surveyor-general. (*Central Pacific R. R. Co. v. California*, 2 C. L. L., 1052; *California v. United States*, 3 L. D., 521; *California v. Martin*, 5 L. D., 99; *Davis v. California*, 13 L. D., 129.)

The correctness of these views is not questioned in the decision under consideration, but it is affirmed. The survey in question is not a segregation survey, but is a survey made under the authority of the United States, and therefore is of the character contemplated by the first paragraph of section 2488 of the Revised Statutes. It is immaterial therefore whether it was requested by the governor of the State or not.

In the decision under consideration it is said that the return of the surveyor-general does not allege that the lands in question were swamp and overflowed at the date of the grant, and that therefore that return cannot be accepted as conclusive evidence of their swampy character at that date. The law in question prescribes a rule of evidence which is binding upon and conclusive against the grantor, the United States. This rule was not, however, conclusive against the grantee, it being provided that if the State should claim as swamp and overflowed any land not so represented in the plats, the character of the land at the date of the grant should be determined by testimony. Because of this the act of 1866, which was remedial in character, is to be strictly construed upon this point, and the return of the surveyor-general must clearly show the land to be of the character contemplated by the granting act. The designation must be clear and explicit and nothing is to be placed thereunder by implication. *Heath v. Wallace*, *supra*.

On these plats the mark used to indicate swamp lands is found in the body of the plat, while on the margin is found an entry reading as follows:

Area of swamp and overflowed lands unfit for cultivation surveyed in 1880.... acres.
Area of swamp and overflowed land unfit for cultivation surveyed in 1884..... acres.

On the plat of township 23 S., Range 21 E., the entry is:

Area of swamp and overflowed lands unfit for cultivation..... 16568.56 acres.

The survey of 1880 did not include any portion of this township. It seems evident that the words "surveyed in 1884" were simply added to the marginal note for the purpose of indicating the amount of lands covered by said survey of 1884, which together with the amount included in the survey of 1880 made up the total amount of swamp lands in the township.

The formula "Swamp and overflowed lands unfit for cultivation" has been in use for the designation of lands which passed under the swamp land grant since the date of that grant. The fact that it was not stated on these plats that the lands were swamp and overflowed at the date of the grant is not a defect. The return made is in the words of the statute, and the formula used is that which has been sanctioned and approved by your office ever since the date of the grant. It is sufficient to meet the requirements of the statute.

The plats in question, indicating all the lands thereon as swamp and overflowed were approved by the surveyor general and transmitted to your office with his letter of October 14, 1884. The action of your office thereon is shown by letter of October 27, 1884, to the surveyor-general, in which the following language is used:

The returns of the survey executed by W. H. Norway deputy surveyor under his contract, No. 337, dated December 3d, 1883, and received with your letter dated October 14, 1884, have been examined and accepted.

You are hereby authorized upon receipt hereof to transmit the triplicate plats to the proper United States land office.

If the approval of the Commissioner of the General Land Office be necessary this action accepting the plats, and authorizing their filing in the local land office, together with their official use after that time is sufficient to meet such requirement. In the case of *Wright v. Roseberry* (121 U. S., 488, 517), the court held that official use of a plat constituted approval thereof.

We have in this case a survey made under the authority of the United States, the approval of the plats thereof, and the representation upon those plats that the lands in question are swamp and overflowed. All the facts and conditions necessary to conclusively establish under said law, as against the United States, the character of this land to be swamp and overflowed exists here. The facts exist on the face of the record, which make it the duty of the Commissioner of the General Land Office, to certify the land to the State.

The decision in question treated this act as constituting the surveyor general a special tribunal to determine what land in the State of California passed under the swamp land grant, and the arguments in support of the motion for review are found along the same line. This treatment is not strictly correct. That act as said by the supreme court in *Heath v. Wallace*, prescribed rules or methods for the identifi-

cation of swamp lands in California, that is, it established a rule of evidence by which the Department, as the tribunal to determine the identification of lands, passing under said grant, is conclusively bound. The rule announced in the decision in question, that the judgment of a special tribunal is final when acting within its powers, but is not binding when it goes beyond the scope of its authority, is not to be disputed. That rule does not, however, seem applicable in this case. The question here is not as to the finality of a judgment of the surveyor-general, but as to the character of his return as evidence. The law says that return is conclusive evidence, as to the character of the land to which it relates as against the United States.

This evidence is furnished by the grantor, and hence it seems not improper to make it conclusive as against it. We may doubt the propriety of the legislation, and entertain the belief that its provisions are more liberal in favor of the State than a due and just appreciation of the best interests of the government would dictate, but we are not for that reason justified in disregarding its provisions. It is not, however, certain that this law conferred any great benefit upon the State, except in a way of making possible a speedy identification of the lands granted.

The State had not enjoyed to the full extent the benefits of the grant. The condition of this class of lands was changing rapidly by reason of cultivation and the appropriation of water for irrigation purposes incident upon the rapid influx of settlers in the years immediately following the discovery of gold. The task of establishing the true character of any tract of land in the year 1850 was difficult because of the changing population and was becoming more difficult each year. Under these circumstances Congress deemed it necessary to afford the State relief and provide a method for the speedy adjustment of the grant. The act in question is the result of this conclusion.

After a full examination of the questions presented, I have concluded that the evidence furnished by the records conclusively establishes the fact that this land is swamp and overflowed, and that the petition of the State for certification must be granted.

The decision complained of is therefore set aside and the application of the State will be allowed.

CONTEST—DEFAULT—PROCEEDINGS UNDER SECOND CONTEST.

HEINRICHS *v.* BAKKENE ET AL.

The failure of the local office to dismiss a contest, for default on the part of the contestant, will not operate to prevent the filing of a second contest, and the issuance of notice thereon, nor interfere with any rights attaching thereunder.

Secretary Smith to the Commissioner of the General Land Office, August
(W. A. L.) 27, 1896. (J. A.)

The land involved herein is the NE. $\frac{1}{4}$ of Sec. 18, T. 134 N., R. 46 W., St. Cloud, Minnesota, land district.

June 3, 1882, Knudt O. Bakkene made timber culture entry for said tract. December 6, 1892, John Lloyd filed an affidavit of contest against said entry, alleging failure to comply with the requirements of the timber culture law. Notice was issued and hearing was set for June 17, 1893, at which time neither of the parties appeared and no action was taken by the local officers.

July 11, 1893, Joseph Heinrichs filed affidavit of contest against the entry on the same charges that had been brought by Lloyd. The local officers thereupon, on the same date, issued notice on Heinrich's contest, setting a hearing for September 7, 1893.

On July 13, 1893, Bakkene's entry was canceled by relinquishment executed July 12, 1893, and on the same day Lloyd made homestead entry for the tract.

On Heinrichs' motion, hearing on his contest was continued to September 30, 1893, and it was ordered that testimony be taken before a notary public September 27, 1893. On the last mentioned date Heinrichs submitted evidence against Bakkene's entry showing that no trees had ever been planted on the land.

March 26, 1895, the local officers rendered decision stating that Lloyd was allowed to make homestead entry on July 13, 1893, immediately after the cancellation of Bakkene's entry, for the reason that through an oversight the contests brought by Lloyd and Heinrichs had not been entered on the records. They found that Bakkene's relinquishment was not executed as a result of Heinrichs' contest and therefore recommended the dismissal of the contest.

Heinrichs appealed to your office, contending that the preference right of entry should have been awarded to him on Bakkene's relinquishment.

Your office rendered decision July 6, 1895, holding that because of the failure of the local officers to dismiss Lloyd's contest it remained pending until the date of Bakkene's relinquishment; that it was error to order a hearing on Heinrichs' contest, which was subject to that of Lloyd; and that Heinrichs can not be heard to complain, as his contest abated by operation of law on the relinquishment of Bakkene's entry. Lloyd's entry was therefore allowed to remain intact.

Heinrichs' appeal from said decision brings the case before me for consideration.

Through the negligence of the local officers no record was made of Lloyd's contest against Bakkene's entry. As far as the record shows, Heinrichs, at the time of filing his contest, knew nothing of Lloyd's prior contest. It does not appear when he was informed of Bakkene's relinquishment and Lloyd's entry.

The decision of your office holds Lloyd's entry of July 13, 1893, intact, merely for the reason that through the failure of the local officers to dismiss his contest on his default made June 17, 1893, the same was still of record at the date of Bakkene's relinquishment. Had the local officers dismissed his contest, as they should have done, there would have been no question that Heinrichs was entitled to the right of entry.

Lloyd contends that the failure of the local officers to dismiss his contest gave him the status of a prior contestant at the date of Bakkene's relinquishment; and that his entry can not be disturbed, for the reason that he was, as prior contestant, entitled to the right of entry.

After his failure to appear on June 17, 1893, the date set for hearing on his contest, and until July 11, 1893, the date of issuance of notice of Heinrichs' contest, Lloyd could still, because of the failure of the local officers to dismiss his contest, have asked for the issuance of a new notice of hearing. He was still a contestant. But the issuance of notice on July 11, 1893, on Heinrichs' contest, gave Heinrichs the status of prior contestant, although his affidavit of contest was filed subsequent to that of Lloyd. The failure of the local officers to dismiss the first contest for default should not be allowed to prevent the filing of a second contest, nor to interfere with any right attaching thereunder.

In the case of *Hanscom v. Sines et al.* (15 L. D., 27), the Department held that (syllabus):

A pending contest precludes action on the subsequent application of another to proceed against the entry in question.

However, the mere pendency of a contest, where the contestant is not actually proceeding to secure the cancellation of the entry, does not come within the spirit of that decision. The pendency of a contest is, when the contest is subject to dismissal because of failure to appear at the hearing, no bar to the issuance of notice on a subsequent contest. Your office erred in holding that Heinrichs could not be permitted to proceed against Bakkene's entry before the final disposition of Lloyd's contest. Lloyd could not, after July 11, 1893, have moved for the issuance of notice on his contest. His contest was, after that date, subject to that of Heinrichs.

On July 13, 1893, the date of Bakkene's relinquishment, Heinrichs was a prior contestant. Whether the relinquishment was filed as a result of the contest does not enter into the consideration of the case. He has proved his charges against Bakkene's entry and is therefore entitled to the preference right of entry (*Jackson v. Stults*, 15 L. D., 413).

Lloyd's entry must be held subject to Heinrichs' right of entry. The decision appealed from is accordingly reversed.

ABANDONED MILITARY RESERVATION—ACT OF AUGUST 18, 1856.

THE STATE OF FLORIDA.

The act of July 5, 1884, providing for the disposition of abandoned military reservations is not applicable to a reservation restored to the public domain prior to the passage thereof, and as section 4 of said act repeals in terms the act of August 18, 1856, with respect to such reservations in the State of Florida, it therefore follows that in case of such a reservation in said State, that is restored to the public domain prior to the act of 1884, and to which no rights had arisen under the repealed statute, there was no statutory authority for the disposal thereof until the enactment of August 23, 1894, and that the provisions of said act, and the amendatory act of February 15, 1895, must now govern the disposition of said lands.

Secretary Smith to the Commissioner of the General Land Office, August 27, 1896. (J. I. P.)

On the 3rd of February, 1894, August 10, December 1, and December 4, of the same year, the State of Florida through its agent, one W. W. Dewhurst, made application at the Gainesville land office in the State of Florida, to locate with Palatka scrip, certain tracts of land within the limits of the Fort Jupiter abandoned military reservation as follows:

On the first named date: the E $\frac{1}{2}$ NE $\frac{1}{4}$ and the NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Sec. 24, and lots 4 and 7 and the E $\frac{1}{2}$ SE $\frac{1}{4}$ of Sec. 25, all in T. 40 S., R. 42 E.; also lots 1, 2 and 3 in Sec. 36, T. 40 S., R. 42 E.; and lots 1, 2 and 3 in Sec. 19, T. 40 S., R. 43 E. and lot 4 and the W. $\frac{1}{2}$ NE $\frac{1}{4}$ and E $\frac{1}{2}$ SW $\frac{1}{4}$ of Sec. 30 and lot 3, Sec. 31, T. 40 S., R. 43 E.

On the second named date: lots 2 and 5 Sec. 25, lot 3, Sec. 26, and lots 6 and 7, Sec. 36, in T. 40 S., R. 42 E.

On the third named date: the E. $\frac{1}{2}$ SE $\frac{1}{4}$ of Sec. 25, lot 3 of Sec. 26 and lots 1 and 2 of Sec. 36, T. 40, R. 42 E. and the W. $\frac{1}{2}$ of the NE $\frac{1}{4}$ of Sec. 30, T. 40, R. 43 E.

On the last named date: the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 24, lot 6 of Sec. 25 and lot 4 of Sec. 26, T. 40 S. R. 42 E. and lot 1, Sec. 19 and lots 1, 2 and 3, Sec. 30, T. 40, S., R. 43 E.

Each of these applications was rejected by the local officers for the reason that the lands within the limits of said reservation could only be disposed of under the act of July 5, 1884 (23 Stat., 103). From each of said rejections the State of Florida through its agent appealed to your office, which, by its decision of June 26, 1895, affirmed said decision of the local officers, and held that the land within the limits of said reservation could be disposed of only under the act of August 23, 1894 (28 Stat., 491), as extended by the act of February 15, 1895 (28 Stat., 664). An appeal from that decision by the State brings the case here. Since the case has been here a relinquishment has been filed by the State as to lots 2 and 3 of Sec. 19 and lot 1, Sec. 30, T. 40, R. 43, and there has also been received a protest from the Commissioner

of Agriculture of said State against the attempt to locate said scrip on lot 3, Sec. 31, T. 40 S., R. 43 E., which is covered by the homestead entry of George Proctor.

The Fort Jupiter military reservation was established by executive order of May 14, 1855, and was relinquished and turned over to the Interior Department for disposition under the act of August 18, 1856 (11 Stat. 87), on the 16th of March 1880, with the exception of a certain described tract reserved for light-house purposes.

At the time when the State made its first application to locate said Palatka scrip, to wit: on February 3, 1894, the rule of the Department as established by its decisions was that lands within the limits of an abandoned military reservation having the status of this one could be disposed of only under the act of July 5, 1884, *supra*. Hence the rejection by the local officers of said application was in accordance with the departmental rule at that time. But by its decision of July 24, 1894, in the case of Mather *et al. v. Hackley Heirs* on review (19 L. D., 48), the Department changed its former ruling and held that the disposal of lands within a military reservation in the State of Florida, abandoned and restored to the public domain prior to the passage of the act of July 5, 1884, *supra*, is governed by the provisions of the act of August 18, 1856 (11 Stat., 87). That decision applied apparently to this reservation. And, while the action of the local officers in rejecting the application of the State on February 3, 1894, was in accord with the rule then in vogue, yet the decision above referred to, in effect, held that rule to be without authority of law.

When the second application of the State was made, the rule under which the local officers rejected it and under which they acted in the first instance had been abrogated by the decision in the case of the Hackley Heirs, *supra*.

On November 22, 1894, the Department by its decision (19 L. D., 477), held that the lands in the abandoned Fort Jupiter military reservation in Florida, could be disposed of only under the act of August 18, 1856, unaffected by the act of August 23, 1894, above cited. It is true that immediately after the rendition of that decision your office was verbally instructed to suspend all disposition of lands within the limits of said reservation, pending the action by Congress in certain legislation, relative thereto, then before it; that the legislation in question resulted in the act of February 15, 1895, *supra*, and that on June 17, 1895, this Department by letter of that date, directed your office to discontinue the suspension verbally ordered as stated and to proceed to dispose of said lands under the act of August 23, 1894, as extended by the act of February 15, 1895, *supra*. But the decision of November 22, 1894, *supra*, was in no wise affected by the proceedings above detailed. It was allowed to stand, and if it is sound, it must be held to have established a rule of property concerning the acquisition of title to these lands by which the Department is bound. The third and fourth appli-

cations of the State were made within two weeks after the rendition of that decision.

Referring to the decision of the Department in the case of *Mather et al. v. Hackley Heirs*, (on review) *supra*, it was there held:

The act of July 5, 1884, providing for the disposition of abandoned military reservations, is limited in its application to military reservations that were in existence at the date of its passage, or that should be thereafter created.

As the Fort Jupiter reservation was not in existence July 5, 1884, having been restored to the public domain prior to that time, the lands within its limits would not be disposed of under the act of that date. That is very clear. But the decision goes further and holds in effect:

The disposition of a military reservation in Florida, abandoned and restored to the public domain prior to the passage of the act of July 5, 1884, is governed by the provisions of the act of August 18, 1856, and under said act the Commissioner of the General Land Office was authorized to dispose of such lands either at public sale, or under the homestead and pre-emption laws.

The holding is sound in my judgment so far as it applies to the lands in the Fort Brooke reservation which were in controversy in the case of *Mather et al. v. Hackley Heirs* as the rights there adjudicated attached under the act of August 18, 1856.

In the Fort Jupiter case, *supra*, the above holding is cited with approval, and is applied to the lands within the limits of the Fort Jupiter reservation, which it is held must be disposed of under the act of August 18, 1856, for the reason that it was restored to the public domain and the control of the Secretary of the Interior, prior to the act of July 5, 1884, *supra*. That decision is clearly erroneous. I do not now know how Sec. 4 of the act of July 5, 1884, *supra*, escaped observation when the Fort Jupiter case was considered, but that it did so is apparent. That section, without any reservation whatever repeals the provisions of the act of August 18, 1856.

I have already shown that as held, in the case of *Mather et al. v. Hackley Heirs*, *supra*, the lands within the Fort Jupiter reservation could not be disposed of under the act of July 5, 1884. The effect of the repeal by Sec. 4 of said act of the provisions of the act of August 18, 1856, was that it left no law in existence under which the lands in the Fort Jupiter reservation could be disposed of, unless it be held that said lands came within the purview of the act of June 9, 1880 (21 Stat. 171) under which this Palatka scrip was issued, which provides that said scrip may be located on any vacant and unappropriated public lands of the United States in Florida. There can be no question that on February 3, and August 10, 1894, when the State made its application to locate this scrip, these lands were "vacant and unappropriated", but when the applications to locate were made December 1 and 4, 1894, the disposition of these lands was controlled by the act of August 23, 1894 *supra*, and those applications must in any event be rejected. But admitting for the sake of argument that the applications of February

Upon appeal your office decision of June 25, 1894, affirmed the action of the local officers, and upon further appeal this Department, in the decision now sought to be reviewed, affirmed that action, and upon motion for review, on the date given, March 11, 1896, that action was adhered to.

In the motion for re-review it is urged that notice to Dodge's counsel was given prior to the day fixed in the decision complained of, to-wit, on February 10, 1891, and counsel cites the following records of your office:

That on February 15, 1890, Britton and Gray addressed the following letter:

Hon. JOHN W. NOBLE,
Secretary of the Interior,
Washington, D. C.

SIR: We file herewith our printed argument (three copies) in the case of the United States v. J. B. Haggin *et al.*, involving Visalia, California Desert Land entries. . . .

Very respectfully,

BRITTON & GRAY,
Attys. J. B. Haggin et al.,
Desert Entrymen.

And that the brief began as follows:

This case involves one hundred and sixty three desert land entries in Kern County, California, aggregating about 40,000 acres of land.

and it is signed (page 69) "Britton & Gray, Attorneys for Desert Entrymen."

In the argument of Britton and Gray submitted at the oral hearing in this cause they state that in 1890 they were attorneys for George S. Dodge and that they received from the Commissioner of the General Land Office a letter dated February 10, 1891, to the following effect:

Referring to your appearance for a large number of parties whose entries were included in office letter of September 28, 1877, suspending all D. L. E. from No. 1 to 337 inclusive made in the Visalia, Cal. land office, you are advised that by letter of even date to the register and receiver at Visalia, said order was revoked, and a number of applications to contest certain of the entries, were returned for appropriate action.

The question presented for determination is whether the notice shown to Britton and Gray was binding upon George S. Dodge, and inasmuch as there is no dispute over the question that notice to counsel is notice to the client, the question raised resolves itself into one of the sufficiency of the notice shown. The maxim "*id certum est quod certum reddi potest*" does not apply to questions of pleading, and therefore it can not be argued that one can look outside of the notice (*supra*) into the letter to the register and receiver of the Visalia land office to supply defects, if any, in the notice received by Britton and Gray. It has been held by this Department that it is not necessary to send a copy of a decision to local counsel. The case that has gone furthest on this question is that of *Weed v. Sampsel* (19 L. D., 461), the syllabus of which case is as follows:

Written notice from the General Land Office to the resident attorney of record in a case that "action has this day been taken" therein, is sufficient notice of an adverse decision.

The rule that requires a copy of the decision to accompany the notice thereof is not applicable where the notice is sent by the General Land Office to attorneys of record resident in Washington.

The notice given in that case was as follows:

WASHINGTON, D. C., *March 30, 1893.*

MESSRS. PADGETT AND FORREST,

Attorneys-at-law, Washington, D. C.

GENTLEMEN: As attorneys for Edwin A. Weed in the matter involving lot 9, block 56, Oklahoma, you are advised that action has this day been taken in the case of Edwin A. Weed *v.* John A. Sampsel. Reference is had to your letter of May 26, 189-.

Very respectfully,

EDWARD A. BOWERS,

Acting Commissioner.

The distinction between that case and this appears to be as follows:

That in the notice shown in the case at bar the name of the case does not appear, nor is there a description of the tracts of land; whereas in the case (*supra*) the title of the case is given with a description of the tract involved. It further appears from the decision itself that the point upon which counsel in that case urged the insufficiency of the notice was as follows (page 462):

Counsel for Weed contend at length, that your office should have notified them that a "decision" had been rendered, and not that an "action" had been taken. I fail to see any force in this position in view of the fact that the two words are often used interchangeably in the rules of practice and in the departmental decisions.

Recurring, therefore, to the notice given in this case, it appears to be valueless by reason of its uncertainty.

Subsequent to the hearing counsel for the petitioner furnished a copy of the letter of September 25, 1891, of your office, to the register and receiver at Visalia, California, in which it appears that in the case of Cottle *et al. v.* George S. Dodge, being an application to contest the entry of the defendant, the following appears:

The affidavits of contestant fail to show that the tract was non-desert at the date of the entry. The said entry was one of the number suspended by order of September 28, 1877, which order was revoked by office letter "H" of February 10, 1891, and this office, by its decision of July 30, 1891, in the case of Vradenburg *v.* Orr, having held upon substantially a similar state of facts that the entrymen should be allowed three years in which to comply with the law, exclusive of the period of suspension, the charge of failure on the part of Dodge to comply with the law was premature.

On the same day it appears that the following letter was addressed:

MESSRS. BRITTON AND GRAY,

Attorneys-at-law, Washington.

SIR: Referring to your appearance for the defendant in the case of F. L. Cottle, E. E. Cottle and J. D. Rush *v.* G. S. Dodge, involving desert land entry No. 2, Visalia, California, land district, you are hereby notified that by letter of this date directed to the local officers said case was dismissed and the case closed.

Respectfully,

W. M. STONE,

Assistant Commissioner.

It is urged that this showing is sufficient notice. All the objections that exist to the prior notice exist to this notice. The notice to Britton and Gray gives the title of the case and the number of the desert land entry and states that the contest initiated by other parties against this entry had been canceled and refers to the corresponding letter of September 25, 1891, to the register and receiver, which in turn refers to the revocation of the suspension by referring to office letter "H" of February 10, 1891. The petition for re-review is therefore denied.

COAL LAND—PROOF AND PAYMENT—ADVERSE CLAIM.

OUIMETTE v. O'CONNOR (ON REVIEW).

On the failure of a coal claimant to perfect title within the statutory period the work done by him inures to the benefit of a valid adverse claim then asserted for the land involved.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 28, 1896. (J. A.)

March 25, 1895, your office rendered decision in the above entitled case, dismissing Ouimette's protest against O'Connor's final proof for the land in controversy, rejecting his coal declaratory statement, and suspending O'Connor's entry for further consideration in the event of said decision becoming final.

On Ouimette's appeal said decision was, by departmental decision of May 13, 1896 (22 L. D., 538), reversed, and you were instructed as follows:

As the proceedings before the local officers appear to have been unskillfully conducted, and as the record before me is unsatisfactory, both parties should be given an opportunity to submit evidence in support of their respective claims. You will therefore direct the local officers to order a hearing between Ouimette and O'Connor at which O'Connor will be allowed to show whether Bridges (the former claimant) had opened a vein of coal on the land prior to the filing of his relinquishment, October 2, 1894, and at which the parties may introduce such further evidence as to them seems proper.

By letters of June 11, and July 1, 1896, your office transmitted motions for review of said decision, filed by Ouimette and O'Connor, respectively. Ouimette's motion was filed in your office June 5, and O'Connor's motion was filed in the local office June 16, 1896. By letter of July 27, 1896, your office transmitted a motion filed by Ouimette in the local office July 17, 1896, to dismiss O'Connor's motion for review on the grounds,—

1. That it is not accompanied by an affidavit that it was made in good faith and not for the purpose of delay, and

2. That the copy of the motion served on Ouimette June 16th was not accompanied by a copy of the required affidavit.

Attached to O'Connor's motion for review is an affidavit executed June 17, 1896, the day after the filing of the motion, that the motion is

made in good faith, and not for the purpose of delay. It was not necessary under rule 114 of practice to give Ouimette notice of the motion for review. Ouimette's motion to dismiss is therefore denied.

O'Connor's motion for review consists of a twenty-five-page argument. The grounds for the motion, set out on the first page of the argument, are as follows:

First: Because it appears that material facts, in the case, have been misapprehended, and therefore, have not received due consideration.

Second: Because the conclusions reached, and the decision rendered in the case are not sustained by law, and the practice of the Department.

None of the material facts which it is alleged have been misapprehended are specified in the assignments of error. The motion is denied for the reason that it does not conform to Rule 114 of Practice as amended June 1, 1894, which provides that "each motion must state concisely and specifically, without argument, the grounds upon which it is based."

Ouimette's motion for review assigns errors as follows:

First: In finding that Charles S. Bridges, the former claimant, relinquished his coal declaratory statement.

Second: In finding that Charles S. Bridges made no assignment of his right to purchase to Ouimette.

Third: (a) In holding that Ouimette acquired no right by his purchase of Bridges' improvements; (b) in holding that immediately upon the filing of Bridges' relinquishment (which was never filed) the work done by him on the land inured to O'Connor's benefit, if O'Connor's claim was valid.

Fourth: In allowing O'Connor at the hearing to be had "to show whether Bridges had opened a vein of coal on the land prior to the filing of his relinquishment, October 2, 1894."

The records of your office show that Bridges did not relinquish his coal declaratory statement October 2, 1894, as stated in said departmental decision of May 13, 1896. He filed his statement August 28, 1893, alleging settlement on the same date. The time within which he could have made proof expired by limitation on October 28, 1894.

Ouimette's motion is in effect a request that the statement made in said decision, that Bridges relinquished his coal declaratory statement October 2, 1894, be corrected. Under a strict observance of Rule 114 of Practice it would be necessary to notify the parties that the motion is entertained, and to allow them time within which to file argument. However, as a mistake of this nature may be corrected upon the suggestion of one of the parties, it is not deemed necessary to formally entertain the motion. As Bridges did not relinquish his coal declaratory statement, and as the time within which he could have made proof expired by limitation on October 28, 1894, the work done by him inured to O'Connor's benefit on that day, instead of October 2, 1894, if O'Connor's claim is valid. The finding that Bridges made no assignment of the right to purchase under paragraph 37 of the regulations of July 31, 1882, does not prejudice Ouimette's claim, as he did not make proof

and payment before October 28, 1894, but relies upon his claim initiated by the filing of his declaratory statement on October 2, 1894. O'Connor will be allowed, at the hearing ordered by departmental decision of May 13, 1896, to show whether Bridges had opened a vein of coal on the land prior to the date of the expiration of his right to purchase, October 28, 1894. To that extent the said decision is modified.

* * * * *

ALASKA LANDS—SURVEY—TRADE AND BUSINESS.

F. P. KENDALL.

The survey of a tract of land in Alaska, with a view to the purchase thereof, must be rejected, where the alleged trade or business to be transacted thereon is entirely prospective and no improvements have been placed on said land.

Acting Secretary Reynolds to the Commissioner of the General Land Office, August 28, 1896. (W. M. B.)

With your office letter of June 12, 1895, is transmitted the papers relating to survey No. 107, executed by Albert Lasey, U. S. deputy surveyor—under provision of sections 12, 13 and 14 of the act of March 3, 1891 (26 Stat., 1095)—of a tract of land containing 150.29 acres, situate on Coal Point, Kachemak Bay, Cook's Inlet, district of Alaska, made upon the application of F. P. Kendall, claimant, with a view to the purchase and entry of the tract embraced in said survey.

When the survey, and the plat made in conformity with the field notes thereof, were examined and considered in your office, the same were rejected, it appears, upon the grounds stated in your office letter of May 14, 1891, to the United States marshal, *ex-officio* surveyor-general, to the effect that the act of March 3, 1891, providing for the disposal of public lands in Alaska actually occupied for the purpose of trade or manufacture does not provide for the entry of lands for the purpose of securing rights of way for railroads, or for the entry of such lands where no business or trade is in operation thereon.

The applicant Kendall, appealing from the action of your office, as above indicated, files the following assignments of error, to-wit:

1. That the area of the tract surveyed is less than the quantity of land allowed by the act of March 3, 1891.
2. That the tract of land is bounded by navigable waters on the easterly and westerly sides.
3. That the claim is occupied for the purpose of carrying on a trade and the shipping of coal from the mines in the vicinity.

The deputy surveyor, in his report, to be found at the close of his field notes relating to this survey, states that:

The location in connection with the other locations on the spit (Coal Point) is valuable on account of its proximity to the coal fields on the Kenai peninsula, the spit forming a natural road bed for a railroad from the coal fields to the only anchorage at the extreme southern point of the spit.

The record submitted discloses the further material facts—a portion of which are set out in your office letter—that said claimant was a non-resident claiming possession of the land in question, but had never made any improvements thereon; that claimant and other parties—some of whom were adjoining locators—stated that it was their intention to build a railroad jointly on the spit, and that the purpose of the locators was to secure a right of way for such road.

Setting up an adverse claim under the *proviso* contained in section 12 of the said act of March 3, 1891, J. K. Luttrell, President of the Cooper Coal and Commercial Company, a corporation organized under the laws of the State of California, filed his written protest against the right of Kendall to purchase the tract described by survey No. 107, stating, among other things, in his affidavit of February 3, 1893, that his company had a right superior to that of Kendall to the land in question, and that the said company had for a long time claimed a right of way for a railroad from their coal mines on Kenai peninsula at the head of the spit, and across the tract located by Kendall, to their stores and place of business situate near the end or southeast extremity of said spit.

It appears that Coal Point is a long, narrow, gravelly spit, which the surveys thereof represent to be about five miles long and about one fourth of a mile wide at point of greatest breadth, extending about half way across Kachemak Bay.

It is very clear that claimant, as well as protestant, desires to secure a right of way for a railroad over the land involved, and that the tract possesses but little value for any other use that could be made of it, but the value thereof for the use or purpose named might prove to be very considerable since the coal at the mines in process of development on Kenai peninsula at the head of the spit can only conveniently reach deep water anchorage by being carried over the entire length of the spit to the southern extremity thereof.

There can be no doubt from the evidence furnished by the record that there was merely a location made—without actual occupancy for any purpose—of the tract in question by the claimant Kendall.

The unverified allegation of appellant that the tract “is occupied for the purpose of carrying on a trade and shipping of coal”, has sole reference to such business as is contemplated to be transacted when the railroad is constructed, which necessarily implies that the business proposed to be transacted is simply and entirely prospective.

Where a business or trade is thus prospective, and the land for the survey of which application is made—and upon which it is proposed to transact such business or trade—contains no “improvements” thereon at the time such application is made and survey executed, as is the case with respect to the survey under consideration, it is proper for your office to wholly reject the survey made under such circumstances.

For the reasons herein contained your office decision of May 14, 1895, rejecting survey No. 107 is hereby affirmed.

RAILROAD GRANT—SETTLEMENT ON DESERT LAND CLAIM.

WILSON v. NORTHERN PACIFIC R. R. CO.

A settlement on public land with intent to appropriate the same under the desert land law does not operate to except the land from the effect of a railroad grant.

Assistant Secretary Reynolds to the Commissioner of the General Land
(W. A. L.) *Office, August 28, 1896.* (A. E.)

This is an appeal by Wilson from the decision of your office, dated May 15, 1895, holding intact on the list the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 19, Tp. 13 N., R. 19 E., North Yakima, Washington, formerly listed by the Northern Pacific Railroad Company on September 26, 1888.

It appears from the papers in the case that the land involved in this controversy is within the grant to the Northern Pacific Railroad Company. The map of definite location opposite this tract became effective on May 24, 1884. Wilson settled upon the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ in 1883, with the intention of buying it from the railroad company. In 1884 he made entry, under the desert land act, of the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the forty acres adjoining that in dispute. On March 23, 1892, Wilson filed an affidavit claiming that his application to enter the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ had been refused, and asked for a hearing. This request was granted. At the hearing held Wilson does not show that he tendered, prior to the date of definite location, the formal application and purchase money required by the act, but admits he made but a verbal request of the local officers.

The settlement of Wilson, with the intention of taking the land in controversy under the desert land act, did not confer upon him any rights either as against other settlers, entrymen or the railroad company. The desert land act confers no preference right until entry, which includes the payment of fees and a portion of the purchase money. Until the entryman performs this requirement he initiates no right which another who takes the step could not defeat. The desert land act is similar in its object to the timber culture act, and each is different from pre-emption or homestead act. The first two were passed in order to encourage, respectively, the reclamation of arid land by irrigation and the growth of forests; the latter two to populate and improve the vacant agricultural lands.

The Department has held, in the matter of settlement with intention to take under the timber culture act, that such settlement does not confer such a right as will except the land so settled upon from the grant to the Northern Pacific Railroad. (See 19 L. D., 28; id., 452).

The desert land act is in this respect analogous to the timber culture law, and settlement with intention to take under its provisions would not be such an appropriation of the land as would prevent the right of the railroad company from attaching on selection.

Your office decision is therefore affirmed.

HOMESTEAD CONTEST—ACT OF JULY 26, 1894.

WEEDIN *v.* LANCER.

The tender of proof and payment is an act that may be invoked by the claimant for his protection, but cannot be used by a contestant to defeat the operation of the act of July 26, 1894, extending the time for proof and payment; nor will an intervening contest, resting alone on the charge of failure to make proof and payment within the statutory period, have such effect.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 28, 1896. (P. J. C.)

I have considered the case of Thomas F. Weedin *v.* Andrew Lancer, involving the homestead entry of the latter for the SW. $\frac{1}{4}$ of Sec. 1, T. 5 S., R. 2 E., Tucson land district, Arizona.

Lancer made said entry on January 10, 1887. On January 12, 1894, Weedin filed affidavit of contest, containing several allegations, all of which have been tacitly abandoned and waived, except the one that Lancer did not make final proof within seven years from date of entry.

The local officers found as a fact, that Lancer applied to make final proof on February 5, which final proof was filed March 27, 1894, and as more than seven years had elapsed from date of entry, and contest had been instituted, they recommended the cancellation of the entry.

Lancer appealed to your office, which found that the affidavit of contest was not corroborated as required by Rule 3 of Practice,—there being no corroborating witness—and therefore dismissed the contest; adding that “the time for making final proof was extended for one year from January 10, 1894, by Sec. 1, act of July 26, 1894 (28 Stat., 123).”

From this decision of your office Weedin appeals, contending, in substance, “that an affidavit of contest is in the nature of an information, and when accepted, notice issued, and service made, jurisdiction is acquired;” and that “the act of July 26, 1894 (28 Stat. 123), does not apply to this contest.”

The testimony taken at the hearing is insufficient to sustain any of the charges made, but by the records of the local office it is clear that Lancer had not made his final proof within seven years from the date of his entry. Thus the only charge that would be effective for the purpose of cancelling this entry is one based wholly on facts within the knowledge of the government.

The act of Congress referred to in your office decision reads,—

That the time for making final proof and payment for all lands located under the homestead and desert-land laws of the United States, proof and payment of which has not yet been made, be, and the same is hereby, extended for the period of one year from the time proof and payment would become due under existing laws.

This is a remedial statute enacted for the purpose of allowing those who had failed to make proof and payment within the period limited by law one year from the expiration of the time when proof and

payment would become due, in which to do so. The act is by its terms restrictive, and would therefore cover the case of Lancer.

If it be claimed that Lancer had made proof prior to the passage of the act, and thus taken his case out of the operation of the statute, it may be said that the statute contemplates "proof and payment" and it is not shown that payment was made or tendered. The proof itself was not acted upon by the local officers, so far as disclosed, hence it cannot be said that it was made as contemplated by this act.

The tender of proof and payment is an act that may be invoked by the claimant for his protection, but cannot be used by the contestant to defeat the operation of the statute; nor will an intervening contest resting alone on the charge of failure to make proof and payment within the statutory period, have such effect.

Your office judgment is therefore affirmed.

REPAYMENT—MINERAL ENTRY—ASSIGNEE.

JOSEPH H. HARPER.

The return of purchase money, in case of an entry erroneously allowed and canceled, may be made on the application of one who shows a partial interest, according to the proportion of his interest.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 28, 1896. (E. B., JR.)

On February 28, 1891, Helena, Montana, mineral entry No. 1485, made December 31, 1886, for the Fontenoy Placer claim, embracing the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 25, and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 26, T. 3 N., R. 8 W., containing eighty acres, was canceled by your office on the ground that the tract was not mineral land and therefore not subject to entry under the mining laws.

On November 10, 1894, Joseph H. Harper filed an application for the return of the money paid the government for said land, amounting to \$200.

On September 25, 1895, your office refused repayment to Harper, holding that no repayment could be made until all the interests in said claim at date of entry were represented in the application, and that Harper was not shown to have acquired the interest of P. F. Kelly, one of the entrymen, by conveyance in writing, such conveyance being essential under the laws of Montana to the acquisition of the interest of the latter. From this decision Harper appeals, contending that it was not necessary to show a transfer in writing from Kelly, and that even if Kelly's interest was not represented Harper's application should have been allowed to the extent of his interest in the claim, which was three fourths.

The application for repayment in this case is made under the provisions of the act of June 16, 1880 (21 Stat., 287), authorizing repayment of the purchase money in case of an entry of public lands erroneously allowed and therefore canceled, to the person who made the entry, his heirs or assigns, under rules and instructions therein provided for. Paragraph nine of instructions dated August 6, 1880, under said act declares that:

Those persons are assignees, within the meaning of the statutes authorizing the repayment of purchase money, who purchase the land after the entries thereof are completed and take assignments of the title under such entries prior to complete cancellation thereof, when the entries fail of confirmation for reasons contemplated by the law.

See also cases of Adolph Emert and Albert G. Craven, 14 L. D., 101 and 140, respectively, and case of Alpha L. Sparks, 20 L. D., 75.

Paragraph ten of said instructions contains, among other things, the following:

Where applications are made by assignees, the applicants must show their right to repayment by furnishing properly authenticated abstracts of title, or the original deeds or instruments of assignment, or certified copies thereof, and also show by affidavits or otherwise that they have not been indemnified by their grantors or assignors for the failure of title, and that title has not been perfected in them by their grantors through other sources.

It appears from an abstract of title to said placer claim on file that John Coleman, Patrick F. Kelly, William E. Davidson and Cornelius J. McSherry, who made said entry, then held the entire interest in the claim, that said Harper acquired an undivided one-fourth interest therein from said McSherry January 7, 1887, and an equal interest from Coleman April 27, 1888, and that these were the only interests in Harper shown of record at the date of cancellation of the entry, February 28, 1891. It is not in any way shown, nor is it alleged, that Harper acquired any other interest *in any manner*, in said claim prior to the cancellation of the entry. It does not therefore appear that Harper had acquired said Kelly's interest at the last mentioned date, nor that he was then an assignee, under the instructions given above, of more than a one-half interest in the claim. It is unnecessary, in view of the foregoing, to consider the requisites of a transfer of possessory right in a mining claim under the laws of Montana. Your office properly refused repayment of the whole amount of the purchase money to said Harper.

The Department does not concur, however, in the conclusion that all the interest in said claim must be represented in the application for repayment before return of any part of the purchase money can be made. In the case of Sparks (*supra*) it was held that return of purchase money in case of an entry erroneously allowed and canceled might be made upon the application of one who showed but a partial interest, according to the proportion of his interest. No reason is apparent why the rule followed in that case may not govern in this. Your office decision is modified accordingly.

ALABAMA LANDS—ACT OF MARCH 3, 1883.

JOHN R. L. BONNER.

The provisions of the act of March 3, 1883, with respect to the public offering of lands returned as containing coal or iron, must be followed, whether the land is properly or improperly so classified.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 28, 1896. (J. L. McC.)

John R. L. Bonner has appealed from the decision of your office of October 7, 1895, rejecting his application to enter under the homestead law the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, of Sec. 28, T. 12 S., R. 10 W., Huntsville land district, Alabama.

The ground of said rejection was that the land is specified on the original mineral list, on file in your office, as being valuable for coal; and that under the act of March 3, 1883 (22 Stat., 487), lands which had been reported to the General Land Office as containing coal and iron should be offered at public sale before being disposed of.

The appellant contends that if the land in question is classified as mineral, it was erroneously so classified; that the fact is shown, by the applicant's corroborated affidavit, that the land is not valuable for coal, but that it is strictly agricultural land, and unfit for any other purpose.

The requirement of the statute must be followed whether the land is properly or improperly reported as mineral (George H. Sherer, 15 L. D., 563).

The action of your office in rejecting Bonner's homestead application is therefore affirmed.

OKLAHOMA HOMESTEAD—QUALIFICATION OF ENTRYMAN—COSTS.

BUCKNAM v. BYRAM ET AL.

Under the statutes of Kansas the ownership of land is not divested by the execution of a mortgage thereon, hence a mortgagor of realty in that State is not entitled to plead that by reason of such mortgage he is not "seized in fee" of the land involved, and therefore is not disqualified as a homesteader under section 20, act of May 2, 1890.

A quitclaim deed of a small tract of land to township authorities for "road purposes," executed by one who previously owned one hundred and sixty acres, effectually divests the grantor of title to the land so conveyed, and he is consequently thereafter not the owner of one hundred and sixty acres within the meaning of section 20, act of May 2, 1890.

A contestant who seeks to secure the right of entry solely on the ground of priority of settlement is not required to pay the costs incurred by other parties to the suit.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(W. A. L.) August 28, 1896. (C. W. P.)

Benjamin F. Bucknam and Wyley R. Byram have appealed from your office decision of May 28, 1895, holding for cancellation Byram's

homestead entry, No. 7769, of the SE. $\frac{1}{4}$ of section 17, township 17 N., range 1 E., Guthrie land district, Oklahoma Territory, made on September 23, 1891, dismissing Bucknam's contest and awarding the right of entry to William Gilchrist.

The record shows that on September 23, 1891, Bucknam filed an application to enter the above described land, which the local officers rejected for conflict with homestead entry No. 7769.

On September 25, 1891, Gilchrist filed an application for the same land, which they also rejected because it conflicted with Byram's entry. On the same day Gilchrist filed an affidavit of contest, alleging that he settled on the land seven minutes after twelve o'clock noon of September 22, 1891, and has resided thereon ever since, and improved and cultivated the land.

On October 14, 1891, Bucknam filed an affidavit of contest, alleging that he settled on the land September 22, 1891, prior to the settlement made thereon by any other person, and that he has resided thereon ever since and has cultivated and improved the land. He also alleged that Byram was disqualified from entering, because he entered upon and occupied the land opened to settlement by the President's proclamation of September 18, 1891, during the prohibited period. The contests were consolidated, and went to hearing April 28, 1892.

On February 1, 1894, the local officers found that Byram had resided upon the land in contest from the middle of April, 1891, to the latter part of June, 1891, and that his occupation of the land during 1891 was under lease given by an Indian, who represented to Byram that he intended to take the land as an allotment; that about the latter part of June, 1891, the said Indian informed Byram that he would not take the land as an allotment, and that Byram then removed from the land to Old Oklahoma, and that since June, 1891, and prior to September 22, 1891, Byram had frequently passed over the land and in the vicinity of it. Upon this finding they held that Byram was disqualified to enter the land, and recommended the cancellation of his entry. They further found that Bucknam, when he made settlement, and at the time of the hearing, was the owner of one hundred and sixty acres of land in Chase county, Kansas, and that he was therefore disqualified to enter the land, and recommended that Gilchrist be allowed to make entry of the land.

Both Byram and Bucknam appealed.

Your office affirmed the judgment of the local officers.

The land in controversy is part of that opened to settlement and entry by the act of February 13, 1891 (26 Stat., 759), and the President's proclamation of September 18, 1891.

It is not necessary to consider the testimony in regard to the allegation that Byram is disqualified by reason of his having entered the Territory during the prohibited period, as I am of opinion that Bucknam made settlement prior to both Byram and Gilchrist. As to Byram—what is the testimony? Bucknam swore that he reached the land about

two minutes after twelve o'clock M. When asked if he saw any one on the land, he answered: "No." "When did you first see any one?" Answer: "I would think I had been there about two minutes, may be, a little more or a little less." "Who did you see?" Answer: "The first I saw, two colored men come up across the school claim northeast." "Who next?" "Mr. Wyley R. Byram and his father were two next men that I saw." "When was that time?" "Mr. Byram, the old gentleman, took out his watch, and, as near as I can recollect, said it was six or seven minutes, I wouldn't be positive which it was, past twelve." Byram was asked, "At what time and place did you first see Mr. Bucknam," and replied: "I first saw him on the land in dispute about forty rods east and about forty rods north of the south line;" then corrected his answer by saying, "About forty rods west of the east line and forty rods north of the south line, standing by a pole. I think about three minutes past twelve o'clock was when I first saw him, close to that." But he does not pretend that he reached the land before Bucknam. And in his appeal he relies solely upon the charge against Bucknam "that he was disqualified by reason of being the owner of one hundred and sixty acres of land in the State of Kansas." (See fourth specification of errors in Byram's appeal.)

Upon the claim of Bucknam:

In your office decision it is stated that:

During the progress of the trial, on May 7, 1892, a stipulation was entered into between Gilchrist and Bucknam, by which it was agreed that Bucknam settled on the land two minutes after twelve o'clock, noon, of September 22, 1891, and before any settlement made by Gilchrist, and that if Bucknam was qualified to enter, his rights were superior to those of Gilchrist.

This is an error.

The record does not show any agreement between Gilchrist and Bucknam. In pages 107-108 of the testimony, there is an agreement between Gilchrist and Byram, to which Bucknam was not a party.

Bucknam is charged with "soonerism." But the charge is not supported by the evidence. The evidence, in his behalf, shows that, at twelve o'clock M., on the 22d day of September, 1891, he started from the northeast side of the Cimarron river, crossed the river on foot, and went the balance of the way on horseback, traveling in a southwest direction from the river for some twenty or twenty-five rods, through some scattering trees, and crossing Soldier creek to an open prairie; thence to the southeast quarter of Sec. 17, Tp. 17 N., R. 1 E., about forty rods, or a little over from the south line, and about thirty-five or forty rods from the east line of the quarter. He then stuck up a stake in the ground about nine feet long, the forks of the stake ran up in a "V" shape; tied a small handkerchief to the end of the prongs of the stake; that he arrived on the land in dispute from one and a half to two minutes after twelve o'clock; plowed about four rods long and one rod wide that evening; that on the 28th, 29th and 30th of September he was hauling and preparing the lumber for a house; that he put frame up for the house on the 5th of October, and afterwards completed

it gradually. The house is a frame house, twelve by sixteen, about eight feet high, walls painted on outside with two coats of paint. He put in cultivation some thirty-two or thirty-three acres. The improvements are worth about \$200.00. Part of his family arrived on the place on the 12th day of October, part on Christmas day, and his wife and another child arrived on the 7th day of January, 1892.

On the other hand, Byram and Gilchrist attempted to prove by several witnesses that Bucknam started in the race a few minutes before twelve o'clock M. But the weight of evidence is decidedly in favor of Bucknam. It is not pretended that Gilchrist reached the land before Bucknam.

Upon a consideration of the whole testimony, the conclusion is irresistible that Bucknam was the prior settler on the land.

The question then occurs, is Bucknam disqualified by reason of the provision contained in the twentieth section of the act of May 2, 1890 (26 Stat., 81), that

no person who shall at the time be seized in fee simple of a hundred and sixty acres of land in any State or Territory shall hereafter be entitled to enter land in said Territory of Oklahoma.

It is admitted by Bucknam that at the time he settled on the land in controversy, he was the owner and in possession of one hundred and sixty acres of land in the State of Kansas, less sixty or eighty rods, which he by a quitclaim deed, dated the 12th day of February, 1889, conveyed to the township board of Cedar township, of Chase county, Kansas, "for road purposes." In his testimony he says that, when he purchased the said one hundred and sixty acres of land, he agreed to pay \$1,200 for it, and paid \$100 down in cash, but gave a mortgage on the land for the remaining \$1,100, and that he has been informed that a judgment has been rendered to foreclose the mortgage and sell the land to pay the \$1,100 and accrued interest, amounting to a sum much larger than the value of the land, and he therefore claimed no more interest in the land.

It is contended, in behalf of Bucknam, that he was not "seized in fee" of this Kansas land, because he had given a mortgage to the vendor to secure the payment of the part of the purchase money which was unpaid. Whatever force this contention might have, under the common law, it can have none under the laws of the State of Kansas, in which State the property is situated, and by whose laws Bucknam's rights in the property must be determined. In the case of *Chick et al. v. Willetts*, 2 Kansas, 384, it is said (p. 391):

Some of the States still adhere to the common law view, more or less modified by the real nature of the transaction; but in most of them, practically, all that remains of the old theories is their nomenclature. In this State, a clear sweep has been made by statute. The common law attributes of mortgages have been wholly set aside; the ancient theories have been demolished; and if we could consign to oblivion the terms and phrases—without meaning except in reference to those theories—with which our reflections are still embarrassed, the legal profession on the bench and at the bar would more readily understand and fully realize the new condition of things. The statute gives the mortgagor the right to the possession, even after

the money is due, and confines the remedy of the mortgagee to an ordinary action and sale of the mortgaged premises; thus negating any idea of title in the mortgagee. It is a mere security, although in the form of a conditional conveyance; creating a lien upon the property, but vesting no estate whatever, either before or after condition broken. It gives no right of possession, and does not limit the mortgagor's right to control it—except that the security shall not be impaired. He may sell it, and the title will pass by his conveyance—subject, of course, to the lien of the mortgagee.

And in the more recent case of *Robbins v. Sackett*, 23 Kansas, 301, it was held that, in the State of Kansas, a mortgage of real estate does not confer title; and hence a mortgagee of real estate cannot claim, by virtue of his mortgage, to own a house situated on the mortgaged property.

The only question, then, is, what is the effect of the quitclaim deed to the township board of Cedar township, of Chase county, Kansas, of a part of an acre of the land, "the same to be used for road purposes," which is in evidence.

A quitclaim deed, by the laws of Kansas, is as much a conveyance as any other kind of deed, and conveys whatever title the grantor has, unless otherwise specified in the deed itself. *Utey v. Fee*, 33 Kansas, 681; *Johnson v. Williams*, 37 Kansas, 179.

There are no words in this deed, except the words: "the same to be used for road purposes," from which it might be inferred that the grantor did not intend to convey the land in fee. In the case of *Kilmer v. Wilson*, 49 Barbour (N. Y.), 86, the land was conveyed to the grantee "for a private road," and it was contended that these words should be construed to limit the grant to a mere easement in the land. But the court held that to give the words the controlling effect claimed for them would be in conflict with the plain words of the grant, and the obvious intent of the parties thereto.

A careful consideration of the questions involved results in the conclusion that Bucknam, at the time he settled on the land in dispute, was not seized in fee simple of one hundred and sixty acres of land, and was not disqualified as a homestead entryman in the Oklahoma Territory.

On May 9, 1892, Bucknam filed a motion to tax all the costs of taking testimony in the case against him to Gilchrist. The local officers overruled this motion, and on April 15, 1893, Bucknam filed a motion to re-tax the costs, which motion they also overruled. Your office affirmed the rulings of the local officers. Bucknam in his appeal complains that your office erred in taxing the costs to him, and in overruling his motion to re-tax.

Bucknam's contention is that the allegation made by Gilchrist is prior settlement, and on that allegation he went to trial, and that if Gilchrist relied on the charge of Bucknam's disqualification to enter, he thereby claimed the preference right, and that under the statute he (Gilchrist) was legally bound to pay all the costs of taking the testimony.

But it does not appear that Gilchrist claimed a preference right by reason of Bucknam's alleged disqualification as a "sooner." In his contest affidavit he simply alleged priority of settlement, and claimed the land on that ground. I am, therefore, of opinion that there is no error in your office decision refusing to overrule the decision of the local officers on Bucknam's motions to tax the costs as against him to Gilchrist.

Bucknam will be allowed to enter the land, and Gilchrist's application rejected.

The decision of your office is modified as above indicated.

ASPEN CONSOLIDATED MINING CO. v. WILLIAMS.

Motion for review of departmental decision of July 7, 1896, 23 L. D., 34, denied by Secretary Smith August 28, 1896.

HOMESTEAD CONTEST—DEATH OF CONTESTANT—ENTRY.

MEAGHER v. CALDWELL.

A charge that a contest was begun under a speculative contract with a third party, if proven, will not affect the subsequent entry of the tract involved, after its restoration to the public domain, by the widow of the contestant in her own right, the contestant having died prior to the conclusion of the contest.

Assistant Secretary Reynolds to the Commissioner of the General Land
(W. A. L.) *Office, August 28, 1896.* (J. L.)

This case involves lots 2, 4, and 5, and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 3, T. 11 N., R. 3 W., Oklahoma land district, Oklahoma. On December 24, 1894, Mrs. Belle Caldwell made homestead entry No. 9429 of said land. On March 25, 1895, J. W. Meagher filed his affidavit of contest against said entry, and afterwards, on October 30, 1895, an amended and supplemental affidavit of contest, both based upon information and belief. He also filed a corroboratory affidavit of one Samuel Crocker based upon personal knowledge. From these three papers it appears that the ground of contest as alleged was:

That in the month of July, 1889, Robert Caldwell, whose residence at that time was Columbus Junction, Iowa, came to visit said Samuel Crocker at Oklahoma City. That Crocker suggested to Caldwell that he knew a person who he feared would lose her claim, and offered to bring him acquainted with the claim, and the evidence necessary to maintain a contest against the same, provided he (Caldwell) would pledge his word to Crocker, that if a successful contestant, he (Caldwell) would give the said party one half of the claim. That Caldwell gave said pledge to Crocker. That thereupon Crocker furnished Caldwell with the name of Rachel A. Haines and a description of her entry; and with the evidence necessary to maintain a contest against her. And that under that agreement with Crocker, Caldwell instituted and successfully prosecuted a contest against Rachel A. Haines's entry of the tracts herein involved.

On October 30, 1895, the register and receiver, on motion of Mrs.

Caldwell, and after hearing arguments by counsel, on both sides, dismissed Meagher's contest, upon the ground that the facts alleged, if true, were not sufficient in law.

Meagher appealed; and on April 17, 1896, your office affirmed the decision of the local officers, finding that "the charges found in the complaint are not sufficient to warrant an investigation."

Meagher has appealed to this Department.

It appears that the contest initiated by Robert Caldwell against Rachel A. Haines was finally closed in favor of the contestant on November 14, 1894, in accordance with the decision of this Department rendered therein on appeal. Robert Caldwell was then dead. He died on December 24, 1892, leaving surviving him a widow, Mrs. Belle Caldwell aforesaid, and two infant children, Robert C. and Catherine E. Caldwell. Mrs. Caldwell qualified as administratrix of her husband's estate on January 17, 1893.

On December 24, 1894, after Rachel A. Haines's entry had been canceled, and the land in contest had been restored to the public domain, Mrs. Belle Caldwell made homestead entry of said land as above stated.

The facts alleged in Meagher's affidavits of contest, if true, cannot affect the qualifications of Mrs. Belle Caldwell as a homestead entryman in her own right. She is a citizen of the United States, twenty-one years old, an unmarried woman, and the head of a family consisting of herself and two children. It is irrelevant to consider what would or would not have been the effect of Robert Caldwell's pledge to Samuel Crocker, as against Robert Caldwell, if he had survived the successful termination of his contest and had attempted to exercise his preference right of entry. His preference right of entry died with him. It was a personal privilege not assignable, not devisable, not transmissible by inheritance. Mrs. Belle Caldwell was, fortunately for her, the first legal applicant for the land in contest after its restoration. Her rights rest upon her personal qualification under the homestead laws; and the sin of her husband (if any) cannot be visited upon her.

Your office decision is hereby affirmed.

MINING CLAIM—ADVERSE PROCEEDINGS—ACT OF MARCH 3, 1881.

NEWMAN *v.* BARNES.

Under the act of March 3, 1881, the judgment of a court in adverse proceedings to the effect that neither party has shown title to the land involved, precludes subsequent favorable action by the Land Department on the claim of the applicant.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 28, 1896. (P. J. C.)

The record shows that Henrietta E. Barnes and a co-claimant made application for a patent for the Altura quartz mine, San Francisco

land district, California. During the period of publication Samuel Newman filed an adverse and protest against said entry, and in due time brought suit in the superior court of the county in which the land is situated, as provided for in section 2326 Revised Statutes. The judgment of the court on the issues presented was,—

We are unable to say that either of the parties to this action are entitled to the premises in controversy. The action will be dismissed.

Notwithstanding this judgment the defendant filed her application to purchase and the same was allowed by the local officers. Subsequently Samuel Newman filed a protest against said entry, setting forth the proceedings had in the court, and asking that the entry be recalled and canceled, and the proceeding in the matter of the application for patent be dismissed.

It appears that your office on receipt of this protest, by letter of June 12, 1894, directed that the protestant be allowed a hearing "to determine whether the law has been complied with in this case." A hearing was accordingly had and the protestant introduced two witnesses for the purpose of showing that the annual work was not done in said claim for the year 1893. The claimant did not offer any testimony. The local officers found that the claimant had made full compliance with the law and was entitled to the patent, and recommended the dismissal of the protest.

On appeal, your office by letter of September 3, 1895, reversed the action below and held the mineral entry for cancellation. Whereupon defendant prosecutes this appeal, assigning numerous grounds of error, which, however, it is not deemed necessary to consider at length, for the reason that there is but one proposition involved in this controversy and that is conclusive of the issue.

The act of March 3, 1881 (21 Stat., 505), provides:

That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land-office or be entitled to a patent for the ground in controversy until he shall have perfected his title.

The trial of the cause in the local court was without the intervention of a jury. The finding of the court was,

that neither the plaintiff, Samuel Newman, nor the defendants, Henrietta E. Barnes and Hiram B. Barnes, had on the 24th day of August, 1891, or at any time prior thereto, the possession of, or were they or either of them, entitled to the possession of the land or mining claim described in finding V.

The judgment rendered on the finding has been given above.

In view of the plain and unmistakable language of the statute, together with the finding of the court, and the facts, it would seem to be idle to argue that the claimant had any right to make entry after the rendition of this judgment. The statute provides for the submission of controversies between rival mining claimants to a court of

competent jurisdiction for the purpose of settling any dispute in regard to their possessory rights.

It is also wisely provided that where neither party is entitled to judgment, the court shall so find. It would seem that the last paragraph of the act of March 3, 1881, *supra*, was sufficient in itself to preclude the local office from entertaining the application to enter the land after judgment had been rendered by the court. So far as the record before me shows the proceeding was regular in every way, and there is no complaint made to the jurisdiction or otherwise, so far as the court proceeding is concerned. In view of this, it is difficult to conceive upon what hypothesis the claimant was allowed to make entry. In view of the judgment rendered, it became entirely immaterial whether the assessment work was done for the year 1893 under the former entry, or for any other year, as they had no right to the property.

Your office judgment is therefore affirmed.

TIMBER-CULTURE CONTEST—NOTICE OF CANCELLATION—APPLICATION TO ENTER.

MELLOY *v.* FAIRFIELD (ON REVIEW).

An intervening entry will not defeat the preferred right of a successful contestant who fails to receive notice of cancellation, if such failure is not due to want of diligence on his part.

An application to make timber-culture entry, filed with a timber-culture contest, prior to the repeal of the timber-culture law, if not returned to the local office on the successful termination of the contest, is a pending application that operates to exclude the land from the adverse appropriation of an intervening applicant.

Assistant Secretary Reynolds to the Commissioner of the General Land
(W. A. L.) *Office, August 28, 1896.* (G. C. R.)

Albert R. Melloy has filed a motion for review of departmental decision of October 31, 1895 (21 L. D., 347), rejecting his application to make timber-culture entry of the SW. $\frac{1}{4}$ of Sec. 1, T. 21 N., R. 54 W., Alliance, Nebraska.

Said departmental decision reversed the action of your office of January 10, 1894, which held for cancellation timber-culture entry made for said tract May 14, 1888, by Andrew M. Fairfield.

It appears that the land was entered on June 2, 1885, by one Frederick Plogue under the timber-culture laws, and that on August 17, 1886, Melloy filed a contest affidavit against said entry; with this contest affidavit he also filed his application to make timber-culture entry of the land.

A hearing was had at North Platte, October 22, 1896; Plogue made default. The local officers recommended that this entry be canceled, and your office, by letter ("H") of March 21, 1888, affirmed the action of the register and receiver and canceled the entry.

The contest affidavit was sworn to before one Lafferty, a notary public, on June 29, 1896. Lafferty appears to have written the affidavit, and in doing so wrote the contestant's name as "Albert Maloy." Contestant was then advised that he could sign his name to the affidavit spelled in the same way, and could correctly spell it when he came to enter. He accordingly signed his name as thus directed.

In the affidavit accompanying his application to enter, he wrote his name "Albert Malloy;" in the affidavit to secure service on Plogue by publication, executed also at the same time, he wrote his name "Albert Maloy." Service on Plogue by publication was secured in the name of "Albert Maloy;" and he signed his name in the same way in his affidavit, showing that he had mailed notice to Plogue at last known address, &c.

The decision of the register and receiver, dated November 23, 1886, recommending the entry for cancellation, was entitled "Albert Maloy v. Frederick Plogue."

On February 27, 1888, the contestant wrote from Minatare, Nebraska, to Mr. G. B. Blakely, then receiver of the Sidney, Nebraska, land office, as follows:

DR. SIR: I have been compelled to leave the country for a few months, and fearing the return on my contest might be made while absent, I have made out my papers and will remit you the money for entry. Hoping this may prove satisfactory, I am,

Yours very resp'y,

ALBERT R. MELLOY.

Please find enclosed \$14 —. If this is not satisfactory, notify me at Fort Laramie, Wyo., c/f, P. F. Ranch.

Accompanying this letter he also forwarded his application to make timber-culture entry of the land, with necessary affidavit, sworn to before one John Dyer, a notary public. In all these papers he signed his name "Albert R. Melloy."

The receiver promptly answered this letter, on March 3, 1888, and addressed the same to Albert R. Melloy, Fort Laramie, Wyoming, saying:

Enclosed find \$14 check amount sent by you, and your T. C. app. and aff., which are rejected for the reason that we have not received cancellation yet. You will be notified when same is canceled.

Resp'y,

G. B. BLAKELY,

Rec. S.

On May 14, 1888, Andrew M. Fairfield was allowed to make timber-culture entry of the land, and on June 19, 1888, Melloy's application was rejected, because of conflict with Fairfield's entry, and Melloy appealed.

Your office letter ("C") of October 30, 1888, ordered a hearing "to determine the priority between the parties."

Upon this hearing the local officers decided that Melloy was legally notified of the cancellation of Plogue's entry and had failed to avail

himself of the preference right of entry within the thirty days allowed by law, dismissed the contest, and allowed Fairfield's entry to remain intact.

Melloy appealed, and your office letter ("H") of September 19, 1891, reversed the action of the register and receiver, and held Fairfield's entry for cancellation.

Fairfield filed a motion for review, which your office sustained on February 12, 1892, and a hearing was ordered "to determine whether Melloy received legal notice of the cancellation of Plogue's entry."

Hearing was ordered for May 16, 1892; but on March 7, 1892, Melloy filed a motion for review of your office decision of February 12, 1892, ordering the hearing. Your office letter of April 30, 1892, denied Melloy's motion for review, and he appealed.

Your office, by letter of May 31, 1892, declined to forward the appeal, and on June 15, 1892, Melloy filed his petition for certiorari. The Department, on October 5, 1892, denied said petition, and your office directed the hearing to proceed, as per order of February 12, 1892.

Hearing was accordingly had at the local office, testimony, oral and by deposition, was submitted, and case closed May 29, 1893.

On August 10, 1893, the register and receiver recommended that Melloy's contest be dismissed and Fairfield's entry held intact.

On appeal, your office, by decision dated January 10, 1894, reversed that action, and held that Melloy is entitled to his preference right, and that Fairfield's entry is subject thereto.

The Department, in the decision sought to be reviewed (21 L. D., 347), reversed your office decision, and held Fairfield's entry intact.

Practically, two questions are raised by this motion:

1. Did Melloy receive notice of the cancellation of Plogue's entry, or, failing to receive such notice, was the failure attributable to his own carelessness or neglect in the premises?

2. Was Melloy entitled to have his entry placed of record on the cancellation of Plogue's entry under his application made at the time he filed his contest against Plogue's entry?

Melloy was certainly entitled to a preference right of entry on the cancellation of Plogue's entry. It will be noticed above that twenty-two days before your office canceled Plogue's entry, Melloy mailed to the local office his second application to make entry of the land, enclosed a check for \$14, and directed the local officers to notify him at Fort Laramie, Wyoming, care of P. F. Ranch. He signed his name "Albert R. Melloy," thus corresponding with his application then transmitted. The receiver notified him that his application was rejected, and in doing so addressed him as directed, in name and place.

Your office decision canceling Plogue's entry was promptly received at the local office, and on April 2, 1888, the register wrote the notice advising Melloy that he was "allowed" thirty days' preference right of entry. This letter, as shown on the envelope, was mailed at Sidney,

Nebraska, April 3, 1888, and addressed to "Albert Maloy, Ft. Laramie, Wyo." The instructions which Melloy gave the local officers, and which, as above seen, were received by the office, were thus not carried out; the name was not written as he had directed, and the register failed to place on the envelope "c'f P. F. Ranch," meaning Pratt and Ferris ranch.

It appears that this ranch was owned by Messrs. Pratt and Ferris; that it is about thirty-five miles from Fort Laramie, Wyoming, and several hands were employed by the company to attend to stock, etc. Among the persons so employed was Melloy, and he was so engaged during April and May, 1888.

Melloy swears that about April 10, 1888, he went from Pratt and Ferris ranch to the post-office at Fort Laramie; that he was then expecting a registered letter from the land office notifying him of his preference right to enter the land; that the postmaster informed him there was no letter for him, but there was a registered letter there for "A. Maley;" "I told him it might be for me; he said, no, it belonged to, it was for Maley that lived east of the post office, pointing his finger in that direction;" that he was thus led to believe that the postmaster knew the person to whom the letter belonged; that it was, perhaps, six weeks before he next inquired for mail at Fort Laramie; that his mail was regularly sent down to him with the Pratt and Ferris mail; that about the first of May, 1888, he wrote a letter of inquiry to the land office.

The record contains such a letter of inquiry, dated May 21, 1888, and addressed to the receiver. In this letter, signed "A. R. Melloy," he says:

I am compelled to write again for information regarding my contest on T. C. entry No. 6750. . . . I am led to believe there is some crooked work about the contest, as there was another contest the same as mine and it was decided last winter; can't see why it takes mine so much longer.

It will be noticed that this letter was written seven days after Fairfield entered the land.

As tending to corroborate Melloy's statement that he went to Fort Laramie post-office about April 10, 1888, one Yorick Nichols swears that he lived near the Pratt and Ferris ranch in April and May, 1888, and knew Melloy; that he got his leg broken and was sent to the hospital at Fort Laramie; that while in the hospital, and about April 11, or 12, 1888, Melloy visited him; that he remained in the hospital four and a half weeks, and on his return to Pratt and Ferris ranch, about May 5, he found Melloy there.

B. H. Hart, who was postmaster at Fort Laramie in April, 1888, testified that on May 4, 1888, he received a letter registered at Sidney, Nebraska, addressed to "A. Maley." "Can't say at what time it was called for, or whether it was called for at all;" that Melloy did call for a letter, but affiant was unable to state when; that the records of the

post-office show that the exact spelling on the registered letter, received about April 4, 1888, is "A. M-a-l-e-y."

In a deposition subsequently sworn to by Mr. Hart (February 23, 1893), he stated that Melloy resided at the Pratt and Ferris ranch, and in April and May, 1888, received his mail at Fort Laramie; he repeated his testimony as to receiving the letter addressed to "A. Maley," and swore that no one called for the letter by that name; he modified his former testimony by saying that, to the best of his knowledge and recollection, Albert R. Melloy called for a registered letter at Fort Laramie in April, 1888; that mail was received at the Pratt and Ferris ranch from the post-office at Fort Laramie once and frequently twice a week; that he returned the registered letter to the sender July 1, 1888. He further stated: "I believe if said letter had been addressed to Albert R. Melloy, he would have received it."

That the postmaster incorrectly recorded the name as addressed on said letter is evidenced by the envelope itself. The letter was addressed as follows: "Albert Maloy, Ft. Laramie, Wyo." It was mailed April 3, 1888, from Sidney, Nebraska.

The records of the Fort Laramie office thus corroborate Melloy's statement; the postmaster told him there was a registered letter for "A. Maley," when as a fact it was addressed to Albert Maloy. He had instructed the local office to address him by the name he employed in his second application to enter, namely: Albert R. Melloy. This was done by the local office when they notified him at Fort Laramie, on March 3, 1888, that his application was rejected; but one month later the register failed to obey said instructions in two particulars: first, as to the name; second, as to the specific instructions to send the letter "c'f P. F. Ranch."

It is true, Melloy spelled his name differently in his contest with Plogne and in his application to enter, but it sufficiently appears that he was at all times anxious to receive the notice advising him of his right to enter; and his correspondence with the local office shows he was diligent. There can be little doubt that he went to Fort Laramie on or about April 10, 1888, and made inquiry for the letter then awaiting him, and that its delivery to him was refused by the postmaster. It is reasonably certain, also, that if the notice had been addressed as per his own instructions, he would have received it. His failure, therefore, to receive the letter can in no manner be attributed to his own carelessness or neglect.

Thomas C. Patterson, of North Platte, Nebraska, was Melloy's attorney, and the records show that he was so noted on the records. He swears that he received notice of the cancellation of Plogne's entry on May 29, 1888 (fifteen days after Fairfield made entry), and on same day wrote Melloy at Fort Laramie.

The depositions of one Harry Mosler, William Walker and Charles Amerman were read in evidence, for the purpose of discrediting the

testimony of Melloy as to his calling for the letter at the time and place sworn to by him. It is sufficient to say that the testimony of these witnesses is directly impeached by the post-office records. To illustrate: Mosler swore that he was at Fort Laramie in the latter part of May, 1888, when Melloy had a conversation with the postmaster about the registered letter; that the postmaster told him there had been a registered letter there for him, but that the same had been returned; that they looked at the post-office records. Mr. Hart swore that the registered letter was returned July 1, 1888, and Melloy swore he never knew Mosler. The testimony of Walker and Amerman is equally unsatisfactory and fails entirely to impeach Melloy's testimony.

In ordinary contests, where the preference right is awarded under the act of May 14, 1880, it is presumed that notice thereof sent to the contestant at his post-office address reached him; and, if in due time he fails to apply for the land, the same is subject to the first legal applicant, whose entry would be *prima facie* valid. But if after such entry it should be made to appear, affirmatively, that the contestant, without any fault of his own, failed to receive the notice sent to him, it would be proper, after due notice, to cancel the intervening entry and allow contestant the privilege of exercising his preference right under his contest. *Robertson v. Ball et al.*, 10 L. D., 41.

Second. It is alleged in the motion that the application to make timber-culture entry, filed by Melloy on the date the contest was initiated, was never returned to the local officers for allowance, but is still pending, among the papers in this case, and was a bar to the entry of Fairfield.

The timber-culture laws having been repealed by the act approved March 3, 1891 (26 Stat., 1095), it is clear that Melloy could not now be permitted to make a new timber-culture entry, but if his applications, made June 2, and February 27, 1888, were in fact not returned to the local office on the cancellation of Plogue's entry, so as to enable him to perfect the entry, his right still exists under his first application.

The circular of August 16, 1887, referred to in *Smith v. Fitts* (13 L. D., 670), provides for the rejection, without formal notice, of these applications to enter, filed with contests, which are returned to the local office, and are not perfected into entries within thirty days from notice; but, as said in *Zacariah T. Bush* (22 L. D., 182), the circular "does not cover or affect those applications which for any reason are not returned."

It follows, therefore, that if Melloy's application was not returned to the local office, it could not have been acted upon, and was in that condition a bar to the allowance of Fairfield's entry. There is no proof that the application was in fact returned, or ever considered, before Fairfield was allowed to enter. On the contrary, the application of February 27, 1888, was rejected June 19, 1888, more than a month after Fairfield's entry, and then only for "conflict."

For the reasons above given, the motion herein is allowed. Melloy will be notified that he will be allowed thirty days in which to perfect his timber-culture entry of the land. Should he apply within the time given, Fairfield's entry will be canceled; otherwise it will remain intact.

Departmental decision of October 31, 1895, in *Melloy v. Fairfield*, is set aside and revoked.

RAILROAD GRANT—JOINT RESOLUTION OF MAY 31, 1870.

CORLIS v. NORTHERN PACIFIC R. R. CO.

In determining what lands were passed to the altered main, or branch line, as provided for by the joint resolution of May 31, 1870, said resolution must be considered as in the nature of a new grant, and that only such lands as were public lands at the date of the passage of said resolution were intended to be granted thereby.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(W. A. L.) August 28, 1896. (F. W. C.)

John H. Corlis has appealed from the decision of your office, dated September 5, 1894, rejecting his homestead application covering the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and Lots 3 and 4 of Sec. 5, T. 23 N., R. 5 E., Seattle land district, Washington, for conflict with the grant to the Northern Pacific Railroad Company.

This tract was within the limits of the withdrawal upon the map of general route of the main line of said road, filed August 13, 1870, for that portion of the road extending from Portland, Oregon, to Puget Sound. It fell north of the terminal established at this part of the road at Takoma, so that a further consideration of any claim the company may make of this land on account of the main line of its road is unnecessary. It is, however, also within the limits of the company's grant for the Cascade branch, as shown by the map of definite location filed March 26, 1884.

The records show that one Amos Hurst made homestead entry of this land June 26, 1869, which entry was canceled February 11, 1871. In his appeal Corlis urges that said entry, being of record at the date of the passage of the joint resolution of May 31, 1870 (16 Stat., 378), served to defeat the grant on account of said branch line.

By the act of July 2, 1864, a grant was made to aid in the construction of a continuous line of railroad

beginning at a point on Lake Superior in the State of Minnesota or Wisconsin, thence westerly by the most eligible route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget Sound, with a branch via the valley of the Columbia River to a point at or near Portland in the State of Oregon, leaving the main trunk line at the most suitable place not more than three hundred miles from its western terminus.

By the resolution of May 31, 1870 (*supra*), the designation of the lines of road were changed. That which by the granting act was known as the branch line (*via* the valley of the Columbia River to a point at or near Portland in the State of Oregon) was changed to main line, and that which had been designated as main line (across the Cascade mountains to Puget Sound) was changed to branch line.

In the case of the United States *v.* Northern Pacific Railroad Company (152 U. S., 284), in referring to the joint resolution of May 31, 1870, it was stated that:

By the resolution of 1870 it was declared that if at the time of the final location of the company's main line or branch there were not enough lands per mile within the prescribed limits, the deficiency could be supplied from lands within ten miles beyond those limits, other than mineral and other lands as excepted in the charter of the company "to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of subsequent to the passage of the act of July 2, 1864." It is therefore clear that no public land disposed of after the passage of the act of July, 1864, was intended to be embraced in the grant of May 31, 1870.

It is true that in the case pending before the court the lands involved were upon the portion of the road extending northward from Portland to Puget Sound, and that the grant for this portion of the road depended solely upon the resolution of 1870, but when it is remembered that no location had been made of the grant under the act of 1864 prior to the resolution of 1870; and that by said resolution the location of the road, at least in the then Territory of Washington, was changed, and the further fact that in providing for this additional right to indemnity both the main and branch lines are referred to, I am of opinion that under the language before quoted; taken with the resolution of 1870, any lands disposed of along the branch line provided for in said resolution, prior to the passage of said resolution, were excepted from the grant for the said branch line. In other words, that in determining what lands were passed to the altered main or branch line as provided for by the resolution of 1870, said resolution must be considered as in the nature of a new grant and that only such lands as were public lands at the date of the passage of said resolution were intended to be granted thereby.

As before stated, the records show that the tract here involved was entered under the homestead law June 26, 1869, which entry was of record, uncanceled, at the date of the passage of the joint resolution of May 31, 1870, and as against the grant made by said resolution was an appropriation of the land. I must therefore reverse your office decision and hold that the tract here in question was excepted from the company's grant on account of its branch line and is subject to the application by Corlis.

MINING CLAIM—ANNUAL EXPENDITURE—RELOCATION.

DOLLES *v.* HAMBERG CONSOLIDATED MINES CO.

Compliance with law on the part of a mineral claimant, who is at such time holding under color of title, will accrue to his benefit on the acquirement of the legal title.

Where a mineral claimant owns adjoining claims the annual work may be done on one of said claims, if such work is designed for the improvement or development of the group. In such case, however, the burden of proof is upon the owner to show that the work done, or improvement made, does as a matter of fact tend to the development of the property as a whole, and that such work is a part of a general scheme of improvement.

The failure of a mineral claimant to perform the requisite amount of annual work on his claim renders the same subject to relocation.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(W. A. L.) August 28, 1896. (P. J. C.)

The Lowland Chief Consolidated Silver Mining Company on June 20, 1881, made application for patent for the Chemung lode mining claim, survey No. 901, Leadville, Colorado, land district. By the field notes of the survey the conflict with surveys No. 449, 542, 473, and 539, were excluded, leaving the net area applied for 5.09 acres. By a map in evidence it is shown that the names of these claims excluded are, respectively, Curran, Little Alice, Grand Prize and Highland Mary.

On June 20, 1894, the Hamberg Consolidated Mines Company, the successor of the applicant, made entry, No. 3869, of said Chemung claim, with the exclusions noted above.

On June 24, following, Mary A. Dolles filed a protest against said entry, on the grounds that the Hamberg Company and its grantors had failed to do any annual work since the year 1881 on the Chemung, and thereby forfeited all rights to the same; that on July 17, 1886, the said claim was relocated as the Medium, and is now owned by the protestant.

Your office ordered a hearing, and as a result thereof, the local officers found,

that an abandonment of the said Chemung lode has not been proven for the years 1883, 1884, 1885 and 1886; that the protestant has failed to sustain her protest, and we accordingly recommend the dismissal of the same.

On April 18, 1895, your office affirmed the action below, and subsequently overruled a motion for review, whereupon protestant prosecutes this appeal, assigning error as follows:

I. Error in holding that the officers of the Hamberg Consolidated Mines Company, through their lessees, performed actual mining work on the drifts from the shafts on the Curran lode claim in 1885, of the value of more than \$400, and that the work was intended to develop and improve both the Chemung and Curran claims.

II. Error in holding that the contestant has failed to show, by clear and convincing evidence, that the Chemung lode claim, on July 17, 1886, had been abandoned

and forfeited by the owners of the claim, and that the said Chemung lode claim was not, at that time, subject to relocation by reason of such abandonment.

III. Error in holding that any work which might have been done upon the Chemung lode, or upon or for the development of said Chemung lode claim by contestee or its lessees, could be considered as having been done by the owner of the claim.

IV. Error in holding that the Hamberg Consolidation Mines Company was in possession of the Chemung and Curran mining claims during the years 1884, 1885, and 1886, *under color of title*.

V. Error in not holding that during the years 1884, 1885 and 1886, contestee or its grantors had failed to comply with the law in the matter of annual expenditures during each and every one of the years mentioned.

VI. Error in not holding that the ground covered by the Chemung lode claim was subject to relocation during the years 1884, 1885, and 1886, and was properly relocated by the Medium claimants.

VII. Error in not holding the Chemung entry for cancellation on the record evidence in the case.

It is shown by the extended abstract of title that the Chemung claim was sold by the sheriff of Lake county to one C. W. Tankersley, who, in December, 1883, transferred it to one Ellery C. Ford. This deed was recorded January 2, 1884. The heirs of Ford transferred it to the Hamberg Company June 2, 1894.

The Hamberg Company, however, claim to have owned the Chemung during all this time. The testimony shows that Tankersley and others organized this company in July, 1883; that Tankersley made a proposition to convey to the company, the Chemung, Curran and Grand Prize claims in consideration of seventy-five thousand shares of the stock, which was issued to him; that in 1883, Tankersley did make a deed to George Huston as trustee, and that the deed recited that it was made in trust for the benefit of the Hamberg Company; that the company had recently come into possession of this deed, but it has never been recorded. In addition to this, it is stated by witnesses that the officers of the Hamberg Company had given leases on the property in 1883, 1884 and 1885, and there is exhibited a copy of a lease given in April, 1886, by the company. The Hamberg Company claims to have exercised all rights of ownership over the property and has had possession of the same. The apparent indifference of the Hamberg Company as to the condition of its title to the property would seem to indicate that it paid but little attention to matters of detail. It is stated that it had no knowledge of the transfer by Tankersley to Ford, and that this transfer was in fraud of the company. If it were material to the issue here, the company would be charged with notice that the county records disclosed of this transfer and would be estopped from pleading lack of knowledge of the same. As the record stands, it is clear that neither Ford or any one for him ever made any attempt to comply with the requirements of the law in regard to annual work, and so far as he is concerned, or his heirs, the ground was surely subject to relocation.

The possession of the company and its acts of ownership, however,

was under color of title, and now that it has whatever rights the Ford heirs inherited, it would appear that if there was a compliance with the law by the company, although without the legal title, that, under the circumstances surrounding this particular case, it should accrue to its benefit (White Extension West Lode, 22 L. D., 677).

Sec. 2324 (R. S.) provides,—

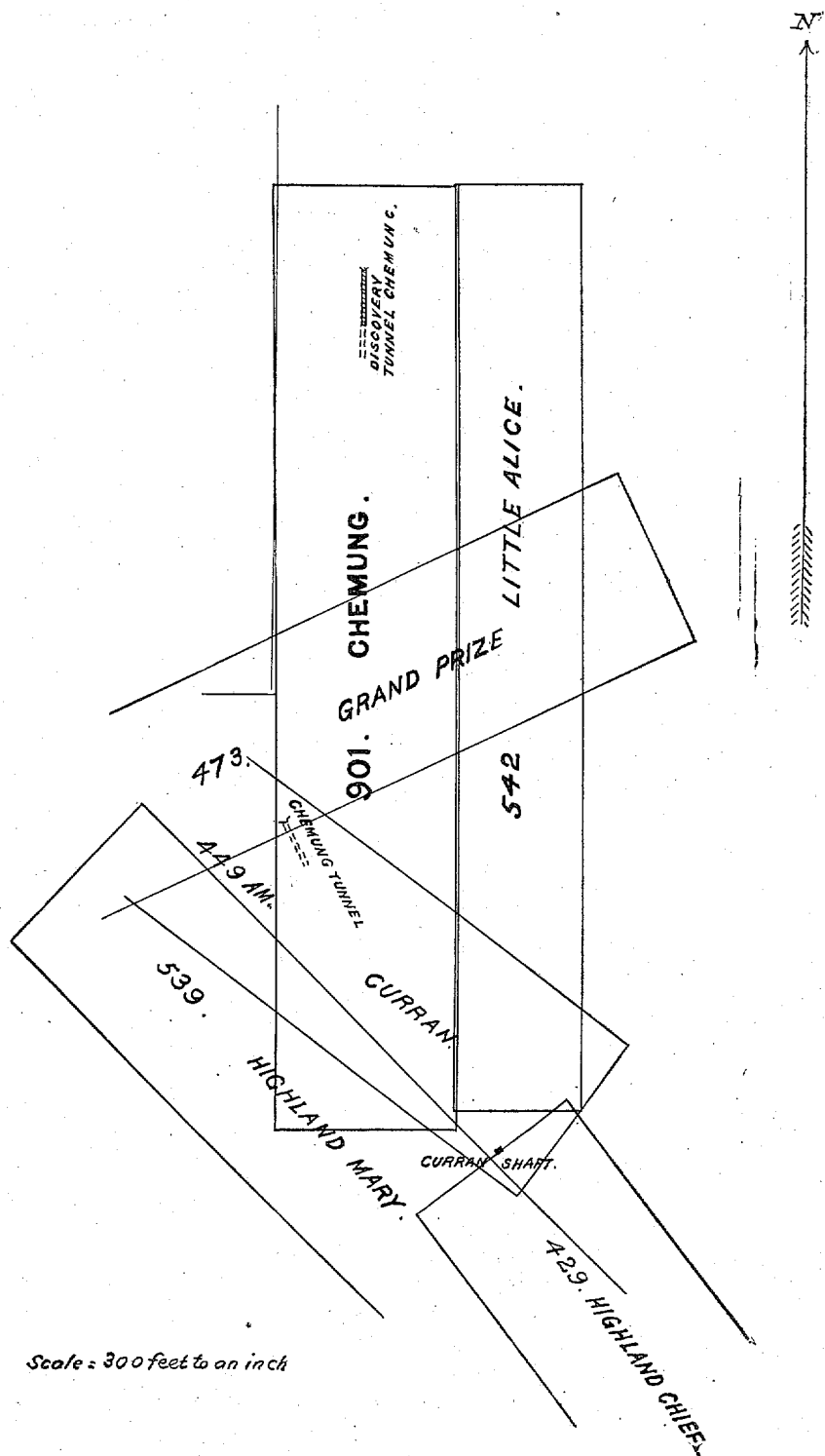
On each claim located . . . and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year . . . and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided the original locators, their heirs, assigns or legal representatives have not resumed work upon the claim after failure and before such location.

Sec. 26, Chapter LXXIV., General Statutes of Colorado, provides that within six months after the time set for annual labor on any lode claim, "the person in whose behalf such outlay was made, or some person for him, shall make and record an affidavit" that at least one hundred dollars' worth of work or improvements were performed or made upon the claim, at the expense of the owners, and for the purpose of holding said claim; "and such signature shall be *prima facie* evidence of the performance of such labor."

The testimony upon the question as to whether the annual work was done on the Chemung for the years 1884, 1885 and 1886 is rather conflicting. The accompanying plat gives a correct representation of this claim and those excluded from the application for patent, together with the Highland Chief, which cuts an important figure in this controversy. It will be seen by this plat that the only territory claimed now as the Chemung is that part of it lying north of the north side line of the Grand Prize and a little triangle, the lines of which are formed by the east side line of the Chemung, the north side line of the Curran and the south side line of the Grand Prize. It is not claimed by the Hamberg Company that any annual work was done for the years mentioned on any part of the ground entered as the Chemung, as described above, but that the work was done in the Chemung tunnel and the Curran shaft, the former on the ground excluded, and the latter is entirely off the Chemung on the Curran ground, and on the northwest end line of the Highland Chief.

There are two questions of fact presented here for determination; first, was there any annual work as contemplated by the statute done during the years mentioned, and, second, if there was, was it such a part of a general scheme for development of the Curran, Grand Prize and the Chemung, as to be credited to the last named.

It is a well-settled rule that where parties own adjoining claims the annual work may be done on one of them, if such work is designed for the improvement or development of the group. But the burden of proof is on the owner to show that the work done or improvement made does as a matter of fact tend to the development of the property



as a whole, and that such work is a part of the general scheme of improvement.

The burden of proof is upon the protestant to show that the annual work was not done, as the presumption is that the owner of a mining claim has complied with the requirements of the law. No certificates of annual work, as provided by the Colorado statute, were offered in evidence by the Hamberg Company. Neither did the company make any showing whatever in this regard when it made its entry.

Dwyer, one of the locators of the Medium lode, but owning no interest in it at the time of the hearing, testified that all the work done on the Chemung from 1879 to 1883, inclusive, was done under his personal direction; that he quit work in March, 1883; that he was thoroughly familiar with all the work done on the claims at that time and subsequently; that there was no work done on the Chemung in 1884, 1885, or in 1886, prior to his relocation, July 24; that he examined all the workings on the Chemung, just before making the relocation, and they were in the same condition as to development as they were when he left them in 1883.

The witness Gardner was engaged in hauling ore from the vicinity of the claim in controversy during the years mentioned. The plat offered in evidence by the claimant shows a road running the entire length of the Curran over the Chemung tunnel and within a few feet of its mouth. He testified that he hauled ore over this road, and was over it nearly every day in 1884 and 1886. He does not know whether there was any work done or not on the Chemung during those years, but testifies that he saw no evidence of any having been done; that if there had been anyone working there for any length of time he would have seen them. He was over this road less frequently in 1885, but saw no signs of any work having been done.

The witness Poos was working about one-quarter of a mile away during the years mentioned. He kept watch of the Chemung during 1884, with the intention of relocating it himself, if the annual work was not done. He saw no work done; examined the Chemung tunnel in the fall of 1884, and again in 1885, and found it in the same condition as the year previous. The same is true of 1886.

Hensley, one of the locators of the Medium, but not interested in it now, testified that he was well-acquainted with the Chemung ground from 1881; he "was there quite a number of times in the fall (of 1881) looking through the tunnel and prospecting it a little," with the view of taking a lease on it; was there again in 1885, and just before the relocation in 1886. He says there was no work done on the Chemung, since Dwyer quit in 1883. About a month before he relocated the ground he tried to get into the Chemung tunnel, "and it was caved in and filled in with ice and broken timbers so that he could not get in."

On behalf of the claimant, the witness Reed testified, in chief, that there was work done on the Chemung tunnel during January, February and March, 1884. He says that this work was done by one Coombs,

who had a lease on the property; that he did seventy-five feet in the tunnel; that he "was there a number of times;" that there was one man and sometimes two working. He does not say that he was in the workings at all during this period, but does say that he was not in the tunnel in 1885. He says that he had a lease on the Curran, Chemung and Highland Chief and worked in the Curran shaft; extended a drift toward the Chemung, which if extended would penetrate it; that the Curran shaft would be a part of the system for the development of both claims. On cross-examination, this witness claims to have had two leases on the Curran and Chemung,—one in 1883, and the other in 1884; one from Dr. Law, and the other from the Hamberg Company; one of them was written the other verbal, but he cannot state which one was written; that the one in the "Chemung tunnel" was in December, 1884, and he quit work there in June, 1885. He says, "I know it was in 1883 or 1884." Finally he admits that he is not sure he had a lease on the Chemung tunnel in 1884. The one on the "Curran shaft" he thinks he took in November or December, 1884, and went to work "in 1885, I think it was." He cannot tell what day or month it was. He drifted a little south of west from the shaft seventy-five or one hundred feet; was working the Highland Chief from the Curran shaft; made connection with the Highland Chief from this shaft. Says he got the lease for the purpose of working the Highland Chief, and all the ore he got was from its territory; that he spent from \$400 to \$600 "on the Curran shaft and all the drifts from it."

Kenens was interested with Reed in the lease in 1884 and 1885. He says he knows they worked through the Curran shaft, "and that is about all I know about it." He did not see any lease; his understanding was that it was a lease on the Curran shaft, and not on any other ground; they worked the Highland Chief through the drift. He did not hear the Chemung mentioned as being in the lease.

Dr. Law, who is vice-president of the Hamberg Company, says the annual work was done on the Chemung by Coombs in 1884 in the Chemung tunnel; that he made arrangements to have the work done "upon the claims" in 1885, "and I investigated and satisfied myself that it was done, and made an affidavit for the annual labor being performed." He says that the work was done also in 1886 by one Morrison to the amount of \$100 for each claim. "I do not know what amount of work was done," but he satisfied himself that it had been performed; that the work in the Curran shaft as sunk and the drifts extended from it was a part of a system for the development of all three of those claims. Says he does not think he saw anyone working on the Chemung lode in 1885; "I was up there, and I saw where there had been work done; it looked to be recent;"—this was near the mouth of the tunnel. He gave a lease to Morrison in April, 1886; they went to work on the Chemung tunnel "soon after they got the lease," . . . don't know how long they worked. "I do not know only what they told me;" was in the Chemung tunnel before the relocation in 1886. He says,—“I

think every lease that has been made there, but there might be one or two exceptions, required them, as part of the consideration as having the lease, to do sufficient work to cover the annual assessment on all claims." Reed testified that his lease did not require him to do the annual work. Dr. Law thinks he was mistaken in this statement.

Morrison testified that he had a lease on the "Chemung claim" in 1886; he won't be certain as to when he began work, but is "pretty sure it was in April," when he cleared out the mouth of Chemung tunnel and did some work inside; thinks he worked "the best part of the week." Cannot tell whether it was a few days after he got the lease that he began work, or a few weeks, and it is not sure that it was in the month of April. He worked in one of the drifts in the Curran shaft; does not know which direction it ran, but thinks it was southeast; it connected with the Highland Chief workings; thinks he worked there two or three days in April, 1886.

A certified copy of the lease from the Hamberg Company to Morrison is exhibited. It is dated April 14, 1886, and it is for "that portion of the property of said company known as the "Chemung tunnel," together with a space of two hundred feet on each side of the same. Also that part of said property known as the "Curran shaft" "with a space of two hundred feet on each side of the same." There is no condition in this lease requiring annual work, as such, to be done on the claims.

In rebuttal, it is shown by Mr. Dwyer, that there could not have been any work done in the Chemung tunnel, either in 1885 or 1886, because it was caved in and it was impossible to get into it. The road had broken down and filled it up. "They cut up the road, but the tunnel was filled with debris, ice and snow." The witness and a Mr. Thompson cleared out the tunnel in July, after the relocation.

It is not at all clear from this evidence that there was any work done on the Chemung tunnel during the years referred to. In his examination in chief, Reed says it was done by Coombs, who had a lease on the property. On his cross-examination, he says he had two leases,—one in 1883 and the other in 1884; that the one on the Chemung tunnel was given in December, 1884, and he quit work in June the following year. He is in doubt, evidently, as to the year he had this lease on the Chemung tunnel, whether in 1883 or 1884. But inasmuch as in his direct testimony he says positively that Coombs did work there in January, February and March, 1884, under a lease, and that he (Reed) was only there a few times, it is not unlikely that he may be mistaken in fixing his lease in 1894. His evidence on this point is not sufficient to overcome the *prima facie* case made by the protestant. It is simply an assertion. No facts are given from which a conclusion can be arrived at. He says they went seventy-five feet, yet he did not examine it to see. To do this in three months, one man and sometimes two were employed. There is much doubt and uncertainty in the mind of this witness as to his connection with this property, both as to the leases he

claims to have had and the work he did. On his cross-examination, much time was spent by counsel, in trying to get him to fix the year in which he claimed to have done work in the tunnel, but without avail. He seems to be able to remember with a reasonable degree of accuracy other events, in which he was interested at the period, but is utterly unable to fix the time with any degree of certainty when he did this work. He is equally uncertain as to whether this was under the written or verbal lease. It is to be remarked that no explanation is offered on behalf of the claimant, as to the failure to produce the written lease, or, in the event of its loss, a certified copy, as was done with the Morrison lease.

The only other testimony on the work for 1884, is that of Dr. Law, and it is subject to the same criticism as Mr. Reed's. He says he satisfied himself that the annual work had been done, but he does not say of what it consisted, or give any details by which it can be determined that he was right in his conclusion.

It is not claimed that any work was done in this tunnel on the original Chemung ground in 1885, or in 1886, except that testified to by Morrison and Law. The testimony on this point is not, in my judgment, conclusive. All Law knows about it is what some one told him. Morrison does not pretend to fix the date when he began work there. He will not say whether it was a few days or a few weeks after the execution of the lease. On the other hand, both Dwyer and Hensley testify positively that no work was done there that year, and give as their reasons for so asserting that the tunnel was inaccessible by reason of its having caved at the mouth, and was filled with debris, ice and snow until Dwyer and another cleared it out after the relocation.

I cannot escape the conviction that there was no work done or improvement made in the Chemung tunnel by the alleged owner for the years 1884, 1885 and 1886. It occurs to me that the testimony of the witnesses for the protestant, given as it was in a frank and candid way; their knowledge of the conditions that existed being the subject of rigid cross-examination, that in no wise broke the force of their statements, has not been overcome by the rather dogmatical assertions of the claimant's witnesses, accompanied as they were by doubt and uncertainty upon every important or material question that was testified to.

It is conceded that work was done in the Curran shaft in 1885 and 1886, but it is not shown by any convincing evidence that this would in any wise tend to the development of the Chemung, or, in fact, even the Curran itself. It is indisputably shown that this shaft was used only for the convenient working of the Highland Chief, upon which the parties had a lease, and not for the development of the Chemung group, or for the purpose of extracting ore therefrom. The only testimony in the record that asserts that this work would in any wise tend to the development of the group, is the naked assertion of the witnesses for the claimant, that it is a part of the general scheme for its development.

But it is not stated what that general scheme is. It is difficult to conceive how a drift, run from the bottom of this shaft in a southwesterly direction, which took it into the Highland Chief territory, tends to develop ground north and northwest of the shaft. At all events, it is not shown by competent evidence that this would be the result, and the Department cannot assume that it would do so upon the mere assertion of interested witnesses.

The Department is not unmindful of the fact that the rule is that "a forfeiture cannot be established except upon clear and convincing proof of failure of the former owner to have work performed or improvements made to the amount required by law (*Hammer v. Garfield*, M. D. M. Co., 130 U. S., 201-301).

The evidence in the case at bar, however, is as nearly clear and convincing as will ordinarily be presented on such a question. The protestant's witnesses, who are shown to have great familiarity with the ground are positive in their statements that the work was not done. This is met with mere general statements,—nothing specific or definite. If there were any affidavits made of annual labor, which under the State law are *prima facie* evidence of the fact, they are not offered in evidence. It would seem as if self-interest would prompt miners to have these made while the fact is fresh in their minds, and recorded, so as to be a perpetual memorial of their compliance with the requirements of the law. The protestants familiar with the conditions relocated the ground in 1886. The claimant allowed the matter to rest for about eight years, without making any effort to settle the controversy. It would seem as if it would have been to its interest to have tested the matter while the facts were fresh in the memory of persons familiar with them.

It seems to me that the preponderance of the evidence fairly establishes the fact that there was no work done in the Chemung tunnel during the years 1884, 1885 and 1886, and that that done in the Curran shaft did not tend in any wise to the development of the Chemung claim. The ground was, therefore, subject to relocation.

Your office judgment is reversed, and the entry by the Hamberg Company of the Chemung claim will be canceled.

RIGHT OF WAY—ACT OF MARCH 3, 1891—RESERVOIR SITE.

BLUE WATER LAND AND IRRIGATION CO.*

The provisions of the act of March 3, 1891, conferring right of way privileges for irrigation purposes over the public domain and reservations of the United States, do not contemplate the allowance of such rights over lands reserved by the government for reservoir sites.

Secretary Smith to the Commissioner of the General Land Office, June 9, 1896. (F. W. C.)

In your office letter of November 23, 1895, were presented the facts relative to a certain application pending in your office, filed by the

* Omitted from Vol. XXII.

Blue Water Land and Irrigation Company, for right-of-way under the provisions of sections 18 to 21, act of March 3, 1891 (26 Stat., 1095).

From the presentation made it would appear that said application, if approved, will amount to an appropriation of reservoir site No. 33, New Mexico, recommended for segregation under the act of August 30, 1890 (26 Stat., 371-391), by the Director of the Geological Survey, on February 27, 1891, and approved by the Secretary of the Interior August, 1894.

Your office letter states:

It has been the practice of this office to refuse to receive application for right-of-way upon these sites, and several have been rejected under this ruling. But the question having been raised whether such ruling was in accordance with the law, it has been considered best to submit the question for your decision before rejecting the present application.

By the act of Congress approved October 2, 1888 (25 Stat., 526), \$100,000 was appropriated—

For the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation, and the segregation of the irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows.

and it was provided that—

All the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches or canals are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act, to entry, settlement or occupation until further provided by law.

Under this legislation great bodies of land were reserved.

Your letter further states that—

On February 14, 1889, a resolution was adopted by the Senate providing for the appointment of a select committee of seven Senators to consider the subject of irrigation and the best mode of reclaiming the arid lands of the United States and to report at the next meeting of Congress thereafter what legislation is necessary for such irrigation and reclamation. A majority and a minority report were submitted by this committee on May 8, 1890, and with each report was a proposed bill to carry out the views respectively embodied in said reports. The bill submitted by the majority of the committee contemplated the reclamation of the arid lands and the construction of hydraulic works necessary for such reclamation by the inhabitants of irrigation districts to be formed in each State and Territory in the arid land region, under the supervision of a bureau of irrigation, which was to be established. The report of the minority stated that the effect of the bill proposed by them "was to reserve the sites for irrigating works until Congress should finally decide upon some method of disposing of them to the people." Both bills contemplated that works constructed in the irrigation districts should occupy the sites designated by the irrigation survey for the purpose of protecting the water rights in the several irrigation districts.

In his statement before this committee the Director of the Geological Survey, who was evidently the author of the bill proposed by the minority of the committee, said: "The reservoir and canal sites should remain in public possession in trust for the

people who will need them. The statutes already provide for their discovery, segregation and reservation, but some provision must be made for their utilization. It is manifestly not the purpose to reserve them from use, but to reserve them for use, and to prevent them from falling into the hands of individuals or corporations for speculative purposes. But to whom they shall be turned over for use, and under what conditions their utilization shall be permitted, is the problem to be solved." (Powell's statement, page 64, volume 4.)

It might further be stated, that in reply dated July 30, 1890, to the resolution of the Senate dated July 10, 1890, in relation to the selection of sites for reservoirs, the then Secretary (Mr. Noble) stated that the general purpose and plan of the Department under the law of October 2, 1888, was—

To do no more than to recognize the effect of the statute that imperatively reserves the reservoirs, ditches, and lands therein expressly named; and by appropriate executive action to let it operate distinctively upon the vast territories to which it applies by its own terms; preserving now as rapidly as possible the sources of water supply from the possession or appropriation by individuals or corporations that could thereby dominate all the people dependent for the fertility of their farms and the preservation of their homes upon the element of water. It is believed to be the duty of this Department so long as this statute remains to enforce it, that its fruits, at least in the preservation of the sources and reservoirs of water, may be kept under either National or State governmental control.

It must be clear from this recitation that all the reports on this subject were as a unit on one proposition, viz., the continued reservation of the advantageous *sites* for public good, as against private appropriation for gain, but the matter at issue was the means of utilization to accomplish the desired results.

With these reports before them, Congress by the act approved August 30, 1890 (26 Stat., 391), provided that—

So much of the act of October second, eighteen hundred and eighty-eight, entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes," as provides for the withdrawal of the public lands from entry, occupation and settlement, is hereby repealed, and all entries made or claims initiated in good faith and valid but for said act, shall be recognized and may be perfected in the same manner as if said law had not been enacted, except that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by said act, until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof.

It will thus be seen that the plan of reserving the arid lands, rendered subject to irrigation from the sites selected was abandoned, but the reservation of the sites was continued "until otherwise provided by law."

The Secretary of the Interior in his report dated November 1, 1890, for the fiscal year ending June 3, 1890, states as follows upon the subject of the utilization of these reservoir sites:

The act, it will be perceived, reserves from all lands west of the one hundredth meridian a right of way thereon for ditches or canals constructed by authority of the United States.

It needs but a moment's reflection to recognize that these reservoir sites must be upon very high ground for the most part to gain those natural depressions in the mountains or foothills where the water can be garnered in vast volume; that this water will be gathered in the season when the streams are full and overflowing, so that the amount caught in the reservoirs will not deprive any one of his own abundant supply at that time, and were it not so reserved this overflow would go to waste; that both to conduct the water to the reservoir in the flood season, and thence back into the bed of the stream in the dry season, ditches must exist under the same control as that which commands the reservoirs.

In this connection it is also to be recognized that when these reservoirs exist they will be, with the water they contain, the absolute property of the United States on its own soil and not in any degree dependent upon the stream, which they are rather to supply than to exhaust.

Many of the streams also upon which these reservoirs will be, will run not only between States or between Territories or between Territories and States, but one or more also between Mexico and the United States; and thus the rapid expansion of the system of irrigation now already in progress and to be greatly increased both in extent and completeness, will be apt to exhaust the small supply of the summer stream and leave its bed quite dry before it reaches its ordinary mouth, and even at points near the reservoir, as well as at a distance, the tillers of these arid lands will be dependent for water upon these basins. Whatever authority, therefore, commands this water, the time of accumulation, of its supply and its use, will have control not only of the prosperity, peace and even liberty of the people there, but possibly of the friendship of neighboring States and Territories, and also that between ourselves and the Republic south of us.

It will be an immense expense to make dams of such solidity and skillful construction as will assure safety to valleys and lands below, and appropriate ditches to and from the basins, or through lands, and Congress may not deem it best to build them, but may consider that the use of the lands segregated for reservoirs should be placed under local control for proper use in irrigation.

Therefore, in view of the facts and ideas already mentioned, the Secretary would urge that Congress should without delay enact comprehensive laws, determining the national policy in this business, and, if the reservoirs are subject to local control particularly guarding against such misuse of the powers granted as would either allow the upper lands to absorb the water continuously through the dry season, or the authorities to require any but the cheapest and most liberal terms for its transportation to the inhabitants and farmers.

The act should sanction its provisions and reservations to these ends by the most severe penalties of forfeiture of the privileges conferred, and of all improvements, with absolute and immediate resumption by national control to preserve and effect its original purposes.

It is believed that if this is done there will never be any occasion for the exercise of the reserved powers, but that with less than this the national government will abdicate its authority in a matter of vast importance to great areas of its lands and millions of its people, and find itself impotent to legitimately control affairs in emergencies that by foresight and wise legislation may now be prevented.

After referring to the report above quoted your office letter concludes:

It is therefore clearly shown that both the legislative and executive departments contemplated that some practical and systematic plan would be adopted for the reclamation of the arid lands under the direction of the general government or by the inhabitants of irrigation districts to be established in the several States and Territories, and that the sites reserved under the act of 1888 would remain segregated for such use and not for private ownership. But Congress failed to pass either

bill, or to provide a plan for the utilization of these sites by the general government, or by the public, but by the act of March 3, 1891, granted the right of way through the public lands and reservations of the United States to any canal or ditch company formed for the purpose of irrigation and the right to appropriate the public lands for the construction of reservoirs to the extent of the grounds occupied by the water of such reservoirs and of the canal and its laterals and fifty feet on each side of the marginal lands thereof.

It being evident that the reservation of these sites was for the sole purpose of preventing their appropriation under the general land laws in order that they might be used in the construction of reservoirs for the purpose of reclaiming the arid lands made susceptible of irrigation thereby, and that Congress failed to make any provision for their use by the general government or the public, after its attention had been called to the pressing necessity of immediate legislation providing for the use of such sites, would it not appear that the act of March 3, 1891, passed at the close of the Congress was intended to provide the means for the utilization of those sites and that it fulfilled the purposes contemplated by their segregation?

Two objects controlled in the selection of these sites by the Geological Survey: 1. The availability of the site itself, and 2, the desirability of the particular lands to be irrigated from the body of lands made susceptible of irrigation by the storage of water in such reservoirs. But these are not the only locations that can be successfully used to store water for the irrigation of these same lands, and if these sites cannot be appropriated under the act of March 3, 1891, other sites will be selected for the storage and distribution of the water for the irrigation of the same lands under less economical conditions which will result in rendering the selection by the Geological Survey absolutely valueless for the reason that all the available supply of water in that particular region is stored and utilized by the constructed reservoir. In fact, locations for reservoirs have been selected and approved under the act of March 3, 1891, either because the site was supposed to be more advantageous than the site selected by the government, or because the appropriation of such sites was denied under the right-of-way act, which has resulted in rendering the site selected by the Geological Survey of no practical use for the purpose contemplated by its segregation.

After a most careful review of the entire matter, I am unable to agree with the suggestion covered by your report, to the effect that the purpose of the 18th section of the act of March 3, 1891 (26 Stat., 1095), was to provide a means of utilization, of the sites selected under the acts of October 2, 1888 (*supra*) and August 30, 1890 (*supra*).

By the 17th section of said act reservation of these sites was specifically declared, but was restricted to the land actually necessary for the construction and maintenance of the reservoirs.

Said section reads—"That reservoir sites located or selected and to be located and selected," etc., thus evidencing not an abandonment of the original purpose of reserving the sites but their continuation.

For what purpose? surely, not that they might be held for individual appropriation, as would be possible if sections 18, 19 and 20, were held to embrace them within its scope.

It is true the 18th section grants "the right of way through the public lands and reservations of the United States" to any canal or ditch company organized under the laws of any State or Territory, which shall comply with its conditions, but the word "reservation" as here used, is limited by the proviso to the section which provides—

That no such right-of-way shall be so located as to interfere with the proper occupation by the government of any such reservation.

For the reasons before given, it must be held that the occupation by the government here referred to includes future, as well as present, occupation, and to permit the appropriation of these sites by private corporations and individuals, and at the same time retain the occupation of them by the government, would be impossible.

I am, therefore, of the opinion that the practice which has prevailed since the passage of the act of 1891, is proper and that the scope of the privileges granted by said act does not include these reservoir sites.

ALASKAN LANDS—OCCUPANCY—SURVEY.

W. H. H. HART.

The evident intendment of section 12, act of March 3, 1891, is that claimants must be in possession and occupying the tracts sought to be entered by them for the purpose of trade or manufactures, at the date of application to have the survey made, with such trade or manufactures in actual operation at such time.

The land taken under said section must be as nearly as practicable in a square form.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 28, 1896. (W. M. B.)

This is an appeal by W. H. H. Hart from your office decision of May 14, 1895, wherein was rejected survey No. 105, executed by Albert Lasey, U. S. deputy surveyor, under provision of sections 12, 13 and 14 of the act of March 3, 1891 (26 Stat., 1095), of a tract of land comprising 159.61 acres, situate on Coal Point, Kachemak Bay, Cook's Inlet, district of Alaska, and claimed by Hart; the survey being rejected upon the ground that the said claimant was a non-resident, and that the tract was not occupied for any purpose—there being no business in operation thereon, the particular business which the claimant proposed to engage in and conduct upon the land being entirely prospective.

Hart's location which is marked off by this (No. 105) survey, which appears from the record submitted to be a mere location of a body of land without occupancy, includes within the limits thereof a tract something over one mile in length, with an average width less than one fourth of a mile, and adjoins the location of H. M. Witherbee described by survey No. 106 to the northwest. That the tract, being in the above described shape fails to conform to the statutory requirement as to "square form," will be noticed later on herein.

It also appears that the only effort made by the claimant in the way of making any improvement upon the tract consists of an unfinished log cabin eighteen by fifteen feet square, and about twelve feet high, there being in close proximity thereto valuable improvements erected

by the Cooper Coal and Commercial Company, and the Alaska Coal Company, containing stocks of general merchandise, valued at several thousand dollars each, and placed there by the said companies for the purpose of conducting a general trade in connection with the shipping of coal from their mines in process of development and near at hand.

As stated in your office letter of May 12, 1895, protests have been filed against the approval of this survey by the said companies and certain individuals therein named, based upon a statement of facts made under oath. The said protestants themselves assert actual possession and occupancy of, and a superior right to, the land involved.

As disclosed by the record it would seem that claimant seeks to enter this tract for the purpose of erecting in the future coal bunkers and wharves on the southeast extremity thereof for the shipment of coal, no work as yet having been done on the contemplated improvements. For a non-resident, as claimant is shown to be in the case at bar, to partially complete a log cabin of the description given above on a tract of land preparatory to engaging in a business or trade thereon subsequent to the application for, and execution of, the survey, without actual occupancy of any portion of such tract at said time, would not warrant or justify the approval or acceptance of the survey.

It is unnecessary to refer more at length to the grounds upon which the protests above alluded to are founded, or to consider the materiality thereof, since, aside from and independent of any rights which the protestants may be supposed to have in this tract, appellant's claim to have the survey accepted is not protected by the provision of section 12 of said act of March 3, 1891, the evident intendment thereof being that claimants must be "in possession and occupying" tracts sought to be entered by them for the "purpose of trade or manufactures" at the date of application to have such survey made, with such trade or manufactures in actual operation at such time. Appellant alleges no such state of fact in connection with this survey.

Furthermore, the tract is more than four times as long as it is broad and therefore does not conform in that respect to the statutory provision, and the rules and regulations formulated in accordance therewith, requiring the lines of the survey to be so run as to embrace a tract of land as "near as practicable in a square form." By an examination of the survey under consideration, and the plat thereof, it will be readily observed that the tract surveyed, as indicated on the said plat, is not essential in its unnecessary elongated and existing form for the transaction of the ostensible business—yet to be put in operation and therefore *prospective*—which the claimant Hart alleges he has in view.

For the foregoing reasons your office decision rejecting survey No. 105 is hereby affirmed.

REPAYMENT—PAYMENT TO RECEIVER.

FRANCIS J. DYSART.

The payment of the purchase price of land to the receiver before the acceptance of final proof is at the risk of the purchaser, and if said proof is rejected and the receiver fails to account for the money so paid, the right to repayment from the government cannot be recognized.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 28, 1896. (E. B., JR.)

On October 25, 1895, Francis J. Dysart filed his application claiming a right to repayment by the United States, under the act of February 15, 1893 (27 Stat., 456), of three hundred and twenty dollars which he alleges he paid Fred W. Smith, then receiver of the land office at Tucson, Arizona, as final payment or purchase money for the SW. $\frac{1}{4}$ of section 13, T. 7 S., R. 26 W., for which tract he made desert land entry No. 450 April 15, 1885. Your office denied his application November 12, 1895, on the ground that the case he presented did not come within the provisions of said act, and that there was no law authorizing repayment in such a case. He appeals, contending that both the act aforesaid and the act of June 16, 1880 (21 Stat., 287), authorize the repayment sought.

The records of the local office show that Dysart submitted final proof in the matter of his said entry, and that the same was rejected by the local office February 22, 1887,

on the ground that the land, or a portion of it, had been occupied, cultivated and reclaimed prior to entry, and that you (he) failed to prove entire reclamation of the tract,

and that the letter of rejection contained the usual notice of the right of appeal; but neither they nor the records of your office afford any evidence of the payment of purchase money as alleged. The records of your office show that said entry was canceled April 30, 1887, upon the voluntary relinquishment of Dysart dated March 2, 1887; Dysart further alleges that he handed the sum specified above to said receiver, at the time he offered his final proof, to be applied in payment for the land, and that he received the said letter of rejection, but that the said sum, nor any part thereof was ever returned to him.

It would appear from the record and Dysart's allegations that the said sum was probably handed to the officer named to be applied by the latter as purchase money for the land (which was double minimum land being then within the limits of the grant to the Texas Pacific Railroad) in the event of the acceptance of the final proof. Until such acceptance there could be no sale or final entry of the land under Dysart's entry, and the money was the private property of Dysart.

Not having ever become public funds no responsibility for its return could legally attach to the government.

The arrangement by which the receiver was its custodian until it should be applied as purchase money for the land, subject necessarily to the acceptance of the final proof, was for the convenience of himself and Dysart. His failure to return it upon the rejection of the final proof was a private wrong or tort against Dysart for which the receiver only, and not the government, was legally responsible (Am. and Eng. Ency. of Law, Vol. 19, p. 514, and authorities there cited). As was said by the supreme court in *Gibbons v. United States* (8 Wall., 269),

No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents.

And again, in the same decision, concerning the question of the government's responsibility:

It does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it, in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests.

The acts of February 15, 1893, and June 16, 1880, (*supra*), provide for the return only of money which has actually been received by the government, under certain specified conditions. The money which Dysart asks that the government shall restore to him was never received by it. Said acts clearly can have no application to his case.

The denial of his application is therefore affirmed.

ALASKAN LANDS—AREA OF CLAIM—SURVEY.

CHARLES A. JOHNSON ET AL.

The right to purchase lands in Alaska for purposes of trade or manufactures does not extend unconditionally to one hundred and sixty acres, but only to so much as may be actually occupied for the purposes named, in no case to exceed one hundred and sixty acres.

The requirement that such land shall be taken in "square form" means that the tract claimed should be surveyed and laid off in the form of a rectangular equilateral parallelogram, as nearly as the configuration of the land will permit.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 28, 1896. (W. M. B.)

This is an appeal by Charles A. Johnson and William H. Metson from your office decision of May 9, 1895, wherein was suspended survey No. 71, executed by Clinton Gurnee, Jr., U. S. deputy surveyor, under provision of sections 12, 13 and 14, act of March 3, 1891 (26 Stat., 1095), and regulations thereunder (12 L. D., 583), of a tract of land containing 109.08 acres, situate on Ugashek river on the western coast of the Alaskan Peninsula, a portion of which tract is occupied and used for a salting and fishing station; said survey being suspended

for the reason that more land is claimed than is occupied and used by claimants for the purposes of their business, and also because the regulation as to square form has not been complied with.

In your said office decision you state:

It is suggested that if the survey was amended by beginning at a point on the line of ordinary high water 4.40 chs. S. $2^{\circ} 15'$ W. of corner No. 1 of the original survey; thence S. $87^{\circ} 45'$ E. 10 chs.; thence S. $2^{\circ} 15'$ W. 10 chs.; thence N. $87^{\circ} 45'$ W. to line of ordinary high water mark; thence along said line to point of beginning, final action by this (your) office would be greatly facilitated. Such an amended survey would include all the land occupied by the claimants for their business, an area of ten acres.

In appealing from said decision claimants file assignments of error as follows:

1. That under the act of March 3, 1891, the claimants are entitled to one hundred and sixty acres of land.
2. That the survey as returned by the deputy covers the tract claimed according or within the monuments of the claimant's location.
3. That the square form alluded to in said act relates not to technical measurement, but substantially to conform to the system of government surveys, so as to include the lands occupied by the claimants and adjoining thereto, to the extent of one hundred and sixty acres.

Under provision of the act of March 3, 1891, the claimants are not entitled, unconditionally, to one hundred and sixty acres of land, but only to so much as may be in their possession and actually *occupied* by them for the purpose of conducting the trade in which they are engaged; in no case to exceed one hundred and sixty acres; and to be "as near as practicable in a square form."

With respect to such square form, the regulations (12 L. D., 587, par. 4) issued under the act of March 3, 1891, for the purpose of carrying out the provisions thereof, respecting the survey and purchase of non-mineral public lands in Alaska, require that such lands must be surveyed so as to be laid off "in one compact body, and as nearly in square form as the circumstances and the configuration of the land will admit." Such requirement can mean nothing more nor less than that lands claimed and sought to be purchased under said act and regulations should be surveyed and laid off in a shape similar to that of a *rectangular equilateral parallelogram* as near as the configuration of the land will allow. The tract embraced in this survey was not laid off in square form as near as practicable, it, being about six times as long, from north to south, as its average width, from east to west, and the survey appears to have been made with a view of covering as extended a shore line as possible.

The land laws, with respect to the non-mineral public lands, are not in force in the district of Alaska, nor has any general system, as yet, been put on foot for the survey of such lands, hence there is no force in the contention of appellants that these special surveys made under the provision of the cited sections of the referred to act should conform

to the system of government surveys of the public lands so as to include lands occupied by claimants, as well as those *adjoining* thereto, according to the monuments of the claimants' location; to the extent of one hundred and sixty acres. Such contention would evidently imply that occupancy of a part of a tract was occupancy of the whole tract, and that claimants are entitled to purchase one hundred and sixty acres, in other shape than square form, where there was occupancy of a very small portion of the tract for which application to enter is made. Such is not the case. The survey of lands in the district of Alaska will only be recognized and accepted when made in conformity with special statutory provision, relating thereto, and the rules and regulations formulated thereunder.

The quantity of land, to be taken in the form suggested in your office letter as an emendation of the original survey, would give to appellants, it would appear, all the land which they actually occupy and therefore to which they are entitled under the law.

For the foregoing reasons your said office decision suspending survey No. 71 is hereby affirmed.

CONTEST—INFORMATION—CORROBORATION—AMENDMENT.

LOWENSTEIN *v.* ORNE.

After a hearing has been directed by the Department on the charge set forth in an affidavit of contest, the subsequent retraction of the statements in the corroboratory affidavit, does not warrant the General Land Office in revoking the order for the hearing issued under departmental direction.

The right to amend an affidavit of contest should be recognized where no new ground of attack is introduced thereby.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 28, 1896. (J. L. McC.)

On August 10, 1893, Orne made homestead entry for Lots 3 and 4 and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 4, T. 11 N., R. 3 W., Oklahoma land district, Oklahoma Territory.

On the same day Isaac Lowenstein filed affidavit of contest against said entry, in which he alleged that defendant entered upon and occupied a portion of the lands opened to settlement by the proclamation of the President of the 23d of March, 1889, prior to 12 o'clock, noon, of April 22, and subsequent to the 2d day of March, 1889, and that said entry was not made in good faith, but the same is fraudulent and void, in that the said entryman had theretofore entered into a collusive arrangement and understanding with divers other persons, including one Argo, whereby the said parties were and are to receive title to a part and portion of said above described tract, by and through said homestead entry and claim of the said Edward Orne.

The defendant Orne filed a motion to dismiss the contest because the first charge had been tried and determined in the case of *South Oklahoma v. Couch et al.* (16 L. D., 132), and because the second charge, of fraud, collusion etc., did not state facts sufficient to constitute a cause of action, in that no specific charge was made. The local officers sustained the motion as to the first charge, and as to the second charge also unless plaintiff amended it, leave to do which was granted. The plaintiff did not avail himself of the privilege and the case was dismissed.

On June 18, 1894, the plaintiff appealed from the action of the local officers, assigning as error their action in sustaining said motion. On December 13, 1894, your office considered said appeal and sustained the action of the local officers, as to the first charge in the plaintiff's affidavit, but overruled them as to the second charge, holding that a cause of action was therein stated, and directing that a hearing be had thereon.

From this decision both plaintiff and defendant appealed to the Department, plaintiff alleging that your office erred in not overruling the action of the local officer in reference to the first charge in the affidavit of contest, and defendant alleging that it was error to order a hearing on the second charge in said affidavit, because of its vagueness and insufficiency.

The Department upon consideration of the case found that the qualifications of Orne had been put in issue by the proceedings in the Couch case (*supra*), and held that a second hearing on that charge should not be allowed; but as to the second charge—that of having entered into a speculative contract—the Department held the contest affidavit to be sufficient to warrant a hearing, and therefore affirmed your decision. Your office thereupon ordered the hearing to proceed.

Said contest affidavit was corroborated by one Thomas Wright. On March 21, 1896, said Wright made affidavit that—

He did not intend to corroborate in his said affidavit any charge of an illegal contract on the part of defendant Edward Orne; that if said affidavit contains such charge he did not know it at the time, and did not mean to corroborate the same; that your affiant can not read, or write except his own name, and that it was explained to him that he was simply swearing to the charge of soonerism; . . . and that, for the reasons above given, and that justice may be done to all concerned, he does now desire to withdraw and retract all of the said affidavit and asks that it be not considered.

The above affidavit was transmitted to your office, which thereupon, April 16, 1896, revoked its order for a hearing, and dismissed the contest.

Lowenstein has appealed from said decision, alleging, in substance, that after a hearing has been formally ordered, all questions as to the sufficiency of the information upon which it was ordered are removed from the case.

In this he is unquestionably correct. See departmental decisions in

cases of *Houston v. Coyle* (2 L. D., 58); *Koons v. Elsner* (2 L. D., 65); *Edward F. Fritzsche* (3 L. D., 208); and many others since.

He contends further that it was error to hold that,

after a hearing had been ordered by the Department upon the information as filed herein, the procurement and filing of a withdrawal of the corroborating witness upon said information operated to rescind the said order of hearing, and was cause for dismissing the contest of appellant.

It would have been proper for your office to have forwarded the corroborating witness' retraction of his affidavit and his request to be allowed to withdraw the same, to the Department for its information and consideration, with request for instruction what course to pursue in view thereof; but the revocation of the order for a hearing amounted practically to nullifying the decision rendered by the Department in the case, and therefore was erroneous.

Appellant applies for leave to amend his said contest

by filing other and further corroboration of the charge therein, and by rendering the charge more specific, in that said entryman had actually conveyed a part and parcel of said tract by instrument in writing, contrary to law, and prior to the date of contest herein, and had actually delivered possession of said parcel of land, which said possession has at all times since remained in the grantee named in said conveyance, and further asks leave to file as corroboration of said amended charges certified copies of said instrument of conveyance and affidavits showing such delivery of possession; and appellant asks that such charge so rendered more specific under said leave to amend be held to relate back so as to cut off intervening contests.

The Department has held in the case of *Grant v. Rutledge* (23 L. D., 49):

The manifest trend of departmental decisions is to allow amendments, even in the face of an intervening claim unless they introduce a substantially new ground of contest, or else differ essentially from the original affidavit, so as to prejudice the right of the intervening claimant.

In the case at bar the amendment suggested is not substantially a new ground of contest; it is simply an offer to supplement the charge of speculative intent heretofore made by proof that it had been actually carried into effect.

In the case of *Wallace v. Woodruff* (19 L. D., 309)—*syllabus*—the Department held:

The amendment of an affidavit of contest relates back to the original, and excludes intervening contests, where the said amendment does not introduce a new ground of contest, but merely makes more specific and definite the original charge.

I am of opinion that it was an error on the part of your office, under the circumstances set forth, to revoke the order for a hearing and dismiss the contest.

The decision of your office is, therefore, reversed; contestant will be permitted to amend his contest affidavit as prayed for; and a hearing will be had, with due notice to all parties interested, at which he will be afforded an opportunity to prove the allegations contained in said contest affidavit as amended.

RAILROAD LANDS—ACTS OF 1887 AND 1890.

KENDRICH ET AL. *v.* PERDIDO LAND CO.

The agreement of a transferee of the Mobile and Girard R. R. Co. to accept, under section 8, act of September 29, 1890, a *pro rata* share of the lands earned by said company, and the consummation of such agreement, do not operate as a waiver or abandonment of the right on the part of said transferee to subsequently apply for relief under section 4, act of March 3, 1887, as to lands purchased from said company but not secured through said *pro rata* adjustment.

An application for patent under section 4, act of March 3, 1887, to lands erroneously certified on account of a railroad grant must be denied, where the want of good faith, both on the part of the original purchaser and the subsequent transferees is apparent.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(W. A. L.) August 28, 1896. (G. B. G.)

The case of Alonzo Kendrick *et al. v.* The Perdido Land Company is before the Department on the appeal of the company from your office decision of February 12, 1895, rejecting said company's application for patent for certain lands therein described, under the act of March 3, 1887 (24 Stat., 566).

The history of this case and the legislation affecting the same is as follows:

Congress by the act of June 3, 1856, (11 Stat., 17) made a grant to the State of Alabama to aid in the construction, among others, of a railroad from Girard to Mobile in said State. June 1, 1858, the Mobile and Girard Railroad Company, grantee of said State, filed its map of definite location, which was approved. In 1860 and 1861, prior to the construction of any part of the road, there were certified to the State, under said grant, 504,167.11 acres, and by appropriate legislation the lands herein applied for were by the State conveyed to the Mobile and Girard Railroad Company. In 1872, and subsequently, the company sold the lands applied for to Josiah V. Thompson, and by mesne deeds the lands were conveyed to the applicant. The railroad company built its road from Girard to Troy, a distance of eighty-four miles. By the forfeiture act of September 29, 1890 (26 Stat., 496), said grant opposite unconstructed road was forfeited, but by the 8th section thereof the railroad company was entitled to an amount of lands equal to that earned by the construction of the eighty-four miles of road, and the act directs the Secretary of the Interior in making settlement with the railroad company to include all the lands sold or disposed of by said company, not to exceed the total amount earned. By direction of the Secretary of the Interior the applicant, with all other purchasers and claimants, filed its claim under its purchase in the General Land Office, and on October 25, 1892, the Commissioner, in submitting an adjustment of the grant under said 8th section to the Department, passed upon all of said claims, holding that inasmuch as the railroad company

had sold all the lands certified to it before the passage of said act, amounting, as before stated, to 504,167.11 acres, and said company having earned only 302,233.97 acres, that, therefore, said purchasers should receive their *pro rata* share of the lands so purchased, excepting the heirs of one Abraham Edwards, whose claim was rejected.

On December 22, 1892, the "large purchasers" entered into an agreement to *pro-rate*, allowing the heirs of Abraham Edwards to participate, and on April 24, 1893, the Secretary passed upon the report and recommendation of the Commissioner aforesaid, and awarded and allotted to each purchaser his *pro rata* share of the lands, amounting to 58 per cent of their respective purchases.

On May 4, 1892, the residue of the lands were ordered to be restored to the public domain on July 19, 1893, after due notice by publication.

On June 29, 1893, the Perdido land company filed its application in the local land office at Montgomery, Alabama, under the 4th section of the act of March 3, 1887, for patents to the residue of its lands under its purchase, and this application is now before the Department on appeal from your office decision of February 12, 1895, rejecting said application as aforesaid.

There are a number of errors assigned by the appellant, but there are only two questions of controlling importance in the case.

1st. Had the lands herein applied for been sold by the grantee company to a qualified person or persons, purchasing in good faith, prior to the passage of the act of March 3, 1887?

2d. Has the Perdido Land Company, by reason of its agreement to *pro rata* under Sec. 8 of the forfeiture act of September 29, 1890, waived, abandoned, forfeited or exhausted its right to patents for the lands applied for under the 4th section of the act of March 3, 1887?

The last question involves the consideration of two acts of Congress, which do not appear to have been passed upon by the Department in their relation to each other and the issue presented, and will be considered first.

By the 8th section of said act of September 29, 1890, it was provided,

That the Mobile and Girard Railroad company of Alabama shall be entitled to the quantity of land earned by the construction of its road from Girard to Troy, a distance of eighty-four miles, and the Secretary of the Interior in making settlement and certifying to or for the benefit of said company the lands earned thereby shall include therein all the lands sold, conveyed or otherwise disposed of by said company, not to exceed the total amount earned by said company as aforesaid, and the titles of the purchasers to all such lands are hereby confirmed so far as the United States are concerned.

When the General Land Office came to the adjustment of this grant under the section quoted, it became apparent that the company had not earned sufficient land to satisfy the claims for "lands sold, conveyed, or otherwise disposed of" by said company, and, as has been seen, the Perdido Land Company, with other large purchasers, agreed to *pro-rate* its claims.

I do not understand by this agreement that the participants thereunder had any intention of abandoning any rights they may have had under the act of 1887 (*supra*). The third section of the said act of September 29, 1890, provided among other things,

That nothing in this act contained shall be construed as limiting the rights granted to purchasers or settlers by "an act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes," approved March 3, 1887, or as repealing, altering, or amending said act, nor as in any manner affecting any cause of action existing in favor of any purchaser against his grantors for breach of any covenants of title.

It would appear then that it was not the intention of Congress by the 8th section of the act of 1890, to take away or limit any rights of purchasers granted by the 4th section of the act of 1887 (*supra*). The object of said section 8 was to confirm to the Mobile and Girard Railroad Company's grantees, a number of acres of land earned by said company. The lands sold by the company were directed to be included in the list of lands directed to be certified thereunder,—lands that had been sold, without regard to the fact whether these lands were opposite to and coterminous with, the constructed portion of the road. In other words, lands anywhere within the limits of the grant were to be certified to the company to the extent of the number of acres earned, if they had been sold by the company. It is worthy of notice too, that this section does not limit the certification provided for to lands that have been purchased in good faith from the railroad company. It is sufficient if they "had been conveyed, or otherwise disposed of by said company."

It would seem, therefore, that this section was an absolute confirmation of all sales to the extent of the number of acres earned without regard to the good faith of the purchasers. It is not surprising then that those applicants should have invoked the benefits of this act, or that they should have agreed to a pro-rating of lands thereunder. Such pro-rating made an early adjustment possible, and until such adjustment there was no authority of law for the assertion of any right under the act of 1887, that act providing for making the proof required by the 4th section thereof only "after the grants respectively shall have been adjusted." After the adjustment of the grant, and before the lands applied for were restored to the public domain the Perdido Land Company filed its application for the residue of lands under its purchase. It is unfair and altogether unreasonable to suppose that the applicant company had any intention of abandoning its claim under the act of 1887 by accepting a pro-rating under the act of 1890. Such is not the necessary or reasonable effect of the legislation affecting those rights, and the applicants will not be presumed to have abandoned a substantial right guaranteed by law in the absence of any apparent advantage gained thereby.

The company had a right to rely on the express provision of the act of 1890, that no rights guaranteed to purchasers by the act of 1887

should be taken away or limited by the act of 1890; and I am clearly of opinion that if the applicants had any rights under the act of 1887, that they are not affected by the act of 1890, or the proceedings had thereunder.

This brings us to the question of good faith in the purchasers. The act of March 3, 1887, *supra*, provides in the fourth section thereof:

That as to all lands . . . which have been erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States . . . the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land office within such time and under such rules, as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting.

The lands applied for herein were erroneously certified to the State of Alabama for the use and benefit of the Mobile and Girard Railroad company. The railroad company sold to one Josiah V. Thompson prior to the passage of the act above quoted.

The record shows that the Perdido Land Company is the remote assignee of Thompson. The facts connected with Thompson's purchase from the railroad company are substantially as follows—

The lands were certified to the railroad company in 1860. After the civil war the State of Alabama levied tax on the lands, including back years, and they were finally sold by the State for these taxes, and bid in by the State. By a resolution of the board of directors, W. J. Van Kirk, then agent for the railroad company, was instructed to sell the equity of redemption in the lands at a price fixed by the board. Van Kirk went to Pennsylvania and induced Thompson to buy them, he paying at that time and subsequently about \$10,000.00 to the railroad company, and about the same amount to the State to redeem the lands, making the consideration in all about seventeen cents per acre. Van Kirk represented to Thompson that it was a good investment, and gave his personal pledge that should he (Thompson) become dissatisfied with his purchase, that he (Van Kirk) would take it off his hands and repay him the purchase money. Some years later, when Congress began to agitate the question of the forfeiture of the grant, Thompson sold the land to Van Kirk and others, the consideration expressed in the deed being \$25,000.00. Then followed the organization of the Perdido Land Company, the applicant, and the lands were conveyed to it, and stock issued to each one of the purchasers, according to his respective interest.

It appears further that Van Kirk was a kinsman of Thompson, and he admits that he is the present owner of nine-tenths of the stock of the Perdido Land Company.

The following questions and answers appear in his testimony on cross-examination.

Q. How much money was furnished you by Josiah V. Thompson to buy the lands

from the M. & G. R. R. Co., as shown by deeds, when you went to Pennsylvania for the purpose of interesting him in this purchase?

A. Forty-eight hundred dollars (\$4,800.00).

Q. Have you at any time—subsequent to the sales by the H. & G. R. R. Co. to Josiah V. Thompson—returned to said Thompson any part of the original purchase price paid by him for said lands?

A. Thompson never would admit that he owned any of these lands, but held them as trustee, because he thought the title doubtful, his lawyers told him that he would never get the title. I paid him back the money that he paid.

In one view of the law, I might easily rest the case here on the admission of Van Kirk that "Thompson never would admit that he owned any of these lands." There was no purchaser in good faith from the railroad company, and it might be argued with force that assigns would take the land charged with the bad faith of the original purchaser. But assuming that the statute intended to confirm the title of these lands in the hands of good-faith purchasers, regardless of the character of the original purchase from the company, the record does not show the Perdido Land Company to be a good-faith purchaser. On the contrary, the evidences of bad faith are abundant. It is apparent that it was from the beginning Van Kirk's scheme of self-aggrandizement which was paramount. He furnished much at the beginning and eventually all of the money paid for these lands. Instead of having Thompson convey direct to him, the conveyance was made to A. C. Blount, Jr., as trustee for W. J. Van Kirk and others, without consideration. At this time Van Kirk was sole owner of the lands. Blount conveyed to the Perdido Land Company, it appears, without consideration, although \$25,000.00 is the consideration named in the deed. This last conveyance was made, it is admitted by Van Kirk, in anticipation of a legal fight, on the advice of counsel.

I must, therefore, hold that the Perdido Land Company is neither a purchaser in good faith nor an assign in good faith, and, therefore, in any view of the statute, has no rights under the fourth section of the act of 1887. A knowledge of the conditions of the grant, its liability to forfeiture, which the purchasers had, and were charged with, rendered impossible a purchase in good faith.

As further persuasive of this view it appears that the Committee on Public Lands of the House of Representatives (48th Congress, 2d Session; Report 2501), presented and recommended for passage a bill to declare a forfeiture of this grant and took the same ground.

It appears further from your office decision herein, and is not explained on appeal, that Mr. M. D. Brainard, who was attorney for Thompson and the Perdido Land Company before this Department in the matter of the adjustment of the grant, declared "that there are no *bona fide* purchasers or innocent purchasers for value of any of the Mobile & Girard Railroad lands."

The fact that the company has been allowed to take part of the lands purchased under the act of 1890 is no argument in support of its

present contention. That act did not prescribe as a prerequisite condition good faith in the purchase, and even if it had, the pro-rating made thereunder was by agreement of purchasers with conflicting claims, and the then Secretary disclaimed any intention of passing on the good faith of the purchase.

The decision appealed from is modified to meet the views hereinbefore expressed. The company's application is dismissed.

DESERT LAND CONTEST—EXTENSION OF STATUTORY LIFE OF ENTRY.

HODGSON v. EPLEY.

A motion to dismiss an appeal taken from an action lying within the discretion of the Commissioner will not be considered, where the appeal has been duly allowed, and the case presents a new question for departmental adjudication.

The effect of the act of July 26, 1894, on desert land entries, was to extend the time for making proof and payment for one year beyond the time at which the same were due, or would thereafter become due under the law as then existing. Said act is not limited to entries alone which were alive at that date, but is also applicable to old entries which remained of record uncanceled at the date of its passage.

A desert entryman under the act of 1877 who, after the expiration of his entry, and prior to the passage of the act of July 26, 1894, elects to proceed under the amendatory act of 1891, takes by way of the extension of time under said act of 1894, the same privilege as though his entry had been originally made under said act of 1891.

By the act of August 4, 1894, extending the time for compliance with the desert land laws, Congress intended to relieve all desert entrymen from both expenditure and proof for one year, and the entry year, not the calendar year, was meant. In the application of said remedial provisions to particular cases, if the entryman was in default for a year ending in 1894 the act should be applied to cure the default for that year; if not in default for the year ending in 1894, he should be excused for the entry year beginning in 1894.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(W. A. L.) August 28, 1896. (G. B. G.)

This case involves the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, lot 7, of Sec. 6, the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and lot 1, Sec. 7, T. 2 S., R. 7 W., Salt Lake City, Utah.

The record shows that on January 8, 1891, Solomon Epley made desert land entry for the above described tract, together with the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 6, as to which latter tract his relinquishment was filed March 21, 1894.

March 21, 1894, the defendant filed his affidavit, stating that he elected to proceed under the amendatory desert land act of March 3, 1891 (26 Stat., 1095). The affidavit set forth that he "has constructed a ditch over a portion of this land and made other improvements."

By your office letter of April 12, 1894, this election was held to be sufficient, and the local officers were directed to instruct the claimant to furnish final proof by January 8, 1895.

January 14, 1895, John H. Hodgson filed his affidavit of contest,

alleging that the entryman had not conducted water upon the land, and that it was in its wild and uncultivated state.

Subsequently, on March 18, 1895, the plaintiff filed his supplemental affidavit, in which he further alleged that the defendant had not during the fourth year of his entry—that is, after the 6th day of January, 1894, and prior to the 8th day of January, 1895—made any expenditures upon his said entry, as required by the desert land law.

At the hearing had at the local office, the defendant moved the dismissal of the contest for the reason that he was not required to have any improvements upon the land at the time of his election to proceed under the amendatory act of 1891, March 21, 1894, and that he was relieved from making any expenditure upon the land from January 8, 1894, to January 8, 1895, by the act of August 4, 1894 (28 Stat., 226).

The local officers ruled the point well taken, and dismissed the contest as premature. Upon appeal, your office decision of May 28, 1895, reversed the action of the local officers and ordered the hearing to proceed upon its merits. Further appeal brings the case before the Department.

There is contained in the record a motion to dismiss the appeal addressed to you, on the ground that—

the decision of the Honorable Commissioner herein, holding the affidavit of contest sufficient and directing hearing to proceed thereon, is interlocutory in character and not appealable.

Unquestionably, the order of a hearing lies within the discretion of the Commissioner of the General Land Office, and will not be interfered with save where there is a clear abuse of such discretion. The regular course to be pursued in such cases, is for the Commissioner to refuse to forward the appeal and for the party aggrieved to apply for a writ of *certiorari*, in which event the Department will consider whether there has been an abuse of his discretion. But the initiative in the matter of rejecting an appeal under facts similar to the cause at bar, primarily lies with your office, and where such action is not taken, and the case involves a new question for departmental adjudication, the motion to dismiss will not be considered.

To hold that the appeal would not be considered because no appeal lay, would be in effect putting the appellant in a worse condition than if your office had ruled that no appeal would lie, for the reason that if this had been done he could have applied for the issuance of a writ of *certiorari*, and in that way raised the question before the Department, whereas to dismiss the appeal now, would leave him without remedy.

This entry was made under the act of 1877, under the terms of which the life-time of the entry was three years. Under this act the entry in question, having been made on January 8, 1891, expired on January 8, 1894. There was, however, no declaration of forfeiture by the land department, and on July 26, 1894, Congress passed an act, section one of which is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the time for making final proof and payment for all lands

located under the homestead and desert land laws of the United States, proof and payment of which has not yet been made, be, and the same is hereby, extended for the period of one year from the time proof and payment would become due under existing laws (28 Stat., 123).

The effect of this act was to extend the time for making proof and payment on all desert land entries for one year beyond the time at which proof and payment were due or would thereafter fall due under the then existing law. It is not limited to entries alone which were alive at that date, but is alike applicable to old entries which remained of record and uncanceled at the date of the passage of that act. Its effect on this particular entry was therefore to extend the time for proof and payment thereon to the 8th day of January, 1895.

The entryman's election, therefore, on March 21, 1894, to proceed under the amendatory desert land act of March 3, 1891 (*supra*), was, by virtue of the remedial and retroactive operation of the act of July 26, 1894 (*supra*), made within the life-time of the entry, and the question of regularity in the election on account of the old entry having otherwise expired, does not arise.

The case then should be treated just as though the entry had been made on January 8, 1891, under a law which gave the entryman until January 8, 1895, to make proof and payment.

The effect then of the entryman's election to proceed under the act of March 3, 1891, was not, in this view, to give him any additional time. The election, however, had an important bearing in one respect. It imposed upon the entryman the burden of yearly proof required by that act. In the absence of further legislation, this would have been, under the peculiar circumstances of this case, of no practical importance; since his annual proof and final proof would have fallen due on the same date, to-wit, January 8, 1895. Before this time had arrived, however, Congress passed the act, August 4, 1894, entitled "An act for the relief of persons who have filed declarations of intention to enter desert lands" (28 Stat., 226), which is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where declarations of intention to enter desert lands have been filed, and the four years' limit within which final proof may be made had not expired prior to January first, eighteen hundred and ninety-four, the time within which such proof may be made in each such case is hereby extended to five years from the date of filing the declaration; and the requirement that the persons filing such declarations shall expend the full sum of one dollar per acre during each year toward the reclamation of the land is hereby suspended for the year eighteen hundred and ninety-four, and such annual expenditure for that year, and the proof thereof, is hereby dispensed with: *Provided*, That within the period of five years from filing the declaration satisfactory proof be made to the register and receiver of the reclamation and cultivation of such land to the extent and cost and in the manner provided by existing law, except as to said year eighteen hundred and ninety-four, and upon the payment to the receiver of the additional sum of one dollar per acre, as provided in existing law, a patent shall issue as therein provided.

It will be seen that the entry under consideration comes within the descriptive clause of this act. It therefore remains to be ascertained

what effect it may have. It is evident, in the first place, that inasmuch as it extends the time within which final proof may be made to five years, that final proof on this entry is not due until January 8, 1896. This narrows the case down to the one vital question, When, in view of the provisions of the act last above quoted, was the entryman's first yearly proof due under his election and the act of 1891 (*supra*), and, specifically, was this contest, filed on January 14, 1895, and amended on March 18, 1895, charging that the entryman had not during the fourth year of his entry made any expenditures upon his said entry, as required by law, premature?

The language of this act, subjected to legitimate analysis, would seem to defeat its avowed purpose. Construed strictly, or even liberally, without extraneous aids, the calendar year 1894 would seem to be meant; but so construed it results that desert land entrymen get no benefit from the act unless proof falls due in 1894 before the passage of the act, and the entryman is in default at that date, or after the passage of the act in that year. In the latter class of cases no benefit would be derived unless the entryman was in default in the matter of expenditures, except to excuse him from making proof, whereas the act provides relief both in the matter of expenditures and proof.

I am of opinion that Congress intended to relieve all desert land entrymen from both expenditure and proof for one year. It is a matter of history that at the time this act was passed financial conditions were such that all business enterprises were at a standstill. The country had not yet begun to recover from the panic of 1893, loans could not be negotiated on the ordinary securities, and money was phenomenally scarce.

If this act is to be interpreted so as to carry out its avowed purpose, to give relief to all desert land entrymen, and to all alike, then it must be held that the entry year and not the calendar year was meant.

In this view a difficulty arises which must be dealt with arbitrarily—Was the entry year *ending* in 1894 or *beginning* in 1894 meant? This, that the act may be administered so as to confer an equal benefit on all who come within its provisions, will depend on the circumstances of each case. If the entryman was in default for any year ending in 1894 the act should be applied to cure the default for that year. If not in default for the year ending in 1894 he should be excused for the entry year beginning in 1894.

Applying this rule to the case at bar, it follows that the contest herein is premature. The entryman was not in default for the entry year ending January 8, 1894. His default had been cured by the act of July 26, 1894 (*supra*). He is therefore excused by the act of August 4, 1894 (*supra*), from making expenditures and proof for the entry year beginning January 8, 1894, and ending January 8, 1895. His first annual proof would not, therefore, fall due until January 8, 1896.

Your office decision is reversed, and the papers in the case herewith returned for proceedings consistent with this opinion.

CLEAVES *v.* SMITH.

Motion for review of departmental decision of April 24, 1896, 22 L. D., 486, denied by Acting Secretary Reynolds, August 28, 1896.

DOWMAN *v.* MOSS.

Motion for reconsideration of departmental decisions of December 19, 1894, 19 L. D., 526, and February 23, 1895, 20 L. D., 122, overruled by Secretary Smith August 28, 1896.

TIMBER CULTURE ENTRY—HEIRS—RELINQUISHMENT.

MORGAN *v.* GREEN.

By the law of descents in the State of Kansas, the father and mother inherit jointly the estate of a son who dies intestate, leaving no wife nor issue, and it therefore follows in the case of a timber culture entryman who thus dies, having an entry in said State, that if the father subsequently dies before the entry is carried to patent, a valid relinquishment of said entry can not be executed, except by the joint action of the mother and the heirs of the deceased father.

Secretary Smith to the Commissioner of the General Land Office, August
(W. A. L.) 29, 1896. (P. J. C.)

This is an appeal by Walter L. Green from your office decision of November 14, 1893, holding for cancellation his homestead entry made February 9, 1892, and re-instating the timber-culture entry of W. A. Ferguson made August 10, 1885. The land involved is the NW. $\frac{1}{4}$ of Sec. 24, T. 3 S., R. 20 W., Kirwin, Kansas.

The record shows that Ferguson, who was unmarried, died, on March 20, 1889, leaving a father, mother, three brothers and a sister. On July 7, 1890, the father died. On May 14, 1891, Green filed a contest against the entry, charging, substantially, failure to comply with the law on the part of the entryman and his heirs. Dart A. Morgan's contest was filed November 20, 1891, subject to that of Green.

On February 4, 1892, the contest of Green was dismissed for failure to prosecute. On February 9, 1892, Green filed the individual relinquishment of Ferguson's mother, and on same date was allowed to make homestead entry of the land.

After a hearing ordered by your office to determine whether the filing of the relinquishment was voluntary or the result of Morgan's contest, the local office, on April 13, 1893, found it was not the result of the contest, and therefore Green's entry should remain and Morgan's contest be dismissed.

From this Morgan appealed.

On November 24, 1893, your office held that the right of Ferguson ascended to his mother and father, jointly, that on the death of the father his children became parties in interest in his estate, and in order to execute a valid relinquishment they should join therein with their mother. Your office therefore decreed that Green's entry should be held for cancellation and that of Ferguson reinstated, Morgan being allowed to contest under his affidavit filed November 20, 1891, as aforesaid.

From this Green has appealed to this Department.

Section 2 of the timber-culture act (20 Stat., 113) provides that if the entryman be dead, his heirs or legal representatives may make proof, etc. The heirs of the entryman, therefore, have an inheritable interest in the land. (*Rabuck v. Cass*, 5 L. D., 398; *Ewart v. Carey's Heirs*, 20 id., 214.)

Section 2611 of the General Statutes, 1889, of Kansas, provides:

If the intestate leave no issue, the whole of his estate shall go to his wife; and if he leaves no wife nor issue, the whole of his estate shall go to his parents.

Section 2599 provides that on the death of the husband intestate one-half of all his real estate not necessary for the payment of debts shall go to the wife if she survive him, and by section 2609 the remainder of the estate, subject to the same conditions, descend in equal shares to his children.

Whatever estate Ferguson had in the land descended, by operation of law, to his father and mother. The question arises as to what was the character of the estate they had in the land—that is, whether they took it as an estate in entirety, or as tenants in common. If there is no statute in derogation thereof, the common rule prevails in Kansas as to these classes of estates. (*Baker v. Stewart*, 40 Kansas, 442; *Shinn v. Shinn*, 42 id., 7.) In the latter case the court said, on page 9:

The statutes (of Kansas) do not attempt to abolish or affect tenancies by the entirety any more than they attempt to abolish or affect tenancies in common. Both kinds of tenancies still exist and both are alike affected as between husband and wife by the foregoing statutes.

The "foregoing statutes" referred to by the court is a reference to section 3752, which reads:

The property, real or personal, which any married woman in this state may own at the time of her marriage, and the rents, issues, profits or proceeds thereof, and any real, personal or mixed property which shall come to her by descent, devise or bequest, or the gift of any person except her husband, shall remain her sole and separate property, notwithstanding her marriage, and not be subject to the disposal of her husband, or liable for his debts.

An estate in entirety, arose at common law, as a direct result of the incidents with which that law invested the marriage relation; it would not have existed at all if the common law could have recognized in such relation, two persons with equal, similar or distinct civil existence.

It was by that law the logical result of a conveyance made to a man and a woman who were married.

In the case of *Stuckey v. Keef's Executors* (26 Pa., 397), the grounds which alone would sustain such an estate are very clearly put. There it is said: "The intention of the parties to the conveyance is entirely immaterial," and it was held that under a conveyance to a man and his wife "as tenants in common and not as joint tenants," both became seized of the entirety and on the death of either, the whole estate goes to the survivor, irrespective of the intention of the parties to the conveyance.

This conclusion of the court was the logical result, flowing from the causes, which created this estate.

"There can be no moieties between husband and wife." Co. Lit., 187, b. Littleton says that the reason is that they are one person in law (id.). Blackstone tells us, that for that reason, they can not take the estate by moieties; but both are seized of the entirety. 2d Bl. Com., 182; 4th Kent Com., 362. Now it must be admitted that the oneness of the marriage relation refers to the civil state of the parties, the natural persons were recognized and protected by the law, the civil existence of the wife being merged into that of the husband, was the method by which the unity existed.

Then, if under different circumstances, the civil existence of the parties to the contract of marriage was that of two persons, so far as the right to take, hold, sell and convey property was concerned, the reason of the rule would have ceased, and a different estate would vest.

There can be no question but that the origin of these estates was the unity of husband and wife civilly. The authorities cited in the various cases show that both text-writers and adjudicated cases sustain their creation and the incidents attached, alone on this basic proposition. (26 Pa., 402; Washburn on Real Property, page 332).

In Kansas there is no such civil unity. Section 3752, G. S., *supra*.

It would seem that the express purpose of this statute was to change many of the common law rules which subjected either the corpus or profits of estates which a wife owned, to the control of the husband; it was also to vest in her as her sole and *separate* property, such estates as might come to her by descent.

It was competent for the legislature of Kansas to do this, and if the rule has been established that the wife takes in her own right by descent, and uses the property acquired as a *feme sole*, then why is the rule not universal and why should it not be applied when her husband having the same rights, but no more, is a co-heir. It can not be replied that the statutory rule must lose its effect in that case, because of the fact that the marriage relation exists, for the statute itself, so far as descents are concerned, changed the restrictions and limitations of the common law. To illustrate:

At common law, a woman could not be an heir while there was a male in line.

Under the Kansas statute, before referred to, as one of the parents she is a co-heir on perfect equality.

At common law a husband and wife could not inherit, because only the male would take. Under the statute, property may come to her by descent, and when it vests she shall hold as a separate estate. This right of separate holding is, in my opinion, fatal to the theory that an estate of entirety vests—because there are no moieties in such estates.

But it is urged that in the case of *Baker v. Stewart* (40th Kan., 442), negatives this view. I am free to admit that it goes a considerable length in that direction. Attention is called, however, to the fact that the question in that case arose on a deed of conveyance to husband and wife. It is undeniably true that under this deed the court held that an estate of entirety vested, but the text of the decision does not, in my opinion, rule that an estate of entirety can be created under the Kansas statute of descents. It must be remembered that the application of the rules of descent under the statute, were made on the question as to what estate the survivor of an estate in entirety held as against the co-heirs of the deceased wife, and in discussing this question, it is true that the *dicta* of the court would authorize the construction that estates in entirety can be created, notwithstanding the statute of descents and distributions, but the language used is that—

Nearly all the courts hold that estates in entirety may still exist and may be created by an ordinary deed of general warranty to the husband and wife, and such estates are no more against our present laws in Kansas relating to descents and distributions than such estates have always been against all other laws concerning descents and distributions in this and other States.

As I read the case, it is not to be held as authority that in Kansas with its present laws affecting the rights of married women to take property by descent for their sole and separate use, that when the parents being man and wife are co-heirs of a deceased son, that because of the common law incidents of marriage an estate of entirety vests.

The opinion deals with the question under a conveyance. At common law it could only be created by a conveyance, and I am of the opinion that the policy of the law of Kansas, as drawn from the statutes, would indicate that these estates would not be favored.

If there were in my opinion any doubt as to the correctness of this determination it would be removed by the act of the legislature of Kansas, approved March 10, 1891 (Laws of Kansas 1891, p. 349), which reads:

SEC. 1. If partition be not made between joint tenants or joint owners of estates in entirety, whether they be such as might have been compelled to make partition or not, or whatever kind the estate or thing holden or possessed be, the parts of those who die first shall not accrue to the survivors, but shall descend or pass by devise, and shall be subject to debts or charges and be considered to every other intent and purpose as if such joint tenants or tenants of estate in entirety had been or were tenants in common; but nothing in this act shall be taken to affect any trust estate.

Your office judgment is therefore affirmed.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

GRANDIN ET AL. v. LA BAR.

The purpose of section 5, act of March 3, 1887, was to protect all persons who had parted with a valuable consideration, whether in money or other property, in payment for lands to which the company could give no valid title.

The right of a purchaser from a railroad company, to acquire title under the provisions of said section, is not in any degree dependent upon the good faith of the company in making the sale. The question of good faith in the transaction relates solely to the purchaser's connection therewith.

There is nothing in the fact that a purchaser of land from a railroad company is a stockholder therein to affect the good faith of such purchaser; nor does the further fact that preferred stock of the company, that was convertible into lands, was given in exchange for the land, open the transaction to objection on the ground that there was no consideration for sale.

Secretary Smith to the Commissioner of the General Land Office, August 29, 1896. (W. F. M.)

On October 14, 1893, in a controversy between Edward G. La Bar and the Northern Pacific Railroad Company, this Department held that the SW. $\frac{1}{4}$ of section 7, township 146 N., range 50 W., in the land district of Fargo, North Dakota, which lies within the indemnity limits of the company's grant, did not pass to the company by virtue of any valid selection before the date of La Bar's settlement on October 1, 1887, that it was, therefore, excepted from the grant, and it was ordered that La Bar be permitted to make entry of the land, (17 L. D., 406). He gave notice of his intention to submit final proof on December 30, 1893, and on December 29, 1893, John L. and William J. Grandin made application to purchase the land under section 5 of the act of March 3, 1887, alleging purchase from the company on September 15, 1876. On December 30, 1893, they filed a protest against the acceptance and allowance of Le Bar's proof. The register and receiver rejected the application to purchase and dismissed the protest, and the Grandins appealed to your office. La Bar made his proof and paid for the land on the day advertised and on January 2, 1894, final certificate was issued to him.

Your office, by letter of May 4, 1894, directed that the Grandins be given an opportunity to submit proof in support of their application to purchase and that La Bar be specially cited to appear at the hearing, which was held on August 22, 1894, both parties appearing with their attorneys.

The register and receiver found for the Grandins, recommending the cancellation of La Bar's entry, and the latter has now appealed from the decision of your office in affirmance thereof.

The facts, as developed at the hearing, are that the Grandins, being holders and owners of preferred stock of the Northern Pacific Railroad Company exchanged the same, on September 15, 1876, for extensive

tracts of land, including that in controversy, on the basis of three dollars in stock, at its face or nominal value, for one acre of land.

The case has been argued elaborately and with signal ability, both orally and by brief, but the questions involved, after all, must be narrowed to an inquiry as to the good faith of the applicants in their transaction with the company, and as to the character of that transaction; whether they are purchasers in contemplation of the statute. The contentions of counsel, however, have introduced collateral and incidental questions, and these will be stated and disposed of in their order.

In the first place it is contended that the transaction "is precisely what is defined by the authorities as a 'barter' as contradistinguished from a 'purchase,' and is therefore entirely outside of the purview of the act of March 3, 1887." Purchase, in its broad and technical sense, includes every mode of acquisition save that of descent, and in the most narrow sense in which it is ever employed it means acquisition by the payment of a price in money. But neither of these is the popular sense. In common use, and generally in statutes, as the Supreme Court says, "the word is employed in a sense not technical, only as meaning acquisition by contract between the parties." (91 U. S., 374.) In the remedial act of March 3, 1887, it is inconceivable that the word was used in the restricted sense contended for by counsel, but on the contrary it can not be doubted that the object was to protect all persons who had parted with a valuable consideration, whether in money or other property, in consideration of the transfer of lands for which the company could not and did not pass valid title. This construction gives effect to the undoubted purpose of the congress, and is not inconsistent with any canon of interpretation. It may be added that there is no longer any substantial distinction, in law, between the acquisition of property by purchase, and by exchange or barter.

In attacking the good faith of the Grandins it is charged that the transaction between them and the company was *ultra vires*, and therefore void, in that the charter conferred no authority upon the company to issue preferred stock, that it could not legally deal in its own shares, that it had no authority to retire and extinguish its shares and thus reduce its capital stock, that the reorganization of the company under the scheme of which the preferred as well as the common stock was issued, was unauthorized by its charter, that the sale to a stockholder invests the transaction with suspicion, and finally it is said, that there was no consideration for the sale, it not being shown that the stock given in exchange had any value.

The attitude of the company, either legally or morally, is not before the Department in this case. It might be admitted that all of the acts of the company complained of as being without its charter powers were unauthorized, and still the status of the Grandins would not be touched. The company is not on trial and its good faith is not in question. It

would avail La Bar nothing even if it should be held here that the stock was illegally issued and illegally received in exchange for lands, and subsequently extinguished without warrant. In short, this Department has nothing to do, in such cases, with the conduct of the company, whether that conduct be proper or improper. Our sole business is with the purchaser's connection with the transaction through which he claims the land, whether or not he was in good faith. Attorney General Garland, on November 17, 1887, advised this Department that "it is not required that the sale by the railroad company shall have been made on its part in good faith, but only that the purchaser shall have bought in good faith," and his construction of the act has since been authoritative in the administration of the laws here. 6 L. D., 272.

It is elementary that "there is no rule of law which prohibits a shareholder from dealing with the company" and that "it is competent for a corporation to contract with its stockholders." 61 Ill., 472, and 97 Ill., 537. The Grandins, therefore, were not only within the law when they bought lands of the company, but the fact that they were holders of stock in the company was not a suspicious circumstance affecting their good faith in the transaction.

With respect to the consideration passed, there is no testimony in the record showing its value, or, indeed, that it had any value whatever. It was preferred stock issued under the plan of the re-organization of 1875. Its holders were entitled to dividends of eight per centum before the common stockholders should receive anything, but its principal and immediate value, as it seems to me, arose out of the fact that it was convertible into lands of the company situated within certain prescribed limits. Those lands were in an unsettled country, but they had some present and much prospective value, and that value, whatever it was, inhered in the stock that was convertible into them. It is charged that the stock had no market value, but that fact, if true, does not affect the question. It was unquestionably valuable to any one who might desire to invest in western lands, and there were many such persons at that time, but the company had but recently been in great financial distress and had just emerged from a species of bankruptcy proceedings, and it is not surprising, therefore, that its stocks were not in demand in Wall street. The market value of railroad stocks is based upon the earning capacity of the road, but the preferred stock of the Northern Pacific Railroad Company possessed a feature that gave it an independent value, not to investors generally, perhaps, but to certain classes of persons, namely, such as might desire to buy lands in the great undeveloped west.

Upon careful consideration of all the issues in the case I have reached the conclusion that the Grandins are bona fide purchasers from the company and that they are entitled to the protection afforded by section 5 of the act of March 3, 1887.

The decision appealed from is, therefore, affirmed.

EXTENSION OF TIME FOR PAYMENT—COMMUTED HOMESTEAD.

STILLMAN B. MOULTON.

The joint resolution of September 30, 1890, with respect to the extension of time for payment is not applicable to a commuted homestead entry.

Assistant Secretary Reynolds to the Commissioner of the General Land
(W. A. L.) *Office, August 31, 1896.* (E. B., JR.)

On August 22, 1895, your office refused to extend the time for the payment of purchase money on the application of Stillman B. Moulton, in the matter of the commutation of his homestead entry No. 177, made October 18, 1893, for the SW. $\frac{1}{4}$ of section 28, T. 107 N., R. 68 W., Chamberlain, South Dakota, land district, for which he made final proof July 20, 1895, on the ground that the evidence as to failure of crops did not bring his case within the provisions of the joint resolution of September 30, 1890 (26 Stat., 684), which authorizes such extension under conditions set forth therein. He appeals from such refusal, contending that the evidence submitted by him brings his case within the terms of the said resolution.

The said resolution provides:

That whenever it shall appear by the filing of such evidence in the office of any register and receiver as shall be prescribed by the Secretary of the Interior that any settler on the public lands, by reason of a failure of crops for which he is in no wise responsible, is unable to make the payment on his homestead or pre-emption claim required by law, the Commissioner of the General Land Office is hereby authorized to extend the time for such payment for not exceeding one year from the date when the same becomes due.

It is unnecessary, as will more clearly appear hereinafter, to consider the evidence submitted by Moulton in support of his said application. The Department is well convinced from an examination of the said resolution and the homestead law, generally, that the resolution has no application to the case at bar, and can not have to any case of commutation of a homestead. The purpose of said resolution as applied to a homestead is evidently to defer for the period of one year, subject to certain conditions therein specified, the time when, by operation of law alone, the settler would otherwise be required to make the usual final payment of fees and commissions. These the law does not permit him to make, except in cases of soldier's homesteads, until the expiration of five years from date of entry or the establishment of residence on the land, and does not require of him until within two, and, in certain cases, three years thereafter (Section 2291 R. S., and section 1, act of July 26, 1894, 28 Stat., 123). The period within which Moulton would be required by law to pay the final homestead fees and commissions does not begin to run until October 18, 1898, and does not end until three years thereafter, his entry having been in existence at the date of the last mentioned act.

The commutation of a homestead authorized by section 2301, as amended by section six of the act of March 3, 1891 (26 Stat., 1095), is the privilege of making final proof and paying the minimum price of the land at any time after fourteen months' residence and cultivation subsequent to entry. If he does this he does it at his own election. The law does not require but permits it to be done. He may thus substitute payment of the minimum price of the land for the remaining years of residence and cultivation, otherwise required, if he prefers to do so. To hold that said resolution was intended to apply to Moulton's or to any other case of homestead commutation, would be to impute to Congress the doing of a vain thing. Such legislation would confer no benefit, would be wholly superfluous and unnecessary in any such case. In case of failure of crops the intending commutator could simply abandon his purpose to commute—for the time being at least. The extension of the day of payment would lie in his own hands.

The paragraph on page 25 of circular instructions issued October 30, 1895, which refers to said resolution and declares that it

may be taken advantage of in proper cases for obtaining an extension of time of payment of purchase money by parties commuting their homestead entries by proceeding as hereinbefore pointed out under the head "Extension of payment," is error and is hereby abrogated.

The decision of your office is modified in accordance with the foregoing. Moulton's application will be denied upon the ground herein indicated, and his final proof canceled without prejudice to his rights under the homestead law.

SWAMP LAND—FIELD NOTES OF SURVEY—SELECTION.

STATE OF MINNESOTA *v.* CRAIG.

In the absence of an affirmative showing that a tract of land was swamp in character at the date of the grant, the Department will not order a hearing to determine its character, where by the field notes of survey it is returned as agricultural land.

The failure of the State to select a tract as swamp land, that is returned as agricultural, within the two years after survey as prescribed by the statute, will be held sufficient to preclude the subsequent assertion of such right by the State in the presence of an intervening bona fide adverse claim.

Secretary Smith to the Commissioner of the General Land Office, August 31, 1896. (E. M. R.)

This case involves the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 30, T. 63 N., R. 11 W., Duluth land district, Minnesota, and is before the Department upon appeal by the State of Minnesota from your office decision of February 4, 1896, denying its application for a hearing to determine the character of this land.

The record shows that on September 23, 1895, William Craig filed Porterfield scrip for this land and on November 18, 1895, John C. Judge,

as agent and attorney of the State of Minnesota, filed his application for a hearing to determine the character of the land.

The act of March 12, 1860 (12 Stat., 3), extends to the States of Minnesota and Oregon the provisions of the act of September 28, 1850 (9 Stat., 519).

The township plat was filed in the local office on July 20, 1885, and according to the field notes and the plats of that survey, this land is returned as agricultural and not as swamp land.

In the application for a hearing various affidavits are submitted on the part of the State as a basis for ordering the hearing petitioned for. These affidavits are to the effect that in 1881 and at various dates subsequently, this tract was on the date of such survey or examination, of a swamp-land character. Your office decision held that the showing made was insufficient upon which to order a hearing.

On April 10, 1888, Dr. L. J. Woollen, chief of the swamp land division, as special agent, reported to your office the result of his investigation as to the character of certain lands in the Duluth land district, which had been selected and reported to your office as inuring to the State under the swamp land act of March 12, 1860. In his report he stated that from the evidence presented therewith the fraudulent character of the survey is clearly shown and made out in the following townships:

Township 63 north, 11 west;

"	62	"	11	"
"	63	"	10	"
"	62	"	10	"
"	62	"	22	"
"	61	"	21	"

In particularizing his report he says:

The numerous cases of conflict arising in said township against the swamp claim wherein the dry character of the different tracts claimed as swamp is clearly shown by sworn evidence, indicates that the survey of said township was made in a fraudulent manner. . . . There is one tract of fifty acres that was patented to the State of Minnesota in 1883 as swamp land which was shown to be swamp by the field notes of survey which was high, dry, and hilly land. . . . This tract is specially valuable for iron ore and I was informed by a party living near it that the tract was probably worth one hundred thousand dollars. From all the information I could gather I came to the conclusion that surveys made prior to 1880 and 1881 are in the main correct, but that surveys made since that date are mostly fraudulent and unreliable in those townships where there is valuable timber and iron ore.

He therefore recommended that in those townships in the Duluth district where the surveys had been made since the date above mentioned, that the State be required to take her swamp land by agents in the field instead of by the field notes as theretofore and

that all approvals of swamp land heretofore made for said townships, which have not been patented, be revoked and cancelled . . . To continue patenting lands to the State by the field note readings in such townships would be a great wrong to the government and to those settlers who wish to make homesteads on agricultural land that, under the present system, is erroneously shown by the field notes to be swamp and overflowed.

Your office letter of April 28, 1888, transmitted Dr. Woollen's report to this Department and concurred in his recommendation that all approvals of swamp lands which have been selected under surveys made since 1880 and not patented, be revoked and that the State be required to make swamp land selections by agents in the field instead of in the manner previously followed, and acting upon this report the then Secretary on March 2, 1889 (L. and R. 174, page 438), said:

I am of opinion that the affidavit accompanying the report of Dr. Woollen furnished sufficient evidence that the surveys upon which the selections of swamp lands were approved were wholly unreliable, if not false and fraudulent, and that such unreliability could only have been due either to fraud or palpable mistake.

The recommendation of your office was accordingly approved, the approvals of the selections of swamp lands, based on the field notes of the alleged fraudulent surveys made since 1880 were revoked, and the State was required to make future selections by agents in the field.

This tract of land is situated within one of the townships mentioned by Dr. Woollen. It is apparent from reading the report of Dr. Woollen that the fraud of which he complains was in representing dry land to be swamp land and that this fraud was brought about by certain corporations having become interested by reason of purchase from the State. In this particular, only, in so far as I have been able to learn, was the survey of this township now under consideration, deemed fraudulent. There is no allegation that this survey was not actually run; on the contrary, so far as this tract is concerned, the exact opposite appears to be the case.

In the affidavit of Reuben F. McClellan, who testified that in the month of December, 1895, he was detailed by the land commissioner of the State of Minnesota to make a careful and correct survey and examination of the tract of land, he avers that

on and during the 13th, 14th and 15th days of December, 1895, he made a careful and correct survey and examination of said land, and that the plat attached is a correct plat of said survey of said land as made by deponent, and that the memoranda attached to said plat are correct notes of said survey, and that part or portions of said lands marked and indicated on said plat as dry land, was, at the time of such examination and survey, in fact dry land and that every part and portion of said tract of land other than said part and portion marked as dry land on said plat was, at the time of such examination and survey, wet and overflowed land.

The following appears in his field notes: "Found all trees standing noted in the United States survey."

The other element entering into the survey being that of the character of the land as represented by the field notes, it has already been noted that the only objection to the correctness of such representation lies in the return of land actually dry in fact, as being of a swampy nature.

The rights of the State of Minnesota attached to this land in 1860, on the 12th day of March, or not at all, and it was the character of the land upon that date which determined the question as to whether the rights of the State of Minnesota vested.

There is no affirmative showing in this record whatever that the land was of the character contemplated by the act *supra*, at the date of its passage.

The approval of a government map of survey which represents land to be of any specific character is the making of a *prima facie* case which has to be overcome and rebutted by the affirmative showing of the petitioners. It is true that the correctness of the survey has been questioned, but two facts are apparent in so far as they apply to the tract involved, and those are that the survey was actually made upon the face of the earth, and that the only objection to the survey of these townships was that land was returned as swamp which was, in fact, of an agricultural character. There has never been, so far as I have been able to ascertain, any question that lands reported as agricultural were in fact now of such character. From plats furnished by the petitioners, it appears that there is a creek running through this forty acre tract, which has ten feet of mud in it. Possibly, in the lapse of time since 1860, now exceeding one-third of a century, that stream may have become filled up, overflowing its banks and has changed the character of this land. However that may be, it is sufficient to say that in the absence of an affirmative showing that the tract was of the character contemplated in the acts of 1850 and 1860, at the date of the passage of the latter act, the Department would not be justified in ordering a hearing to determine this question.

The act of March 12, 1860 (12 Stat., *supra*), which was substantially re-enacted in section 2490 Revised Statutes, provides that selection of lands by the States shall be made within two years from the adjournment of the State legislature, after notice by the Secretary of the Interior to the governor of the State, that the surveys have been completed and confirmed. This survey was made in 1885. The State asked for a hearing to determine the character of the land in 1895. What was the effect of the requirement that the selection should be made within two years after notice? Was it mandatory and imperative, or simply directory?

Endlich on the Interpretation of Statutes (612, Sec. 433), says:

It has indeed been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience, and that where an act requires a thing to be done in a particular manner, that manner alone must be adopted.

And again in Section 436, in speaking of intervening adverse rights whose standing is being injured by the wrongful conduct of public officials, it is said:

In a word, where a statute fixes a time within which public officers are to perform some act touching the rights of others, and there is no substantial reason apparent

from the statute itself, from other statutes, or from the consequences of delay—*e. g.*, a wrong to the intervening rights of third parties—why the act might not be as well done after the expiration of the period limited as during the same, or indicating that the legislature intended it should not be done at all if not within that period, the latter will, as regards third persons, be treated as directory, and the fixing of it will not invalidate or prevent official acts, under the statute, after the expiration of the prescribed period.

It is not necessary in this case to pass upon the question of whether the failure to select or attempt to select within the two years prescribed by the statute determines the rights of the State of Minnesota. The only question here to be considered is, that intervening adverse rights having attached, whether the application for a hearing by the State looking toward selection, shall be considered.

I am of opinion that the clear intent and meaning of the act requiring the selection to be made within two years after notice of the survey, was a requirement inserted by the legislative will in order to protect citizens of the United States from just such annoyances as that presented by this proceeding in behalf of the State of Minnesota.

This tract of land was returned by the public survey as agricultural; the citizens of the United States had a right to act upon the faith of that return and especially when the two years within which the State of Minnesota was entitled to select the tract had passed with no attempt upon its part to make any claim under the act of 1860 in its behalf, any citizen of the United States had a right to assume that no such claim would in fact be made, and without in this decision holding that the State of Minnesota could not thereafter make a claim under the swamp act to this tract of land, it is sufficient to say that having failed to do so within the time prescribed by the statute, its deferring such an attempt at selection until this time was at its own risk, and that in the presence of an intervening *bona fide* adverse claim this Department will not now entertain that contention.

It is not enough to say that the grant in behalf of the States of Oregon and Minnesota contained in the act of 1860, was a present grant, and therefore conveyed the title to all lands which were in fact of a swampy character on the date of the passage of that act March 12, 1860.

A grant must have definiteness and precision, and there is and could be no definiteness and precision until selection. To say that thirty-five years after a grant of swamp lands had passed within its domain, that a State can assert title to a particular tract of land, is to say that there is actually no bar of time within which such selection can be made, and there would be no such thing as quiet, peaceable possession of real estate inside the State of Minnesota, for fear that now or hereafter, the State of Minnesota might undertake to prove any given tract unpatented, was in fact swamp, and inured under its grant.

The State denies the reception of notice of the making and confirmation of the survey but your office decision states:

The State accepted in 1885, the list of selections of lands in this township made by the United States surveyor-general and known as list No. 54. Whether any actual selection list was filed by the State authorities as the basis of this list by the surveyor-general, or whether the surveyor general upon return of the field notes simply listed to the State, as swamp, all lands so shown, does not appear. But however that may be it is admitted that a copy of the said list of selections was furnished the proper officer of the State having charge of its land matters. The State by accepting the list tendered, adopted it as her own and made it on her part a segregation in said township of the swamp from the dry lands.

This would appear to be sufficient to dispose of the question of notice.

In consideration, therefore, of the failure of the petitioners in this case to make out any showing whatever of the character of the land in 1860, the date at which the rights of the State attached, or failed to attach, and of the fact that this survey was actually made and its correctness in reference to its returns of dry land has never been questioned by this Department, or any one else so far as the Department is aware, and the fact that the survey as run has been identified by the petitioners themselves as a correct survey of the tract, and in consideration of the long lapse of time between the period at which the rights of the State of Minnesota attached, or did not attach, in consideration of this silence of the State and the intervention of *bona fide* adverse rights, for the above reasons and those so forcibly and logically set out in the opinion of the Commissioner, I affirm his decision.

RAILROAD LANDS—SECTION 4, ACT OF MARCH 3, 1887.

DAILY *v.* MARQUETTE, HOUGHTON AND ONTONAGON R. R. CO. ET AL. (ON REVIEW).

By the certification of lands under this grant they are as fully separated from the public domain and removed from departmental control as though patent had issued therefor.

A congressional declaration of the forfeiture of lands granted to aid in the construction of a railroad, for failure to construct the road in accordance with the grant, is also, in effect, a declaration by Congress that certified lands so forfeited, were "erroneously certified," and the Department will not question such declaration in construing the provisions of section 4, act of March 3, 1887.

A declaration of forfeiture as to the unearned lands within a railroad grant requires an adjustment of the grant in order to determine what lands were restored to the public domain by the act of forfeiture, and the determination of such matter is an "adjustment" within the meaning of section 4, act of March 3, 1887.

Assistant Secretary Reynolds to the Commissioner of the General Land
(W. A. L.) *Office, September 2, 1896.* (V. B.)

On September 5, 1894 (19 L. D., 148), this Department decided the case of Daily *v.* Marquette, Houghton and Ontonagon Railroad Company and the Michigan Land and Iron Company, wherein it was held that the application of Amasa Daily, to make entry of the S. $\frac{1}{2}$ of the

NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 17, T. 50 N., R. 34 W., Marquette land office, should be rejected; and that the Michigan Land and Iron Company, vendees of said railroad company, should be allowed, at the proper time, to make purchase and entry of the land in question, under the provisions of Sec. 4 of the adjustment act of March 3, 1887 (24 Stat., 556).

A motion for review and reversal of that decision is now before me.

A number of specifications of error accompany the motion; but they are all subordinate to what counsel for movant, in their first brief, say are "the clear cut" and only questions presented by the motion, viz: "Is this alleged purchase from the Marquette, Houghton and Ontonagon Railroad Company, and are these lands, within the purview of Sec. 4 of the act of March 3, 1887?"

The question as to the character and condition of the land which could be purchased under the provisions of the adjustment act of 1887 was carefully and fully discussed in the case of *Pierce v. Musser-Sauntry Company* (19 L. D., 136), and the right of a corporation to purchase, as a citizen, under the provisions of said act, was also discussed and determined in the case of *Telford v. Keystone Lumber Company* (ib., 141). A careful consideration of the arguments on these questions presented anew, and of the authorities cited to sustain them, on this motion, fails to persuade me that there was error in the decisions referred to, or in the former decision in this case, on the same points. Both of the questions presented in this motion must therefore be answered in the affirmative.

And having so recently discussed and determined the questions involved, it is not deemed necessary to say more in relation to them at this time.

Whilst, because of the full discussion already had of the two principal questions involved, it may not be desirable to say anything more in relation thereto, there are minor points presented in the briefs of Daily's counsel which it may be well to refer to.

(1) It is said that the lands in question were never certified to the State for the benefit of said railroad, and therefore cannot have been "erroneously certified;" that the only certification made was by what was then known as "information lists," which did not and were not intended to convey title.

The answer to this may be found in the case of the *Lake Superior, &c., Company v. Cunningham* (155 U. S., 354, 375), where, in passing upon a like certification under the same act, made about the same time and under very similar circumstances—definite location of a road, which was never built—the supreme court says that such certification "identified and set apart" the lands granted to the railroad company by the act. Continuing, the court says—

By that identification and certification those lands were absolutely separated from the public domain and as fully removed from the control of the Land Department as though they had been already patented to the State.

(2) Counsel urge that, if, however, it should be held there was a certification of the lands to the State which passed title, said lands, being of the granted lands, then they were properly and not "erroneously certified," and are not therefore within the terms of the adjustment act.

There might be some force in this contention if the road had been built opposite to the lands prior to the passage of the forfeiture act of March 2, 1889 (25 Stat., 1008). The grant was a present one, subject to forfeiture for failure to build a road within a specified time. The road not having been thus built, Congress declared the forfeiture of the lands opposite the unconstructed portions of the road, among which lands thus forfeited are those in controversy here. It therefore necessarily results, in view of this forfeiture, that Congress declared that said lands were "erroneously certified;" and this Department may not question that declaration.

Section 4 of the adjustment act declares that, as to lands so erroneously certified, which have been sold by the grantee company, qualified parties, who purchased them, shall be entitled thereto, upon making proof of the fact of purchase, within such time, and under such rules, as may be prescribed by the Secretary of the Interior, "after the grants respectively shall have been adjusted." And counsel for Daily insist that, the lands involved having been forfeited and restored to the public domain, by the act of Congress, the adjustment of the grant, required by section 4 of the act of 1887, previous to entry thereof by the purchaser, is not necessary or possible, and therefore the lands in question are not in the category of lands which may be purchased under said section 4.

I do not concur in this view. On the contrary, it is my opinion that, in order to ascertain what lands were forfeited and what were not forfeited by Congress, an adjustment of the railroad grant was necessary. To the extent of this ascertainment this adjustment was made, when the terminal or end lines of the grant were established at L'Anse by departmental decision. To that extent, and so far as the lands in controversy are concerned, that adjustment is final and conclusive, and the want of it is no longer an obstacle in the way of the consummation of purchase by the Michigan Land and Iron Company within a reasonable time after the promulgation of this decision.

It is alleged by counsel for Daily that the purchase from the railroad company by the Michigan Land and Iron Company was not made in good faith, and that the stockholders of said company are aliens and non-residents, and therefore the purchase should not be permitted.

It is a well settled rule that the judgment of this Department is not to be delayed by mere allegations of this general character, and especially where there has been an abundance of time to sustain them by affidavits or other testimony.

Reviewing the whole case, and all the arguments presented, the motion for review is denied, and the papers are sent to you.

You will notify the parties in interest hereof; and inform the Michigan Land and Iron Company that, the grant having been adjusted, as to the land in question, that company will be allowed thirty days thereafter within which to present proper proof and make entry of the land in controversy, in accordance with the provisions of the circular of February 13, 1889 (8 L. D., 348), so far as the same is applicable to their case; a duly certified copy of their act of incorporation, under the laws of the State of Michigan, will be accepted by you, as the proof of citizenship required by the circular.

Instead of rejecting at once the application of Daily the same may be held in abeyance for the present. If the Michigan Land and Iron Company make the necessary proof and entry within the time required, then Daily's application will be finally rejected; otherwise he may be allowed to make entry of the tract applied for.

Upon entry being made of the lands by the Michigan Land and Iron Company, payment therefor will be required of the Marquette, Houghton and Ontonagon Railroad Company, and you will demand of said railroad company the payment of an amount equal to the government price of similar lands, as provided for in section 4 of the act of 1887, *supra*.

In case of the refusal or neglect of the railroad company to make the payment as above specified, within ninety days after the demand, you will report their action to this Department, transmitting a sufficient record to be sent to the Attorney-General, that he may cause suit to be brought against said company for the amount.

Thus modified, the former decision of the Department is adhered to.

ROMAINE v. NORTHERN PACIFIC R. R. CO.

On motion for review of departmental decision of June 9, 1896 (22 L. D., 662) the new question raised thereby, as to the validity of the company's selection, is referred to the General Land Office, for consideration and decision.

PRACTICE—PROTEST—SCHOOL LAND—MINING CLAIM.

STATE OF MONTANA v. SILVER STAR MINING CO.

A protest filed by a State against the allowance of an entry should be corroborated in accordance with the rules of practice.

In the exercise of its proper supervision over the disposition of the public lands the Department may waive questions affecting the regularity of proceedings below, and render such judgment as seems just and proper in the case.

Where a mineral entry has been allowed on a school section the protest of the State will not be considered with a view to a hearing, in the absence of a definite allegation that the land was in fact not mineral land, or known to be such at the date the school grant attached.

Assistant Secretary Reynolds to the Commissioner of the General Land Office, September 11, 1896. (W. M. W.)

The State of Montana by its attorney general has appealed from your office decision of April 5, 1895, rejecting the protest of said State against the issuance of a patent upon mineral entry No. 84, Bozeman, Montana, land district.

The record shows that on October 8, 1891, the Silver Star Mining Company made entry No. 84 of the Silver Star lode, which was situated almost wholly within Sec. 16, T. 4 N., R. 1 W., Bozeman land district.

By your office letter of October 27, 1892, the State of Montana was allowed thirty days in which to show cause why said mineral entry should not be passed to patent.

On March 8, 1895, your office again directed the register and receiver of the local land office at Bozeman to give notice by registered mail to the State of Montana of your office decision of October 27, 1892.

On March 13, 1895, the receipt of notice of the aforementioned decision was acknowledged by the State Board of Land Commissioners of the State of Montana, and the matter was referred by said board to the attorney general of said State for appropriate action.

On April 18, 1895, the State through its attorney general filed in the local office the following:

1. The State elects to contest the application made by James W. Prouard, for a portion of section 16, Tp. 4 N., R. 1 W., upon the grounds that said James W. Prouard has not complied with the law in filing and posting his original notice of location of the land in controversy.
2. That the notice was not posted in the manner provided by law.
3. That no vein or lode has been discovered upon said land.
4. That the claimants and locators of said Silver Star Lode Claim have not expended upon said claim the amount required by the statute for development and representation.
5. That the claim has not been represented by the said claimant, or by any person for him, in accordance with the laws of Congress and the law of the State of Montana.
6. That said land is more valuable for agricultural purposes than for mineral purposes.

By letter of March 19, 1895, the local officers transmitted to your office the paper filed by said State.

On April 5, 1895, your office dismissed said protest for the reason that it is not sworn to nor corroborated, as required by Rules 1, 2 and 3 of the Rules of Practice.

The State of Montana appeals.

The appellant assigns the following errors in the decision appealed from:

- (a). That the action of the Commissioner in this case is prejudicial to the best interests of the State of Montana.
- (b). That the Commissioner erred in holding that the State of Montana is required to verify a protest filed in cases like the one under consideration.

(c). The Commissioner erred in holding that it is necessary for the State of Montana to corroborate its protest.

(d). The Commissioner erred in holding that Rules one, two, and three (1, 2 and 3) of the Rules of Practice are applicable to, or control, the State of Montana in cases of this character.

The first question to be determined is, whether Rules of Practice one, two and three properly apply to a proceeding initiated by a State.

The Rules of Practice were made for the purpose of aiding the land department in the orderly disposition of the public lands under the laws of Congress. Their requirements are reasonable and tend to aid the department in arriving at just conclusions in controversies arising between adverse claimants for the public lands. Wherever a State seeks to become a party litigant there seems to be no just reason why it should not be required to place itself in the same position as other litigants in order to have its rights determined. The State necessarily must act through its officers and agents. While its chief law officer may not be in possession of the facts to such an extent that he can of his personal knowledge verify the State's protest, he surely can procure the corroboration from parties who are conversant with the facts, and who can verify the facts set forth in the State's protest from personal knowledge.

In the case of the *State of Montana v. Bayliss* (22 L. D., 629) the Department held that a protest filed by a State against the allowance of an entry should be corroborated according to the Rules of Practice. There is no sufficient reason presented in the case at bar to call for any change in the holding in that case.

It was held in *Pike's Peak Lode* (14 L. D., 47), that in the exercise of its proper supervision over the disposition of the public lands, the Department may waive questions affecting the regularity of proceedings below, and render such judgment as seems just and proper in the case. Under this authority the sufficiency of the allegations of the State's protest against said mineral entry will be considered.

The only ground upon which the State appears to make any claim adverse to the mineral entry must arise out of the fact that the land involved is situated in section sixteen.

By section 10 of the act admitting Montana into the Union (25 Stat., 676-679), sections sixteen and thirty-six in every township were granted to said State for the support of common schools.

Section 18 of said act provides:

That all mineral lands shall be exempted from the grants made by this act. But if sections sixteen and thirty-six, or any subdivision or portion of any smallest subdivision thereof in any township shall be found by the Department of the Interior to be mineral lands, said States are hereby authorized and empowered to select, in legal subdivisions, an equal quantity of other unappropriated lands, in said States, in lieu thereof, for the use and benefit of the common schools of said States.

By act of February 28, 1891 (26 Stat., 796), Congress amended sections 2275 and 2276 of the Revised Statutes providing for the selection

of lands for educational purposes in lieu of those appropriated for other purposes. The Department issued instructions under this act on April 22, 1891, in which it was held that said amendatory act superseded the provisions of the act of February 22, 1889 (25 Stat., 676, enabling the people of North Dakota, South Dakota, Montana and Washington to form constitutions, etc.), in so far as they are in conflict with said amendatory act of 1891, and that school lands provided for in the act of 1889 should be administered and adjusted in accordance with the later legislation. See 12 L. D., 400. In so far as the right of the State to select lands in lieu of mineral lands in sections sixteen and thirty-six there is no conflict between the act of 1889, *supra*, and the act of 1891.

It must be remembered that the entry was allowed and the money paid to the government for the land embraced in it in 1891; that this controversy arises on the application for a patent.

In the absence of objections by the State, the proofs preceding the entry and its allowance by the land department would be a sufficient finding of the Interior Department that the land embraced in such entry is mineral land and would form a proper basis for selecting other lands in lieu thereof. If the State insists that the land in question was in fact not mineral land and known to be such at the date the school grant to the State attached, then a hearing should be ordered to determine the fact as to the character of the land at that time.

As to the sufficiency of the State's protest, if the land in question was mineral in character, the allegation that notice was not posted in the manner required by law would be wholly immaterial as far as the State is concerned.

This disposes of the first and second grounds of the protest, for if the land was in fact mineral and known to be so at the time the grant to the State took effect, it is immaterial to the State whether the entryman complied with the mining laws of the United States or not. This question is solely one between the claimant and the United States.

The third ground is insufficient, for the reason that the land may in fact have been known to be mineral, and still no vein or lode been discovered thereon.

As to the fourth and fifth grounds, their allegations are not sufficient to raise any question that concerns the State or could in any way affect its claim to the land. The sixth and last ground is that the "land is more valuable for agricultural purposes than for mineral purposes." This language is too indefinite to properly be construed in such a manner as to embody the claim that the land was in fact not mineral land and known to be such at the date the school grant to the State attached.

For these reasons the State's protest must be dismissed.

However, if the State so elect it may, within thirty days from notice of this decision, file a new protest, duly corroborated, specifically alleging facts showing its claim to the land in question, and in case

it does so, then your office will direct that a hearing be had to determine the rights of the State to the land in question. If the State fails to file its claim within the time named, and there is no other objection, the entry will be passed to patent.

The judgment appealed from is accordingly modified.

LOUISE MINING COMPANY.

Motion for review of departmental decision of June 9, 1896 (22 L. D., 663), denied by Assistant Secretary Reynolds, September 11, 1896.

SECOND CONTEST—COMPLIANCE WITH LAW DURING PENDING CONTEST.

JOHNSON ET AL. v. SMITH ET AL.

A second contest may be properly entertained on a charge that the entryman has failed to comply with the law since the hearing in the former suit.

Assistant Secretary Reynolds to the Commissioner of the General Land Office, September 11, 1896. (E. M. R.)

This case involves the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of section 7, T. 48 N., R. 8 W., Ashland land district, Wisconsin. The record shows that on February 23, 1891, Abraham Johnson made homestead entry of the NW. $\frac{1}{4}$ of the above described land, and on February 24, 1891, Owen R. Tracey made homestead entry for the remaining quarter section.

Henry M. Smith and Thomas Lowe filed affidavits of contest alleging prior settlement under the act of September 29, 1890 (26 Stat., 496), which gave preference rights of entry to settlers upon these lands, and thereupon such proceedings were had which culminated in departmental decision of October 18, 1893 (17 L. D., 454), canceling the entries of Johnson and Tracey, which action was affirmed on April 16, 1894 (18 L. D., 409).

May 30, 1894, Lowe and Smith made homestead entries, the former of the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the latter of the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section, township and range.

On June 6, 1894, Johnson and Tracey filed affidavits of contest against the entries of Lowe and Smith, in addition to affidavits made in the latter part of May, 1894. The register and receiver denied the applications, and upon appeal your office decision affirmed their action, which action was affirmed by the Department on February 4, 1896. A motion for review having been filed, and having been entertained, the case is before the Department for final adjudication.

In the decision complained of it was said:

This Department has decided that Smith and Lowe were entitled to enter the lands in controversy within six months after September 29, 1890, the date of the act. That

question is no longer an open one. It is *res judicata*. But when they offered to exercise their right, they found that the lands had been entered by other parties, and being thus segregated from the public domain were beyond their present reach. While they remained so segregated, the lands were no longer public. They were not available either for settlement or entry, and Lowe and Smith could not rightfully maintain residence thereon. To have done so would have made them trespassers upon the rights of Johnson and Tracey, who were entitled to sole possession and occupancy so long as their entries remained of record.

An examination of the affidavits of contest discloses that those filed on June 4, 1894, are, when taken by themselves, insufficient upon which to base a judgment ordering a hearing, but when coupled with those made on the 24th or 25th of May, 1894, it appears that they contain a charge which justifies the Department in taking such action. The affidavits when so considered together are equivalent to stating that since the former contest the entrymen have not complied with the law with reference to the maintenance of residence and cultivation as required, nor can it be said that this matter is *res judicata*, for the reason that the only matter adjudicated was up to the former hearing, and nothing that may have transpired showing non-compliance with the law since, has been, or could have been, adjudicated by that decision.

It is a familiar doctrine of this Department that he who claims a right of entry by reason of prior settlement can not defer the establishment and maintenance of residence until the allowance of his application to enter. This doctrine was laid down in *Hall v. Stone* (16 L. D., 199), where the Department held, *inter alia*:

A homesteader who claims priority of right by virtue of an alleged settlement, must comply with the settlement law and can not defer the establishment and maintenance of residence until the allowance of his application to enter.

This was again asserted in *McInnes et al. v. Cotter* (21 L. D., 97), where it was held (syllabus):

One who claims the right to make a homestead entry on account of priority of settlement must show that the alleged settlement was followed by the establishment and maintenance of residence.

See also, to the same effect, *Foote v. McMillan* (22 L. D., 280).

There is contained in the answer of the defendants to this action a prayer for the dismissal of the appeal taken from the Commissioner's decision prior to the rendition of the judgment now sought to be reviewed. In view of the apparent sufficiency of the causes of action alleged by the petitioners, and the allowance of the appeal by the Commissioner at the time, for reasons that appeared just and proper to him, that question will not now be passed upon.

The petitioners will bear the expenses of this hearing, and it is better that the defendants be put to the annoyance of another trial than that these petitioners, who appear to be residents upon the land, should lose this opportunity of proving what may be their valuable rights.

The petition is therefore granted, and you will direct that a hearing be had to determine the matters presented by the affidavits of contest.

GOWDY ET AL. v. KISMET GOLD MINING CO.

Motion for review of departmental decision of May 23, 1896, 22 L. D., 624, denied by Assistant Secretary Reynolds, September 11, 1896.

PORTERFIELD SCRIP—UNSURVEYED LAND.

HOSMER v. DENNY ET AL.

Porterfield scrip is locatable only upon lands that have been surveyed under authority of the government.

Assistant Secretary Reynolds to the Commissioner of the General Land Office, September 11, 1896. (W. M. W.)

The case of A. A. Hosmer against A. A. Denny *et al.* has been considered, on appeal of the former from your office decision of December 13, 1894, rejecting his application to locate Porterfield scrip upon a certain tract of land alleged to be located between the meander line of donation claim No. 40 patented to Arthur A. Denny and the township meander line of Elliott's Bay, as shown by the survey of township 25 N., range 4 E., Seattle, Washington, land district.

On July 1, 1889, Hosmer, the claimant, made his application to be allowed to locate Porterfield scrip warrant No. 23 upon the land in controversy, describing it as follows:

Beginning at the government meander corner or evidence post on the 6th standard parallel 2.96 chs. west of the standard corner to Secs. 31 and 32, town 25 N., range 4 east, Will. Mer. in the Territory of Washington; thence along government meander line north 42° west 25 chains; thence north 49° 30' west, 29.53 chains (here intersecting west boundary line A. A. Denny's donation claim No. 40); thence along the west boundary of the A. A. Denny donation claim No. 40, south 50° 45' E., 34.14 chains; thence south 38° 15' east, 17.68 chs. to southwest fractional corner of the A. A. Denny's claim No. 40; thence S. 38° 22' east, 2.89 chs., to place of beginning in section No. 31, township No. 25 north of range 4 E., . . . containing 3.02 acres.

On July 19, 1889, the local officers rejected Hosmer's application, on the following grounds:

1. There is no such tract of land shown on the records of this office as public lands of the United States.
2. That if there [is] such a tract of land it is not surveyed public land of the United States and therefore not subject to location of the class of scrip known as Porterfield scrip.
3. Said tract is occupied land within the corporate limits of the city of Seattle, and therefore not subject to the location of the class of scrip described.

The applicant appealed to your office.

On June 28, 1890, your office affirmed the judgment of the register and receiver.

Hosmer appealed to the Department.

On July 23, 1892, the Department found that "there are interested parties in possession" of the land in controversy "who have had no

notice of Hosmer's said application," and thereupon directed that a hearing be ordered "to determine the true status of the land applied for," with notice to Denny and all parties in interest and in possession of said land.

The hearing was held before the register and receiver, after notice to the several parties claiming an interest in the land in controversy.

A. A. Denny, in his answer to Hosmer's application, alleges that:

He is the same person who located, made proof upon and received the patent to donation entry No. 40, and that said donation claim includes the land in controversy.

2. He alleges that there is no such tract of land shown on the records in the office of the register and receiver of the United States Land Office at Seattle, Washington, as public land of the United States.

3. He alleges that if there be such a tract of land that it is not surveyed public land of the United States.

4. He alleges that said tract described is within the corporate limits of the city of Seattle, and it is occupied, and extensive improvements have been made thereon in aid of commerce and navigation.

He further alleges ownership in fee in certain lots in the city of Seattle, which are included in a portion of the tract covered by Hosmer's application.

These issues are substantially pleaded by divers other parties to the record.

The register and receiver rejected Hosmer's application, and he appealed to your office.

On December 13, 1894, your office affirmed the judgment of the local officers.

Hosmer appeals.

The assignment of errors contains seventeen specifications of alleged errors in your office decision; therefore it is impracticable to set them out in full in this opinion.

The testimony in the case is voluminous, covering over six hundred pages of typewritten matter. It has been carefully examined and duly considered in connection with oral and written arguments submitted by counsel representing the respective parties.

The land in controversy lies between the meander line of the town-ship survey and the meander line of the Denny donation claim on Elliott's Bay, an arm of Puget Sound. It is located in the limits of the city of Seattle, and has on it very valuable buildings.

The rights of Denny under his patented donation claim and those holding under him, the rights of the State of Washington to tide lands on its borders, the effect of meander lines as affecting boundaries under the system of public surveys, and other kindred questions, have all been presented and argued by the respective parties. In view of the conclusion I reach in the case, it is wholly unnecessary to discuss or pass upon any of these questions. The only real, material, question to be determined is, whether under the law and facts disclosed in the record Hosmer has the right to locate his Porterfield scrip upon the land described in his application.

The act of Congress under which the Porterfield scrip was issued (12 Stat., 836), required the Secretary of the Interior to issue to the executors of Robert Porterfield a number of warrants equal to 6,133 acres of land, according:

to the usual subdivisions of the public surveys, in quantities not less than forty acres; to be by them located on any of the public lands which may have been or may be surveyed, and which have not been otherwise appropriated at the time of such location within any of the States or Territories of the United States, where the minimum price for the same shall not exceed the sum of one dollar and twenty-five cents per acre; to be selected and located in conformity with the legal subdivisions of such surveys.

These provisions are plain and unambiguous. The scrip, or warrants, provided for can only be located on public lands that have been surveyed; that is, surveyed under the authority of the government of the United States. The act specifically and clearly limits the selection and location of such scrip to surveyed lands in conformity with the legal subdivisions of the United States public surveys.

Whether lands have been surveyed by the authority of the United States is a question of fact that must be conclusively determined from the records of your office.

The Commissioner of the General Land Office is charged under the law and surveying manual, under the direction of the Secretary of the Interior, with the performance of all executive duties appertaining "to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands." See Manual of Surveying, page 9, sec. 32.

It is claimed by counsel for applicant that the discrepancies between the original survey of the township in 1856 and the survey of Denny's donation claim of 1860, as shown on the respective plats, amount to a government survey of the land in question. This contention is not well taken. No such tract, lot, parcel, or other legal subdivision of land, appears on the original township plat, and it does not appear on the Denny survey as such lot or other legal subdivision of public lands. In fact, it could not properly so appear on the plat of the survey of the Denny claim, for the official authority for such survey was confined to marking the boundaries of Denny's donation claim and conforming his lines as nearly as practicable to the then existing township surveys.

Your office held in the decision appealed from that the land applied for is not public land; that it occupied the position of tide lands on Elliott's Bay and passed to the State of Washington under the doctrine announced in *Hardin v. Jordan*, 140 U. S., 380, and other authorities, as well as under *Frank Burns*, 10 L. D., 365.

I concur in your reasoning, but at the same time prefer to rest my decision upon the fact that the land applied for is not surveyed public land, and therefore under the law Hosmer can not be permitted to locate Porterfield scrip thereon. His application is dismissed, and your office decision appealed from is affirmed.

LAND VALUABLE FOR BUILDING STONE—ACT OF AUGUST 4, 1892.

INSTRUCTIONS.

In the exercise of the right conferred by section 1, act of August 4, 1892, a discovery preceding the entry is necessary, and no right attaches in favor of the entryman until he makes application to enter.

Secretary Smith to the Commissioner of the General Land Office, August 29, 1896. (W. M. W.)

By your office letter of May 29, 1894, you submitted to the Department for consideration three questions respecting the status of lands chiefly valuable for building stone under the act of August 4, 1892 (27 Stat., 348), and request such instructions as the Department may see proper to give under said act.

The purpose of your office communication is to secure a departmental construction of section one of the above named act, and such construction will be given without attempting to answer *seriatim* the questions submitted.

The act of August 4, 1892, *supra*, is as follows:

AN ACT to authorize the entry of lands chiefly valuable for building stone under the placer mining laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims: *Provided,* That lands reserved for the benefit of the public schools or donated to any State shall not be subject to entry under this act.

SEC. 2. That an act entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and Washington Territory," approved June third, eighteen hundred and seventy-eight, be, and the same is hereby, amended by striking out the words "States of California, Oregon, Nevada, and Washington Territory" where the same occur in the second and third lines of said act, and insert in lieu thereof the words, "public-land States," the purpose of this act being to make said act of June third, eighteen hundred and seventy-eight, applicable to all the public-land States.

SEC. 3. That nothing in this act shall be construed to repeal section twenty-four of the act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one.

In construing statutes, it is a well settled rule that when divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them. *United States v. Freeman*, 3 Howard, 556; *Ryan v. Carter*, 93 U. S., 78; *Cooper M'fg Co. v. Ferguson*, 113 U. S., 727.

Applying this rule to the matter in hand, the material thing to be considered is building stone and the disposal thereof by the United States.

By the timber and stone act of June 3, 1878 (20 Stat., 89), Congress provided for the disposition of public lands chiefly valuable for timber or stone and unfit for cultivation. There can be no doubt but what land chiefly valuable for building stone could have been purchased

under said act, if the applicant could have shown himself qualified, and shown that the land was unfit for cultivation and otherwise in such condition as to bring it within the purview of the act. Congress in passing the act of 1892 was directly dealing with the subject of the act of 1878; the second section of the act of 1892 extended the act of 1878 to "the public land States." The language used in section 1 of the act of 1892 fails to show, either expressly or by implication, that Congress intended to repeal any part of the act of 1878. It is equally clear that Congress did not intend by said section for all purposes to place lands chiefly valuable for building stone in the same category as lands containing such minerals as gold, silver, cinnabar, copper, and the like. Lands valuable for such minerals are expressly "reserved from sale except as otherwise expressly directed by law" (Revised Statutes, Sec. 2318), and there is nothing in the section under consideration to show that Congress intended to place building stone on the same general plane with gold, silver, and other minerals. In other words, said section neither takes building stone out of the act of 1878, nor does it add such land to such as contain minerals. It in no way affects the status of land containing building stone. It simply opens up an additional and a new avenue whereby properly qualified persons may acquire title to such lands as contain this particular kind of stone, by permitting such lands to be entered under the placer mining law. The language used is:

That any person authorized to enter lands under the mining laws . . . may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims.

It is not material to inquire for, or ascertain the reasons Congress may have had for extending to these persons the right to *make entry* of building stone lands under the placer mining laws. It is sufficient to know the extension has been made in clear, explicit language. It is equally clear that the extension is limited to the right to "enter" such lands. The language used shows that the right so given can only attach by the *entry*. Under the mineral laws a discovery and a location are both necessary, and in cases where title is sought they both must precede the entry. Mineral claimants who conform to the laws and regulations are protected in their possessory rights to their claims, whether they seek to make entry or not, so long as they comply with the law and regulations. The matter of entry is left optional with them. They secure their rights by discovery, location, performance of the required amount of labor on their claims. Under section 1 of the act under consideration a claimant for lands chiefly valuable for building stone can only secure a right to the land by making an *entry* thereof and the payment of the government price of the land.

It follows that, in order to the exercise of the right of entry under section 1 of the act under consideration, and preceding the entry, a discovery will be necessary, and no right will attach in favor of the

entryman until he makes an application to enter, describing it by legal subdivisions if on surveyed land.

It does not follow that because the mere right of entry under the placer laws is extended to claimants of lands that are chiefly valuable for building stone, that such claimant is thereby invested with all the rights of claimants under the mineral laws. The building stone claimant is only invested with such rights as the statute gives to him, which can only become vested at the time he makes entry.

The views herein expressed find more or less support on principle in the departmental expressions heretofore given, as will appear from a brief reference thereto.

On the 12th day of October, 1892, instructions were issued under said act (see 15 L. D., 360), in which it was said, *inter alia*:

It is not the understanding of this office that the first section of said act of August 4, 1892, withdraws land chiefly valuable for building stone from entry under existing law applicable thereto.

Prior to the passage of the act of August 4, *supra*, the Department held that stone that is useful only for general building purposes does not render land containing the same subject to appropriation under the mining laws, or except it from pre-emption entry. See *Conlin v. Kelley*, 12 L. D., 1. In *Clarke et al. v. Erwin*, 16 L. D., 122, it was held that:

Land chiefly valuable for the building stone it contains is not by such fact excluded from entry under the settlement laws.

In *Hayden v. Jamison*, 14 L. D., 537, the same conclusion was reached.

Your office letter is returned herewith, with the direction that in dealing with building stone applicants under the act of August 4, 1892, *supra*, your office pursue a course in harmony with the views herein expressed.

RAILROAD GRANT—INDEMNITY—SPECIFICATIONS OF LOSS.

NORTHERN PACIFIC R. R. CO. *v.* OWEN ET AL.*

In the re-arrangement of specifications of loss in bulk, so as to show a specific loss for each tract selected, the correction of a clerical error in the description of a tract included in the original assignment of losses, will not be regarded as the substitution of a new basis in support of the list, nor be held to invalidate such list as against the subsequent acquisition of adverse rights.

Secretary Smith to the Commissioner of the General Land Office, February 17, 1896.
(F. W. C.)

I have considered the appeal filed by the Northern Pacific Railroad Company from your office decision of July 31, 1894, holding for cancellation its indemnity list No. 27, filed October 25, 1887, for certain lands in Seattle land district, Washington, on account of pre-emption filings made after the date of such selection.

* Omitted from Vol. 22.

Said list of October 25, 1887, contained a specification of losses as bases for the land selected, but the same were not arranged tract for tract with the selected land.

On September 6, 1892, subsequent to the filings made by J. M. Owen *et al.*, covering the greater portion of the lands embraced in said list No. 27, the company filed its re arranged list. Your office decision recognized these pre-emption filings as against the company's selection, and in referring to the action of the Department in the case of La Bar v. said company (17 L. D., 406) states:

As said ruling is to the effect that the substitution of an amended list of indemnity selections on a specification of losses different from that assigned in the first, as in the present instance, must be treated as an abandonment of the first, and hence, that a settlement made on a tract released from indemnity withdrawal, but subject to a pending selection takes effect at once upon the abandonment of said selection, and precludes the subsequent selection of said land on account of the grant.

In its appeal the company urged that the bases assigned in the original list were merely re-arranged to meet the requirement of this Department, and that different tracts were not specified in the second list as the bases for the selections. As it was intimated in your office decision that the bases assigned in the re-arranged list were different from those used in the list as originally filed, you were requested to make report of the matter in departmental letter of December 16, 1895. In reply thereto your office letter of July 16, 1896, states as follows:

I have to report that a re-examination of the said lists discloses that although the tracts given as a basis in the original list are not arranged tract for tract with the selections, they are nevertheless the identical tracts specified as a basis in the re-arranged list, with one exception, which is that lot 6, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and N. $\frac{1}{4}$ "NW. $\frac{1}{4}$," Sec. 1, T. 27 N., R. 8 E., (159.25 acres) are given as a basis in the original list for the selection of the SW. $\frac{1}{4}$, Sec. 5, T. 28 N., R. 8 E., while in the re-arranged list the basis for the same selection is specified as lot 6, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and N. $\frac{1}{4}$ "SW. $\frac{1}{4}$," Sec. 1, T. 27 N., R. 8 E., (159.25 acres). As the "Remarks" after both bases state the three tracts forming the same to be embraced in homestead entry (No. 8497) of John S. Goodrich, and an inspection of said entry shows that the three tracts given as bases in the second list are the tracts actually covered by the entry, it is evident that the slight variance as above in the basis of the two lists arose through a clerical error.

From said record it appears that there was no intention on the part of the company to substitute new bases for the tracts selected in list No. 27, and I do not think that the mere clerical mistake in one instance in misdescribing the land embraced in the entry by John S. Goodrich, which had been lost to the company's grant under which indemnity was claimed, should be held to avoid the list filed prior to the allowance of the pre-emption filings before referred to.

Said list No. 27, met the requirements of this Department in the matter of the specification of lost lands when filed, and the subsequent re-arrangement of the losses, as required, so as to show a specific loss for each tract selected, in nowise avoided the selection, or subjected the lands to other disposition.

The company having complied with all requirements in the matter of the presentation of its indemnity list, no rights were acquired as against the grant by the allowance of the filings by J. M. Owen *et al.*

Your office decision is therefore reversed; the company's list will remain intact, and the conflicting filings will be canceled, unless, after due notice, other and sufficient cause is shown to avoid the effect of the company's selection.

RAILROAD GRANT—COMMON TERMINUS—ACT OF MAY 6, 1870.

BRAMWELL *v.* CENTRAL AND UNION PACIFIC RAILROAD COMPANIES.

An entry of land embraced within the act of May 6, 1870, granting certain lands for a common terminus of the Central and Union Pacific Railroad Companies, may be permitted to stand as against the protest of one of said companies, it appearing from the status of the lands covered by said act that the purposes of the grant made thereby cannot be accomplished.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 3, 1896. (F. W. C.)

With your office letter of August 9, 1893, was forwarded a record of the proceedings had upon an application filed by George Bramwell for the reinstatement of his homestead entry covering the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 26, T. 7 N., R. 2 W., Salt Lake City, Utah.

On May 19, 1869, one Elisha Thomas filed pre-emption declaratory statement covering the entire NW. $\frac{1}{4}$ of said section 26. On March 29, 1871, he sold his improvements upon the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section to Bramwell and executed a relinquishment of his filing as to said tract. He subsequently perfected title to the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section and received patent therefor. Simultaneously with the filing of Thomas' relinquishment Bramwell tendered his homestead application for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, which was accepted by the local officers. And upon said entry he made final proof December 22, 1877, upon which final certificate issued.

By the act of May 6, 1870 (16 Stat., 121), it was provided that the common terminus and point of junction of the Union Pacific Railroad Company and the Central Pacific Railroad Company

shall be definitely fixed and established on the line of railroad as now located and constructed, northwest of the station at Ogden, and within the limits of the sections of land hereinafter mentioned.

Then follows a description of nine sections of land, among which is section 26 before referred to. Said companies were

authorized to enter upon, use, and possess said sections, which are hereby granted to them in equal shares, with the same rights, privileges, and obligations now by law provided with reference to other lands granted to said railroads.

It was further provided that said railroad companies

shall pay for any additional lands acquired by this act at the rate of two dollars and fifty cents an acre. Also "that no rights of private persons shall be affected by this act."

Bramwell's entry was first considered in your office decision of July 21, 1881, in which the same was held for cancellation for the reason, as held, that Bramwell's rights were initiated subsequently to the approval of the act of May 6, 1870; and he was not protected by the provisions of said act.

Your office decision was affirmed by departmental decision of September 12, 1883. A review of said decision was denied October 27, 1883 (2 L. D., 844). In this decision the grant of 1870 was held to be an absolute and unconditional grant so far as it related to the even numbered sections, and passed title thereto subject only to the rights of those then claiming the lands.

Bramwell's application for reinstatement is made under the provisions of the third section of the act of March 3, 1887 (24 Stat., 556), the object and purpose of which is to correct all decisions made by this Department where it shall appear that any homestead or pre-emption entry has been erroneously canceled on account of any railroad grant or withdrawal of public lands from market, provided the party has not located another claim or made an entry in lieu of the one so erroneously canceled; and provided also that he did not voluntarily abandon his original entry.

Hearing was duly ordered upon Bramwell's application for reinstatement, notice of which was given the companies but they failed to enter an appearance and the testimony is *ex parte*. By the testimony it is shown that after making final proof Bramwell continued to reside upon, improve and cultivate the land covered by his entry to the date of hearing in 1893, and that he had never at any time abandoned said entry or made another in lieu of the one formerly canceled.

Upon this showing your office letter of August 9, 1893, forwarded the papers with a recommendation that Bramwell's entry be reinstated. In your office letter it does not appear that the companies were notified of your recommendation; but in June, 1894, an argument was filed on behalf of the Union Pacific Railroad Company opposing the reinstatement of Bramwell's entry. Nothing has been filed on behalf of the Central Pacific Railroad Company.

From the record before me it is apparent that the act of May 6, 1870, could not have been at once operative upon this land, for it is admitted by the company that Thomas was in possession of and occupying the tract under his pre-emption filing at that time and for about a year thereafter. It is alleged that he was unable to pay for the entire tract and for that reason sold and relinquished his claim as to the west half of the land covered by his filing in favor of Bramwell. Accepting, as urged by the company, that the act of 1870 was a present grant, there

might be a serious question as to whether the same passed any title to this tract, for the reason it is admitted, as against Thomas, that no title would have been conveyed thereby. But a decision upon this question is unnecessary in the disposition of the application under consideration. No other consideration can be reached with respect to the principal object of said act than that it was the intendment thereof that these companies should establish at some particular point upon the lands included within the lines of the square described, a terminus or junction, and the grant was made that terminal facilities of such character and extent as might be rendered necessary for the successful and convenient operation of two such railroads, might be established.

While it appears that a point was selected within the square at a small town by the name of Harris, where the tracks of the two roads should meet, yet it is well known that the real terminal point established for a running connection in the operation of these roads is located at Ogden, more than five miles from Harris and about four miles and a half distant from the nearest point on any portion of the land embraced within the square composed of the designated sections named in the act of 1870. While it may be true, as stated by contestant, that the portion of the road between Harris and Ogden was built and is still owned by the Union Pacific Railroad Company, yet a lease was made of the same by the last named company to the Central Pacific Company, and it would appear that said lease was made in order that the point of running connection between the two roads might be located at Ogden.

Of the nine sections composing the square named in the act of 1870, no claim has ever been made to any portion of the even numbered sections within said square, with the exception of the tract here in question; adverse claim having attached to all of said lands prior to the passage of the act of 1870, which claims were all perfected by the original claimants, with the exception of Thomas' claim of this tract. Of the odd numbered sections in the square, but two hundred acres have ever been claimed as railroad land, and these were claimed by the Central Pacific Company not under the act of 1870 but as inuring to it under the act of July 1, 1862.

The fact that the lands within the square named were thus covered by prior claims, thus rendering it practically impossible to realize the purpose of the act of 1870, may have been the moving cause for the establishment of the common terminus at Ogden. It is apparent, however, that this land is not useful to the companies for the purpose indicated, and in fact it does not appear that any joint claim has been asserted thereto, as provided in the act of 1870.

The protest filed on behalf of the Union Pacific Railroad Company is therefore overruled, the previous decisions of this Department before referred to, ordering the cancellation of Bramwell's entry, are recalled and vacated, and said entry will be reinstated upon the records of your office.

MINERAL LANDS—BUILDING STONE—PLACER CLAIM.

SIMON RANDOLPH.

Prior to the passage of the act of August 4, 1892, there was no authority to locate and purchase lands chiefly valuable for building stone under the placer mining laws.

Under the provisions of section 1, of said act, no rights are secured prior to application, and if at such time the lands are not subject to entry the claim under said act must be rejected.

Secretary Francis to the Commissioner of the General Land Office, October 3, 1896. (C. J. W.)

The Sucia Island Stone Mine is a consolidation of seven locations, made by seven parties on November 8, 1890. On April 10, 1893, Simon P. Randolph, claiming as locator of one of said claims and as assignee of the locators of the other six, filed in the local office at Seattle mineral application No. 97 for said consolidated claim.

By decision of June 29, 1893, the local officers rejected such application for the reason that the tract applied for was reserved for lighthouse purposes under order of the President of July 13, 1892. The applicant appealed from said decision, and on March 3, 1894, your office passed upon the case and affirmed the decision of the local officers. From this decision Randolph appealed to the Department. Pending said appeal here, a survey and selection of such part of the land reserved for lighthouse purposes, as was needed, was made, and a map or drawing of the same filed, and a recommendation made that the remainder of said reservation be restored to the public domain. It appears that the land so selected for lighthouse purposes did not embrace any part of the land applied for by Randolph.

On August 29, 1895, the case being under consideration here, and the reservation for lighthouse purposes no longer conflicting with said application, it was held, that the rights of the applicant under the act of August 4, 1892 (27 Stat., 348), should be reconsidered. The case was returned to your office with directions that you readjudicate the same under existing conditions, and the record and papers in the case were transmitted to your office.

On September 17, 1895, said decision was recalled and your office requested to return the same without promulgation. In accordance with said request, the decision and record were returned here.

On March 4, 1896, the executive order of July 13, 1892, reserving the group of islands known as Sucia Islands for lighthouse purposes, was canceled, except the parts located and designated as being for said purposes; and the remaining part of said islands was permanently reserved for military purposes. This reservation was made on the request of the Secretary of War.

Since the decision of August 29, 1895, the applicant has been granted

a further hearing here, and it becomes necessary to determine what his rights are under conditions as they exist now. The contention of the applicant is, that he has the right under section 2319 of the Revised Statutes to purchase the land covered by his application, as a placer mining claim, and that such right is confirmed by the act of August 4, 1892. This act was, by request of your office, construed here for your guidance by letter of instructions of August 29, 1896 (23 L. D., 322). It is therein held, that the chief and material thing considered in said act of August 4, 1892, was the disposal by the United States of building stone, and that said act did not take building stone out of the provisions of the act of 1878 (20 Stat., 89) or add it to the class of substances known as mineral. It simply provides that lands chiefly valuable for building stone may be entered under the placer mining laws. In said letter of instructions it is said that the extension of right under said act is limited to the right to enter such lands. The right so given can only attach by entry.

Under the mineral laws a discovery and location are both necessary, and in cases where title is sought they both must precede the entry. Mineral claimants who conform to the laws and regulations are protected in their possessory rights to their claims whether they seek to make entry or not, so long as they comply with the laws and regulations. The matter of entry is left optional with them. They secure their rights by discovery, location, performing the required amount of labor on their claims. Under section 1 of the act under consideration a claimant for lands chiefly valuable for building stone can only secure a right to the land by making an entry thereof and the payment of the government price of the land. It follows that in order to the exercise of the right of entry under section one of the act under consideration and preceding the entry, a discovery will be necessary and no right will attach in favor of the entryman until he makes an application to enter, describing it by legal subdivisions if on surveyed land.

It does not follow, that because the mere right of entry under the placer laws is extended to claimants of lands that are chiefly valuable for building stone, that such claimant is thereby invested with all the rights of claimants under the mineral laws. The building stone claimant is only vested with such rights as the statute gives to him, which can only become vested at the time he makes entry.

If the right to locate and purchase land chiefly valuable for building stone under the placer mining laws, existed before the passage of the act of August 4, 1892, the act itself would seem to be unnecessary. It is believed and held that prior to the passage of that act it could not be so located and purchased, and it follows that applicant secured no right by his mineral location.

It may be that an application to purchase and the payment of the purchase money for land, is equivalent to entry within the meaning of the act of August 4, 1892, as above construed.

Randolph filed his application to purchase on June 29, 1893, and made tender of two hundred and eighty-seven and fifty one-hundredths dollars, being the legal price of the land, which was refused. If he had the right to pay for it at that time, the tender continuing he would lose no right by its refusal. If the land was at the time subject to entry, he should have been permitted to purchase and pay the purchase

money. Prior to that date he had made no application to enter, or any other application equivalent thereto, and therefore had predicated no legal right to the land. This application was rejected because on July 13, 1892, the land was in reservation. The order reserving it was not rescinded until March 4, 1896, and the rescinding order of that date, releasing it from use for lighthouse purposes, contained a clause reserving it permanently for military purposes. It must therefore be held that at the time Randolph made his application to purchase, the land was in reservation; and so remained and is still in reservation and not subject to purchase or entry. It follows that the action of the local officers in rejecting his application was proper, and your office decision approving their action is affirmed.

SHOOK *v.* DOUGLAS.

Motion for rehearing denied by Secretary Francis, October 3, 1896. See departmental decision of June 9, 1896, 22 L. D., 646.

PRACTICE—NOTICE—RAILROAD GRANT—SETTLEMENT RIGHT.

NORTHERN PACIFIC R. R. CO. *v.* WALTERS ET AL.

Notice of an appeal served upon a duly recognized agent of a railroad company is a proper and sufficient service.

A settlement right, set up as against a railroad grant, is ineffective if it appears that the alleged settler had prior thereto exhausted his rights under the settlement laws.

Secretary Francis to the Commissioner of the General Land Office, October 3, 1896. (W. A. L.) (E. M. R.)

This case involves the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 13, T. 13, R. 18 E., and the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 13, of the same range and township, North Yakima land district, Washington.

The record shows that your office, on March 26, 1894, in pursuance of departmental instructions of February 19, 1894, ordered a hearing as to the John W. Walters case and as to the Shedrick J. Lowe case on May 19, 1894, under departmental decision of April 5, 1894, said cases being consolidated by order of the Department. On May 18, 1895, your office decision was rendered, affirming the action of the local officers, and holding that John W. Walters, under whom Lowe claims, was disqualified as a settler under the pre-emption and homestead laws at the date of the definite location of the line of the Northern Pacific R. R. opposite this tract of land, namely, on May 24, 1884, on which date the right of the plaintiff company attached to the land within the primary limits of its grant.

In your office decision was discussed a motion to dismiss the appeals of the defendants in this cause, because not properly served upon the railroad company. So much of that decision as held the appeals improperly filed because not served upon the designated authority of the railway company, appears to be in conflict with the case of *Boyle v. The Northern Pacific R. R. Co.*, 22 L. D., 184, wherein it was said (Syllabus):

Notice of an appeal duly served on the general land agent of a railroad company is sufficient service on said company:

and on page 185 thereof it was said, in speaking of the *O'Connor* case, which was cited by your office as of controlling authority:

In that case notice had been served upon a firm not authorized to accept notice for the company, and it could not therefore be held to be bound by the service; in other words, no service had been made. While it might be inferred from the language used that jurisdiction could not be acquired except by service upon the designated attorney, yet it was not the intention so to hold, but rather to show that in that case no service had been made to bind the company.

The company having designated a person to accept service for it, it would seem to be proper to serve all notices upon that person, but it cannot be held that service upon any other proper person will not bind the company.

It would therefore appear that your office decision was in error in holding that service upon the duly recognized agent of the company was not a proper service.

Especially is this the case when it appears that the appeals were duly served upon H. C. Humphrey, the agent of the company at North Yakima, in accordance with the Session Laws of Washington for 1893, page 409.

John W. Walters settled upon these tracts of land in the fall of 1879. He had at that time exhausted his homestead and pre-emption rights by entry and filing in the State of California, but had not exhausted his timber culture or desert land rights. It appears from his testimony as contained in the record that in 1882, two years prior to the attachment of the rights of said company under its grant, he went to the local office and asked if he would be allowed to make a desert land entry upon these tracts, which he was told would not be permitted. It appears that he did not tender any written application to so enter, or make any tender of the fees due in such cases.

It therefore becomes unnecessary to pass upon the question as to whether in the event he had done so the doctrine laid down in *Ard v. Brandon*, 156 U. S., 537, would apply, inasmuch as no legal application was in fact made.

The disposition, therefore, of this case made by your office, was correct, and judgment heretofore rendered is affirmed.

CONFIRMATION—ACT OF MARCH 3, 1891.

UNITED STATES *v.* COOPER ET AL. (ON REVIEW).

The confirmation of an entry under section 7, act of March 3, 1891, for the benefit of a transferee, is not contemplated by said statute in case of a transfer prior to the issuance of final certificate.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 3, 1896. (P. J. C.)

Motion for review of departmental decision of April 26, 1895, in *United States v. Cooper et al.* (20 L. D., 403), having been filed, and notice thereof having been served on opposing party under the rule, the same comes up for consideration.

It appears that Thomas Cooper made pre-emption cash entry, September 7, 1883, of the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and lots 2 and 3, Sec. 2, T. 5 N., R. 3 W., 6th P. M., McCord, Nebraska, land district. On the report of a special agent, your office, on January 3, 1887, held said entry for cancellation on the ground that more than two months before making final proof and entry Cooper had conveyed the land to William J. McGillen. The local officers reported that the entryman had been notified, the usual time given him to apply for a hearing, and had taken no action. Your office, therefore, on April 2, 1887, canceled the entry. On April 7, following, this action was rescinded on the application of the Harlem Cattle Company, who appealed from your office order of April 2, "alleging that it had received no notice of the action of January 3, 1887, until March 1, 1887," and a hearing was ordered. It seems that the hearing was continued from time to time for more than two years, and on June 1, 1889, the local officers so reported, and enclosed an abstract of title showing the conveyance by Cooper prior to entry. Thereupon your office, on July 27, 1889, adhered to your former judgment canceling his entry.

On August 14, 1889, Cooper's relinquishment was filed, also the Harlem Cattle Company's acknowledgment of notice of your action of July 27, and its waiver of appeal. Again, on September 17, 1889, your office ordered the cancellation of the Cooper entry.

On October 1, 1889, William J. McGillen made homestead entry of the tracts.

On October 11, 1890, there was forwarded to your office an application of I. R. Darnell, trustee of the Kit Carter Cattle Company, alleging that it was mortgagee of said land, and setting forth sufficient grounds to warrant your office in ordering a hearing. As a result thereof the local officers recommended the reinstatement of the pre-emption cash entry, and that the same be confirmed under section 7 of the act of March 3, 1891 (26 Stat., 1095). On appeal your office, by letter of November 30, 1892, reversed their action, but on motion for review, by letter of April 11, 1893, reversed your former action and affirmed the

local officers. On appeal the Department, on April 26, 1895, reversed your office decision.

In the departmental decision it is found as a matter of fact that the Harlem Cattle Company, remote grantees of Cooper, executed a deed of trust on the tracts involved, and others, to the Kit Carter Cattle Company for the consideration of \$20,000, on June 24, 1886; that the deed from Cooper and McGillen being on record, and showing that it was executed more than two months before final proof and entry, was constructive notice to the Kit Carter Cattle Company, and that it can not, therefore, invoke the confirmatory provisions of section 7 of said act of March 3, 1891.

Review of this judgment is now asked, and numerous grounds of error are set forth, but at such great length and in such argumentative form that it is not practicable to quote them.

The only question necessary to discuss in this motion is, whether the Cooper entry was confirmed under the act of March 3, 1891.

The hearing ordered by your office, April 30, 1887, was continued from time to time to suit the convenience of the special agent. He finally filed an abstract of title to the land, dated January 21, 1889, which was forwarded to your office June 1, following, with this statement:

Such abstract has been filed in this office by Special Agent A. B. Crump, and is enclosed herewith, together with a communication from Ex-Special Agent Coburn, by directions of Crump, who is of the opinion that further evidence in the case on the part of the government would be superfluous.

It was upon this report that your office, on July 27, 1889, canceled the Cooper entry, as the abstract showed the transfer by Cooper prior to his entry.

At this stage of the proceedings the fact that the Kit Carter Cattle Company did not have notice of the proceedings which resulted in the cancellation of the Cooper entry cuts no figure, for the reason that under its showing its right to be heard was recognized and a hearing was had at its instance.

Section 7 of the act of March 3, 1891, only contemplates the confirmation of such entries as had been made, upon which final certificates were issued, and was transferred thereafter to *bona fide* purchasers or incumbrancers. Cooper's entry was not transferred *after* final certificate issued. Hence it follows that this is not such an entry as can be confirmed under that statute.

The motion is therefore overruled.

ALASKAN LANDS—SURVEY—RIGHTS OF NATIVE OCCUPANTS.

FORT ALEXANDER FISHING STATION.

In the survey of Alaskan land, under the act of March 3, 1891, the claim must be as nearly as practicable in a square form, and not include land to which the natives have prior rights by virtue of actual occupation.

Secretary Francis to the Commissioner of the General Land Office, October 3, 1896. (W. A. L.) (W. M. B.)

This Department is in receipt of the papers transmitted with your office letter, of date June 10, 1895, which relates to survey No. 68, executed under provision of sections 12 and 13 of the act of March 3, 1891 (26 Stat., 1095), by Francis Tagliabue, U. S. deputy surveyor, of a tract of land claimed by the Fort Alexander Fishing Station (a corporation) situate on the Nushagak River, Bristol Bay, district of Alaska, containing 132.33 acres, and used for cannery purposes.

From the record submitted it appears that the improvements made by the company upon the tract claimed are quite extensive, being valued at not less than \$50,000, and that the cannery has a capacity of 30,000 cases of four dozen one pound cans each of salmon per season.

In your office letter to the United States marshal, ex-officio surveyor-general for Alaska, in connection with this survey, you say:

In reply you are informed that the survey cannot be accepted by this office for the reason that the regulation as to square form has not been complied with, and because of the apparent infringement upon the rights of the natives alongside who stand as much in need of the waters of the stream enclosed as the claimants, and further because more land is claimed than is occupied for their business.

The attorney for claimants appealing from the decision of your office files assignments of error as follows:

1. That the quantity of land surveyed does not exceed the area allowed by the act of March 3, 1891.
2. The lines of survey conform to or are within the monuments and boundaries of the location of the claim as found on the ground at the time of the survey.
3. That the length of the shore line is necessary and material to the company as seining ground for fishing purposes.
4. That the tract cannot be further extended inland without including swamp and overflow land, which by the policy of the government, is reserved for the future State.
5. That the tract should be practically in the present form to embrace the improvements belonging to the company.

The field notes of this survey, and the plat thereof, as returned show that the tract embraced therein, in its general outline, varies very slightly in shape from the letter "L", that portion of the tract corresponding to the long part of said letter—extending in an easterly and westerly direction—having a shore line on its northern boundary something over a mile and a quarter in length, with a width of about three and one-third chains at point of narrowest breadth. That portion of

the tract corresponding to the short part of said letter—extending in a northerly and southerly direction—has a boundary line on the west approximately three-fifths of a mile in length.

With reference to contention of appellants with respect to the lines of survey conforming to and being within the monuments and boundaries of the location of the claim “as found on the ground at the time of the survey,” the report of the deputy who performed the work in the field contains the following statement:

The survey was made according to the boundaries of the tract as claimed and desired by H. C. Jensen, agent and superintendent of the Fort Alexander Fishing Station, but as he was not present at the time the survey was made he could not point out the places where the stakes marking the boundaries were originally set, or where the traps are generally placed when the cannery is in operation.

How the deputy could consistently state in the same sentence of his report that the survey was made “according to the boundaries of the tract as claimed,” in the face of the further statement therein contained to the effect, substantially, that at the time the lines of survey were run he was not able, on account of the absence of the company’s agent, to locate the *situs* of the monuments or stakes indicating the boundary of the claim, is a matter rather difficult to comprehend.

These special surveys should not be approved and accepted unless executed in accordance with such general instructions as were issued to the deputy for the execution of the survey under consideration, in words following:

You, . . . , must conform to said act of March 3, 1891, and other laws of the United States, the regulations thereunder dated June 3, 1891, the printed manual of surveyor’s instructions, approved December 2, 1889, and other instructions heretofore issued, or which may hereafter be issued by the said Commissioner, and with such special instructions as may be issued from time to time, from this office.

The provision of the act, and regulations thereunder, mentioned in the instructions as above quoted required that these surveys should be so run as to embrace a tract of land “as near as practicable in square form,” and the attorney in the case at bar was notified by departmental letter of November 25, 1891, that such requirement must be complied with in all cases. *Vide* 13 L. D., 608.

The contention of claimants that the survey should be practically in its present form in order to embrace the improvements belonging to the company, is without merit, for the reason that the nearest improvement (a building used for a boarding house) on the western portion of the claim, to the only alleged improvement (a fish trap at the mouth of the creek between corners No. 9 and 10) on the eastern portion of the tract, are more than a mile distant from each other, and if the limit or total of the area—one hundred and sixty acres—authorized to constitute a single entry, in case of actual occupancy of the whole of such area, was allowed the claimants it would have to be in square form with none of the side or exterior lines more than one half mile (40 chains) in length, which rule if applied in the case at bar would necessarily exclude from

purchase and entry that part of the tract, and the improvements thereon, forming either the eastern or western portion of appellant's claim.

The survey embracing the part of the tract which forms that portion of appellant's claim extending in a northerly and southerly direction was made in the form as appears on the plat, in order to embrace as much of the creek as possible, and for the apparent purpose of securing to claimants the exclusive ownership, control, and use of the only fresh water supply in that immediate vicinity, but whether it was so intended or not it would have that effect if the survey be approved in its existing form. While claimants would secure a monopoly of the only available fresh water supply, long used by the natives, the said natives would at the same time be cut off from the use thereof for domestic purposes by the line of survey forming the western boundary of appellant's claim, and which runs in close proximity to the village of Kanuleck Indians. The said creek appears to be between two and three hundred yards distant from said Indian village, and it may be safely held that land in such close proximity to a native settlement upon which is located the sole and long used source of fresh water supply of the inhabitants is land which in contemplation of law is actually occupied by said natives, and that to accept and approve a survey including within its lines the land containing such water supply would be in contravention of that particular provision of section 14 of said act of March 3, 1891, which reserves or excludes from purchase and entry all lands "to which the natives of Alaska have prior rights by virtue of actual occupation."

The foregoing reasons being sufficient for not approving the survey, it is not necessary to notice those assignments of error to which no consideration has been given, and your office decision of May 11, 1895, rejecting the survey, upon the grounds above stated, is hereby affirmed.

ALASKAN LANDS—SURVEY—SWAMP LAND.

BARTLETT BAY PACKING CO.

A survey of Alaskan land, that does not follow the requirement as to square form, will not be approved on the ground that the irregularity in form is necessary in order to exclude swamp land, as there is no statutory provision excepting such lands from purchase.

Secretary Francis to the Commissioner of the General Land Office, October 3, 1896. (W. A. L.) (W. M. B.)

With your letter of June 7, 1895, you transmitted the papers relating to survey No. 61 executed—under provision of sections 12 and 13 of the act of March 3, 1891 (26 Stat., 1095)—by Clinton Gurnee, Jr., U. S. deputy surveyor, of a tract of land claimed by the Bartlett Bay Packing Company, containing 154.10 acres, situate on Ugashek river on the westerly shore of the Alaskan peninsula, and used for a salting and fishing station.

The said survey was suspended, as stated in your office letter, of date May 9, 1895, to the United States marshal, *ex-officio* surveyor-general, for the district of Alaska, for the reason

that more land is included (therein) than is occupied by the claimants for their business, and because the tract is not as near as practicable in square form.

Your office supplemented such action with the suggestion that the survey be amended in manner set forth in its said letter of May 9, 1895, wherein it is stated that the survey so amended "would include all the land occupied by the claimants for their business, an area of about 14 acres."

Appealing from the action of your office, as above indicated, appellants, as grounds for such appeal, after setting up the usual contention in this class of cases with respect to the entire area claimed being needed for their business; that the extended shore line is necessary for seining and fishing purposes; and that the survey was made in conformity with the monuments and boundaries of the claim; contend further:

That to extend the boundaries of the claim farther inland would include swamp lands which are reserved from sale in contemplation of the future transfer to the State of Alaska.

It is not necessary at this time to consider whether the area claimed by appellants is needed and actually occupied by appellants for the transaction of their business, if the survey fails to conform to statutory requirement, and rules and regulations made in accordance therewith, as to square form.

The tract embraced in the survey is not as "near as practicable in a square form," as required by law, and for that reason its suspension was proper.

While it is quite evident that the survey was made to assume its present form, embracing a tract of land nearly one mile in length and less than one fourth of a mile in breadth, in order to enable claimants to secure as extended a shore line as possible, which they claim is necessary for seining purposes, yet appellants state that the lines of survey could not be run farther inland without including swamp lands which they allege "are reserved from sale in contemplation of the future transfer to the State of Alaska."

It has been held by this Department that these special surveys, under act of March 3, 1891, cannot vary from the statutory requirement as to "square form" for the purpose of embracing a lengthy shore line for seining and fishing purposes. It has also been settled by previous departmental rulings that there is no provision, statutory or otherwise, requiring the lines of survey to conform to the delimitation, by claimants, of tracts of land sought to be purchased and entered by them.

There is no merit in appellants' further contention that the survey should be accepted because the lines thereof had to be run and estab-

lished as shown by the field notes and the plat in order not to take in certain swamp land which they allege to be reserved from sale.

Under provision of sections 12 and 13 of the act of March 3, 1891, every character of land composing the body of public lands in the district of Alaska—for the particular use and purpose named—is subject to survey, purchase and entry, save that “containing coal or the precious metals,” and excepting lands of every character which form the islands of the Pribylov Group or the Seal Islands and the Annette Islands, which are specially reserved by provision contained in sections 14 and 15 of said act, from sale and entry for any purpose.

Since swamp lands are not embraced in that particular class of lands which—on account of their coal or mineral bearing character—are reserved from purchase and entry under provision of section 12 of said act, lands of said description (swamp) are purchasable and can be properly included in the lines of a survey of appellant's claim, if said survey be made in conformity with the requirement of existing law.

For the foregoing reasons your said office decision of May 9, 1895, suspending the survey in question, is hereby affirmed.

WAGON ROAD GRANT—ACT OF APRIL 21, 1876.

DUNCAN ET AL. *v.* THE DALLES MILITARY WAGON ROAD CO. (ON REVIEW).

An entry of land embraced within the limits of a wagon road grant is not confirmed by section 1, act of April 21, 1876, for the reason that when allowed the diagram on file did not show said land to be within the grant, if, by the terms of the grant in fixing the terminus of the road, the fact that said land fell within the grant was apparent.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 3, 1896. (F. W. C.)

The case of James M. Duncan *et al. v.* The Dalles Military Wagon Road Company, involving certain lands in T. 20 S., R. 47 E., W. M., Burns land district, Oregon, is again before this Department upon the motion filed for a review of departmental decision of March 7, 1896 (22 L. D., 271), in which the action of your office in holding for cancellation the entries made by Duncan and others, for conflict with the grant under the act of February 25, 1867 (14 Stat., 409), under which said Wagon Road Company lays claim, was affirmed.

This motion was entertained May 8, 1896, and returned for service and has been again filed bearing evidence of service upon the said company, which has replied thereto.

The act of February 25, 1867 (*supra*), made a grant to the State of Oregon to aid in the construction of a military wagon road

from Dalles City, on the Columbia river, by way of Camp Watson, Canon City, and Mormon or Humboldt Basin, to a point on Snake river opposite Fort Boise, in Idaho Territory.

Under this legislation the eastern terminus of the grant was to be at a point on Snake river, to which the company duly located and constructed its road. In the preparation of the diagram, however, the river was incorrectly indicated. The facts bearing upon the same, as taken from your office decision, being as follows :

According to the old diagram showing the limits of the grant, the Snake river was shown to pass through T. 20 S., R. 46 E., whereas the new diagram, now in use in this office, shows that the river forms the western '(eastern)' boundary of the fractional township 20 south, range 47 east, and the tracts are within the primary limits of the grant for said company.

Your office decision held that:

Even though the diagram, on file in your office, failed to show the tracts above described, to be within the limits of the grant, it should have been noticed that the plat of survey of said T. 20 S., R. 47 E., approved by the surveyor-general January 25, 1876, has the statement endorsed thereon that said wagon road passes through sections 18 and 19 to the ferry in the NE. $\frac{1}{4}$, Sec. 19.

It was therefore held that the entries were improperly allowed, and with the exception of the one upon which patent had issued, the same were held for cancellation.

In the decision under review, in affirming your office decision, it was held that:

The plat of survey in your office of T. 20 S., R. 47 E., shows that the terminus of the road is at the ferry landing on the west bank of the Snake River in the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ of Sec. 19. The tracts in question fall west of a line drawn through that point at right angles to the general direction of the last ten miles (the length of a section under the company's grant) of the road, and are therefore within the limits of the grant. See *Daily v. M., H. and O. R. R. Co. et al.*, 19 L. D., 148.

The motion for review urges that these entrymen are entitled to the protection granted by section one of the act of April 21, 1876 (19 Stat., 35), which provides:

That all pre-emption and homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith by actual settlers, upon tracts of land of not more than one hundred and sixty acres each, within the limits of any land grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office of the district in which such lands are situated, or after their restoration to market by order of the General Land Office, and where the pre-emption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed, and patent for the same shall issue to the parties entitled thereto.

It is claimed that through the mistake in the representation of the river, these tracts were not shown to be embraced within the grant. That is, it would appear that they were east of the river and that therefore, even though they must be considered as embraced within the grant, yet as the diagram did not show them to be within the grant they were not formally withdrawn at the date of the allowance of these entries, the diagram not being corrected until after the allowance of said entry. As before stated, under the terms of the grant the road was to be constructed to a point on Snake River, and the diagram as

prepared shows said river to be the eastern terminus of the grant. While the river was incorrectly indicated upon the map, yet these facts were sufficient notice to any one settling or laying claim to land upon the western bank of the river—the same being included within said grant.

I am therefore of the opinion that these entrymen are not entitled to confirmation under the act of April 21, 1876; the previous decision of the Department is adhered to, and the motion for review is denied.

WITHDRAWAL OF CONTEST—REINSTATEMENT.

WARES ET AL. v. THOMPSON.

A contest based on alleged priority of settlement being withdrawn on a disclaimer of interest on the part of the adverse entryman, and his application to amend his entry so as to embrace different land, should be reinstated, with all rights incident thereto, on the withdrawal of the entryman's application for amendment.

Secretary Francis to the Commissioner of the General Land Office, October 3, 1896. (W. A. L.) (C. J. W.)

November 3, 1893, Isaac Thompson made homestead entry No. 3270 for the SE. $\frac{1}{4}$ of section 28, T. 28 N., R. 3 E., Perry, Oklahoma.

November 6, 1893, John C. Wares filed his affidavit of contest alleging that he made settlement on said tract before Thompson made entry and before he or any other person had made settlement thereon, and at the same time filed his application to enter the land, which was rejected because of conflict with Thompson's entry.

November 11, 1893, Thompson filed an application to amend his entry so as to substitute the SW. $\frac{1}{4}$ of Sec. 10, T. 28 N., R. 3 E., alleging that on September 25, 1893, he made settlement thereon and began to dig a well and build a house with the intention of making it his home, but by mistake he made entry for the SE. $\frac{1}{4}$ of section 28, T. 28 N., R. 3 E., on which he believed at the time he made entry he had settled, and did not discover his mistake until November 6, 1893. On the same day Wares filed a dismissal of his contest.

December 25, 1893, Reuben M. Bilyer filed his protest against allowing Thompson's application to amend and also an application to enter the SW. $\frac{1}{4}$ of section 10, T. 28 N., R. 3 E.

April 26, 1894, Thompson withdrew his application to amend his entry, and on the same day Bilyer withdrew his protest.

November 5, 1894, L. B. Hart filed his affidavit of contest charging that Thompson had abandoned the land embraced in his entry, for more than six months since the entry was made.

December 4, 1894, Wares filed his sworn application to have his contest reinstated, alleging, in substance, that he had been misled by the advice of his attorney and the statements of the register of the land

office, in dismissing his contest and filing application to enter, as well as by Thompson's representations.

His contest was accordingly reinstated. A hearing was had at which Wares appeared and Hart made default, and the local officers thereafter rendered a decision in which they found that Wares was the first settler on the land and recommended the cancellation of Thompson's entry and that Wares be allowed to make entry for the land. From this decision Hart appealed, and on August 20, 1895, your office passed upon said appeal and reversed the decision of the local officers. Wares has appealed from your office decision and the same is now here for consideration.

After stating the record facts substantially as above set forth, your office found that, "These facts show that there is neither law nor equity to support your decision" (Meaning the decision of the local officers), and they were directed to order another hearing on Hart's affidavit of contest.

This adjudication, that Wares showed no right to the land, either legal or equitable, is alleged to be erroneous and is the chief assignment of error.

In addition to the record facts already stated certain others appear in the record. Wares, on the reinstatement of his contest, was permitted to introduce testimony from which it appears that he was the settler upon the land in question on the day of the opening; that no one else has ever settled upon or occupied it, and that he and his family have constantly resided upon and cultivated it since October 1893; that most of the land is enclosed, and the improvements are worth two hundred dollars or more; and that he was thus living upon and claiming the land at the date of Hart's affidavit of contest, as well as at the date of Thompson's entry. Certain affidavits explaining the circumstances under which Wares dismissed his affidavit of contest are a part of the record, and from these it appears, that he was all the time acting in good faith and seeking to perfect his claim to the land. That when Thompson appeared and disclaimed the land and put on record the admission that his entry of it was the result of mistake, he was induced to believe, and that by the statements of the register of the land office, as well as those made by Thompson, that there was no need for the further prosecution of his contest.

Wares therefore appears as the first settler upon the land, who has followed his initiatory acts with valuable improvements and the establishment of residence and the maintenance of residence, with a view to obtaining patent and making the land his permanent home.

The record and affidavits accompanying it show that as soon as Wares ascertained that there was an entry on the land covered by his settlement, he filed contest against it. That Thompson at once voluntarily notified Wares that his entry was a mistake and that no contest would be necessary but that he would at once make known the mistake and

have the entry corrected. This disclaimer of intentional entry of the land claimed by Wares was filed in the local office by Thompson. It was not until this was done that Wares withdrew his contest, simply awaiting the action of the Department on Thompson's application to correct his mistake. Six months after Thompson's application and disclaimer was thus filed, it was withdrawn without any notice to Wares. It is clear that Thompson having entered this land by mistake it was voidable at his option, and having voluntarily notified Wares that he did not claim the land, and having reiterated that disclaimer in his application to correct the entry, it was error to allow the withdrawal of the application under the circumstances without notice to Wares, and it follows that the action of the local officers in reinstating Wares' contest was proper. Upon its reinstatement Wares occupied the status of a first contestant, and Hart under his affidavit was no necessary party to the hearing, as the only charge he makes is that of abandonment of the land by Thompson and not by Wares, and he alleges no settlement by himself at any time.

Your office decision is accordingly reversed and that of the local officers affirmed. The entry of Thompson will be canceled, Hart's affidavit dismissed and Wares allowed to make entry.

CITY OF GUTHRIE v. NICHOLS ET AL.

Motion for review of departmental decision of February 17, 1896, 22 L. D., 190, denied by Secretary Francis, October 3, 1896.

RAILROAD GRANT—CERTIFICATION—ACT OF AUGUST 3, 1854.

ENGLISH v. LEAVENWORTH, LAWRENCE AND GALVESTON R. R. CO.

The certification of land under a railroad grant, in accordance with the provisions of the act of August 3, 1854, is of no operative effect if the land in fact was excepted from the grant.

Secretary Francis to the Commissioner of the General Land Office, October 3, 1896. (W. A. L.) (F. W. C.)

Edward E. English has appealed from your office decision of February 26, 1894, sustaining the action of the local officers in rejecting his homestead application presented February 15, 1893, covering the SW. $\frac{1}{4}$ of Sec. 21, T. 24 S., R. 19 E., Topeka, Kansas, land district, for the reason that said tract has been certified to the State of Kansas on account of the grant made by the act of March 3, 1863 (12 Stat., 772), to aid in the construction of the road afterwards known as the Leavenworth, Lawrence and Galveston Railroad.

From the facts contained in your office decision it appears that this tract is within the primary limits of the grant above referred to and was

certified to the State on account of said grant February 26, 1873. The rights under the grant attached upon the definite location November 27, 1866. One H. M. Ellis, on January 3, 1861, filed pre-emption declaratory statement covering this land, alleging settlement December 17, 1860. Said filing has never been canceled, but, as stated in your office decision, the land was offered land and by law he was required to make proof and payment within twelve months from the date of his settlement. This he failed to do, and your office decision therefore held that the grant was not defeated by reason of said filing. It might be further stated that Ellis, in support of his application, alleges that he commenced settlement on this land in the spring of 1861, and that he has made improvements upon the land to the value of about \$1500. Whether he ever applied to enter the tract prior to the attachment of rights or the certification under the grant does not appear in the record now before me.

The matter presented for consideration by the record is, Was the certification of February 26, 1873, operative so as to prevent further disposition by the United States?

I am aware that this Department has repeatedly held that certification of lands under a railroad grant deprives the Department of further jurisdiction in the matter; but in view of the recent decision of the supreme court in the case of *Weeks v. Bridgman* (159 U. S., 541), I am of opinion that where such certification, being made as in this case under the act of August 3, 1854 (10 Stat., 346), embraced lands excepted from the grant, such certification has no operative effect.

In the case of *Weeks v. Bridgman* (*supra*) there was pending at the date of the filing of the map of definite location of the St. Paul and Pacific Railroad, on appeal from the action of the local officers rejecting the same, an application by one Brott to file a pre-emption declaratory statement for the land there involved, he claiming the right to pre-empt the same as a mail contractor under the act of March 3, 1855. His right to make such filing was recognized by this Department in 1861. Notwithstanding such favorable decision, the land was certified to the State of Minnesota under the act of August 3, 1854, as a part of lands granted by the act of March 3, 1857, to aid in the construction of the St. Paul and Pacific Railroad.

As stated by the court:

But under the granting act, lands to which pre-emption rights had attached, when the line was definitely fixed, were as much excepted therefrom as if in a deed they had been excluded by the terms of the conveyance. And this was true in respect of applications for pre-emption rejected by the local land office and pending on appeal in the land department at the time of definite location, since the initiation of the inchoate right to the land would prevent the passage of title by the grant, and the determination of its final destination would rest with the government and the claimant. *Railway Company v. Dunmeyer*, 113 U. S., 629; *Railroad Company v. Whitney*, 132 U. S., 357; *Bardon v. Railroad Company*, 145 U. S., 535; *Ard v. Brandon*, 156 U. S., 537; *Whitney v. Taylor*, 158 U. S., 85.

The act of August 3, 1854, provided that where lands had been or should be thereafter granted to the several States or Territories, and the law did not convey the fee

simple title of such lands or require patents to be issued therefor, the lists of such lands which had been, or might thereafter be certified, "shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, said lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby."

As we have seen, this particular land was not included in the grant, and the Secretary of the Interior had so decided on August 30, 1861, when he determined that the pre-emption right had attached. And since it was not so included nor subject to disposition as part of the public domain, on October 25, 1864, the action of the land department in including it within the lists certified on that day was ineffectual. *Noble v. Railroad Co.*, 147 U. S., 165, 174.

As against Brott the certification had no operative effect.

It is also objected that Brott was not a qualified claimant under the act of 1855, because that act only applied to a contractor engaged in carrying the mail through any of the Territories west of the Mississippi, and because it does not appear that his declaratory statement was ever accepted or recognized, or that he made proof of his occupation of the land as a mail station, but these and other like objections involve questions between Brott and the government, already determined in his favor, and which the railroad company and its grantees are not in a position to raise upon this record.

The grant under consideration, namely, the act of March 3, 1863, contained a like exception to that considered by the court in the case of *Weeks v. Bridgman* (*supra*), and if the initiation of the inchoate right to the land was sufficient to defeat the grant, surely the perfected proceeding resulting in the allowance of Ellis' filing, which was still of record uncanceled at the date of the definite location of the company's road, is sufficient to except the tract now under consideration from the operation of the grant of 1863. This being so, the action of the Land Department in including it in the lists of 1873 was ineffectual.

I must therefore reverse your office decision and direct that Ellis be permitted to complete entry upon his application heretofore presented. So far as this may be in conflict with any previous holding of this Department, as to the effect of an outstanding certification, such previous holding will be modified; and in the administration of these grants, the certifications made under the act of 1854 will only be considered as operative where they include tracts actually passed by the grant.

WALKER v. TAYLOR.

Motion for review of departmental decision of July 13, 1896, 23 L. D., 110, denied by Secretary Francis, October 3, 1896.

RAILROAD LANDS—ACT OF SEPTEMBER 29, 1890.

CROWLEY *v.* RITCHIE ET AL. (ON REVIEW).

Lands restored to the public domain by the forfeiture act of September 29, 1890, are subject to settlement from the date of the passage of said act.

Secretary Francis to the Commissioner of the General Land Office, October 3, 1896. (W. A. L.) (C. J. W.)

Margaret Ritchie, Charles C. White, John Provost, and John J. McCoy, sent their applications by mail to enter the NW. $\frac{1}{4}$ of Sec. 9, T. 48 N., R. 7 W., Ashland, Wisconsin. Margaret Ritchie's application was for the whole of said NW. $\frac{1}{4}$, Provost's for the north half, White's for the SW. $\frac{1}{4}$ of said NW. $\frac{1}{4}$ and McCoy's for the SE. $\frac{1}{4}$ of said NW. $\frac{1}{4}$. These applications were all received at the local office by mail prior to 9 o'clock, A. M., on November 2, 1891, the announced hour of the opening. All the applicants alleged settlement on the land applied for, and the local officers held said applications to be simultaneous. Daniel C. Crowley at two minutes past nine o'clock, A. M., on November 3, 1891, appeared in person and filed application to enter the land in dispute, alleging settlement thereon. A hearing was ordered to determine the rights of the parties. Said hearing commenced on January 4, 1892, all the parties appearing in person and by attorney. Thereafter the local officers held that the application of John Provost as to the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, of John J. McCoy as to the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, of Daniel C. Crowley as to the entire NW. $\frac{1}{4}$ should be dismissed, and the application of Margaret Ritchie allowed. The losing applicants appealed from the decision, and on September 14, 1892, your office passed upon the case and affirmed the finding of the local officers. From this decision the losing applicants appealed to the Department, and on May 21, 1894, the case was passed upon here, and your office decision was reversed and the right of entry awarded to Crowley. The losing parties filed motion for review, and on March 7, 1896, said motion was here considered and denied.

A motion for re-review has been filed, based upon the ground, that this was one of a batch of cases held up for a long time for the purpose of determining whether or not they were within the rule laid down in the case of *Smith v. Malone* (18 L. D., 482), and that this case was erroneously held to come within said rule, while all of the other cases were held to be free from said rule, although they involved the same questions involved in this case. It was not discovered that the land in question in this case was within the ten mile limits of the Wisconsin Central Railroad grant forfeited by the act of September 29, 1890 (26 Stat., 496), and therefore within the rule announced by the supreme court, in the case of *Forsyth v. Wisconsin Central Railroad Company* (U. S., Vol. 159-46), until after the opinion of March 7, 1896, was rendered, and the motion for review denied. The opinion was based upon

the assumption that the land was in reservation and not subject to entry at the date of the several applications, except that of Crowley. It turns out that the Department was mistaken as to this fact, and this is deemed sufficient reason for the reconsideration of the former departmental decisions in this case. The departmental decision of May 21, 1894, which reversed your office decision of September 14, 1892, rested solely upon the supposed fact that the land was in reservation at the time all of the applications to enter were made, except that of Crowley, and for that reason the doctrine in the case of *Smith v. Malone* was invoked. There was, therefore, a mistake of a material fact in said decision, which mistake has been followed in subsequent departmental action in the case, but which should now be corrected. Under this view of the case, the facts disclosed by the record as to the acts of settlement performed by the several applicants become important. In reference to the acts of settlement, the local officers found as follows:

The condition of the land at the time Margaret Ritchie established settlement thereon was wholly unimproved and uncultivated, that there were no marks upon any of the corners indicating that any person claims this land; it was free from improvements of any kind; that she had no notice of any prior claim of any party, and that she followed up her settlement with residence and improvements is undisputed.

Your office made the following finding from the record:

The preponderance of the proof is that Crowley is a single man; that he went on the land on the morning of November 2, after twelve, cut brush and started a house, cut down some trees and built a house two logs high; remained there eight hours; he has since built a house and cleared some brush; he went on the land again December 1, stayed three days and built his house on the 8th; he never lived in the house; it was built of logs, pole roof covered with boughs and earth; no floor, no furniture; the house was not finished at date of hearing. House worth \$25. He saw Mrs. Ritchie's house when he went on the land to build his house. I find that John Provost made his settlement and improvements on the NE. $\frac{1}{4}$ of the section, and I do not find sufficient evidence to show any settlement or improvements on the NW. $\frac{1}{4}$, the land in controversy, to give notice of any intention of claiming the same. I also find from the evidence that McCoy made his settlement and improvements on the NE. $\frac{1}{4}$ and not on the quarter-section involved, and that he made no such improvements on the NW. $\frac{1}{4}$ as to give notice of any intention of claiming the same.

As to the claims of Provost, McCoy and White, whilst their applications were simultaneous with Mrs. Ritchie's, their settlements and improvements having been made on other quarter-sections than the one in dispute and having given no legal notice of claim to any part of the NW. $\frac{1}{4}$, they can claim nothing by reason of their settlement on other quarters.

The facts found by the local officers and by your office are in accord with the record. In departmental decision of March 7, 1896, it was held that Mrs. Ritchie could take no benefit from her acts of settlement and occupancy performed prior to the hour of opening on November 2, 1891, which holding was error, since the tract was subject to settlement from September 29, 1890. It appears, therefore, that the finding of the local officers and your office should have been affirmed

instead of reversed. Departmental decisions of May 21, 1894, and March 7, 1896, are revoked, in so far as they deny to Margaret Ritchie the right to make entry and perfect her claim to the land in dispute, and your office decision of September 14, 1892, awarding the land to her, is affirmed.

AURORA LODGE *v.* BULGER, HILL AND NUGGET GULCH PLACER.

Motion for review of departmental decision of July 13, 1896, 23 L. D., 95, denied by Secretary Francis, October 3, 1896.

SCHOOL LANDS—ACT OF APRIL 28, 1870.

MILLER *v.* STATE OF NEBRASKA.

By section 2, act of April 28, 1870, extending the jurisdiction of the State of Nebraska over the territory added thereto by the provisions of said act, Congress conferred upon said State all the rights incident to the original enabling act, and it therefore follows that the reserved school sections, embraced within such added territory, passed to said State by such transfer of jurisdiction, though the statute does not in terms make an express grant thereof to the State.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 3, 1896. (A. B. P.)

It appears from the record in this case that on March 15, 1895, James A. Miller applied to make homestead entry of lots 3, 4, 6 and 7, Sec. 36, T. 89, R. 48, O'Neill, Nebraska.

The local officers rejected his application for the reason that the land is part of a section belonging to the State of Nebraska for the support of common schools. On appeal to your office the action below was affirmed. Miller again appeals.

The land was originally within the Territory of Dakota, but now lies in the State of Nebraska, south of the Missouri River.

By the fourteenth section of the act of March 2, 1861 (12 Stat., 239), organizing the Territory of Dakota, it was provided:

That when the land in said Territory shall be surveyed, under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in the States hereafter to be erected out of the same.

The State of Nebraska was formed under the act of April 19, 1864 (13 Stat., 47), whereby the middle of the channel of the Missouri River was established as the eastern, and in part the northern boundary lines thereof. As the river then ran, the land in question was left to the north, and in the Territory of Dakota. Subsequently, however, the channel of the river changed completely at this point and the land in question fell to the south thereof.

By the seventh section of the Nebraska enabling act, there was granted to the State for the support of common schools, sections sixteen and thirty-six of every township therein, but the land in question was not within the then prescribed limits of the State.

Subsequent to the change in the channel of the river, however, the Congress, by act of April 28, 1870 (16 Stat., 93), appears to have recognized the change, and in view thereof, provided that upon Nebraska's giving her consent thereto in the manner prescribed, which was done, the center of the main channel of the Missouri River, as it then existed, should be the boundary line between the State and the Territory of Dakota, at certain stated points, which placed the land in controversy within the limits of the State of Nebraska.

By the second section of that act it was provided:

That the respective jurisdictions of said State and Territory shall extend to and over all of the territory, within their limits, according to the line herein designated, to all intents and purposes as fully and completely as if no change had taken place in the channel of said Missouri river. And the Secretary of the Interior is hereby authorized and required to cause to be made all necessary surveys and meanderings, and to order the transfer of all plats, papers, and documents which may be necessary in the premises.

The substance of appellant's contention is that inasmuch as the lands affected by said change in the channel of the river were thus transferred from the Territory of Dakota to the State of Nebraska after the passage of the enabling act under which said State was formed, there never has been a grant to the State, for school purposes, of sections sixteen and thirty-six of the townships embracing said lands.

It does not appear to me that this contention could, in any event, avail the appellant, for the reason that if said sections sixteen and thirty-six do not belong to the State of Nebraska for school purposes, they are still in a state of reservation under the act organizing the Territory of Dakota, and therefore could not be entered under the public land laws.

The reservation in the Dakota territorial act, of sections sixteen and thirty-six of every township therein, was for the purpose of applying the same to schools in States thereafter to be erected out of said Territory.

In view of the change in the channel of the Missouri River, and of the subsequent legislation by Congress relative thereto, as stated, it is clear that the State of Nebraska was in part erected out of the lands affected by said change and legislation. While not within the limits prescribed by the Nebraska enabling act of 1864, they were brought within the boundaries of the State as extended by the act of 1870, and thus became a part and parcel of the lands of that State.

The remaining question is, whether the State of Nebraska is entitled to sections sixteen and thirty-six for school purposes. We have seen that by the act of April 28, 1870, the jurisdiction of the State was extended to and over the newly acquired territory, to all intents and

purposes as fully and completely as if no change in the channel of the Missouri River had ever taken place. By that act it was the intention of Congress, in my judgment, to place the lands within the newly defined boundary limits of the State of Nebraska, the same as though they had originally fallen, and subject to all the provisions, conditions, and limitations relative to the lands which did fall, within the boundary limits as prescribed by the act under which the State was formed. In other words, it was the purpose of the act to place the lands within the jurisdiction of the State of Nebraska, subject to all the conditions and restrictions imposed, and with full right in the State to all the privileges granted, by the original enabling act.

If the main channel of the Missouri River had always been where it was at the date of the passage of the act of 1870, and is now, then the said lands would have fallen within the original jurisdictional limits of the State of Nebraska, and would have been in all respects subject to the operation of the act under which the State was formed; and sections sixteen and thirty-six of every township thereof would have passed to the State by that act. It was in that position exactly that Congress intended to place the lands, in my judgment, when by the second section of the act of 1870 it extended the jurisdiction of the State of Nebraska to and over the same, "as fully and completely as if no change had taken place in the channel of said Missouri River." And although that act is without words of express grant of sections sixteen and thirty-six to the State of Nebraska for school purposes, yet the intention of Congress obviously was to transfer said sections (and the other lands embraced by the act) to said State, the same, and with like effect, as though they had originally been a part of said State.

It can hardly be presumed that Congress intended to continue the reservation of sections sixteen and thirty-six, under the Dakota territorial act, after the lands had been thus transferred to the State of Nebraska, without any purpose for such continued reservation, specified or otherwise.

I am of the opinion, therefore, that the land here in question belongs to the State of Nebraska for school purposes, and the decision appealed from is accordingly affirmed.

CHILDS *v.* FLOYD.

Motion for review of departmental decision of April 6, 1896, 22 L. D., 442, denied by Secretary Francis, October 3, 1896.

RAILROAD GRANT—INDEMNITY SELECTIONS—ADVERSE CLAIM.

GAMBLE *v.* NORTHERN PACIFIC R. R. CO.

Indemnity selections of the Northern Pacific resting on alleged losses east of Superior City, regular and legal under the existing construction of the grant at the time when made, should be protected under the changed construction of the grant, with due opportunity to assign new bases, as against intervening adverse claims.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 3, 1896. (F. W. C.)

With your office letter of May 20, 1896, was forwarded an application, filed in behalf of E. R. Gamble, for a writ of certiorari, in the case of Gamble *v.* Northern Pacific Railroad Company, involving the SW. $\frac{1}{4}$ of Sec. 31, T. 147 N., R. 49 W., Fargo land district, North Dakota.

The tract is within the indemnity limits of the grant for said company and was included in the company's selection list No. 6, filed March 12, 1883.

Said list was not accompanied by a list of losses as bases for the selections made, but an amended list was filed October 12, 1887. This list contained losses, but were in bulk, not tract for tract, with the selected lands.

On February 23, 1892, further amendment was made by arranging the losses tract for tract with the selections. The losses assigned were, however, in Wisconsin and east of Superior.

On November 13, 1895 (21 L. D., 412), this Department held that the grant for the Northern Pacific Railroad Company did not extend east of Superior, Wisconsin.

It was further held in said opinion, that:

I further learn upon inquiry at your office that the lands east of Superior City were made the basis for the selection of a large quantity of lands from the indemnity belt of the company's grant in North Dakota. These selections having been made some while ago, many, if not all, of the lands selected have, perhaps, been sold by the company.

The previous action of this Department giving color to the company's right to a grant east of Superior City, and the application of the rule that the indemnity lands should be selected nearest to those lost, were the probable causes for the specification of these lands as a basis for the selections referred to.

In view thereof, I have to direct that the company be allowed sixty days from notice of this decision within which to specify a new basis for any of its indemnity selections avoided by this decision, and that during that period no contests against such selections, where the charge is that the basis was made of lands east of Superior City, or application to enter under the settlement laws, will be received.

Acting under this holding the company, on November 25, 1895, filed a further amendment to said list No. 6, substituting losses in Montana.

Gamble's claim rests upon an application tendered on March 20, 1895, and rejected for conflict with the company's selection, from which action he appealed. This appeal was dismissed by your office because the

service made was held not to be sufficient to bind the company, i. e., that no sufficient service was made upon the company.

It has been repeatedly held that an application for certiorari will not be granted where substantial justice has been done in the action complained of.

Your office sustained the rejection of Gamble's application for conflict with the company's selection, but denied him the right of further appeal, because no sufficient service had been made of the appeal from the action of the local officers.

In support of the application under consideration it is urged that the selection of record, at the date of Gamble's application, was invalid, being without a sufficient basis, and could not be amended in the presence of his adverse claim.

It must be admitted that, as a general proposition, amendment can not be made, or a defect cured, except the same be subject to intervening rights, but here the selections were to be made under the direction of the Secretary of the Interior.

Under the rules established, in view of the previous action of the Department tacitly recognizing the grant and making a withdrawal of the lands upon the location east of Superior, it became necessary for the company to resort, in its selections, to the losses east of Superior. It is true that the Department afterwards held that there is no grant east of Superior, but it would be inequitable to avoid a selection made in accordance with departmental regulations, simply for the reason that change had been made in the construction of the grant, without first affording the company an opportunity to comply with the changed condition.

As before stated, the selections are made under the direction of the Secretary of the Interior, and as the selection made before the decision of November 13, 1895 (*supra*), was in all respects regular and legal under the previous construction of the grant, it was not the intention to avoid the same by said decision, but rather to afford the company, within a limited time, an opportunity to supply a new basis, which it has done, and no exception has been taken to the sufficiency of the same. It is therefore held that the rejection of Gamble's application was proper, and that the pendency of his appeal was no bar to the allowance of the amendment in the company's selection, under the circumstances before detailed.

The application is accordingly denied.

SHELDON *v.* ROACH.

Motion for review of departmental decision of May 23, 1896, 22 L. D., 630, denied by Secretary Francis, October 3, 1896.

RELINQUISHMENT—MINERAL LAND—LIMESTONE—LODE LOCATION.

LONG v. ISAKSEN.

An instrument executed by a homestead entryman purporting to waive all claim to any mineral land embraced within his entry, but which does not in terms surrender any specific legal sub-division, and was evidently not intended as an abandonment of any specific tract, should not be regarded as a relinquishment. A lode location on a bed or ledge of limestone is not authorized under the provisions of the mining laws.

To exclude land from appropriation under the homestead law, on the ground that it contains a valuable bed of limestone, it must affirmatively appear that the land is more valuable on account of the stone contained therein than for agricultural purposes.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 3, 1896. (P. J. C.)

The land involved in this controversy is lots 4 and 5 and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 20, T. 10 S., R. 10 W., W. M., Vancouver, Washington, land district.

The record shows that Elias Isaksen made homestead entry of said tract August 19, 1889, and after publication notice, made commutation proof before the clerk of the superior court of Pacific county, Washington, February 28, 1891, making and filing the usual non-mineral affidavit. In answer to question No. 10 of final proof in relation to the presence of mineral on the land, the claimant said—"On a small portion of the tract there are indications of lime, but of no known value." The proof was transmitted to the local office, when, for some reason, wholly unexplained by the record, on March 5, 1891, it required him to furnish "affidavit or additional proof as to the mineral character of the land."

On March 17, 1891, Ira M. Long filed an uncorroborated affidavit of contest against said entry, alleging that it "contains a valuable mineral deposit consisting of a ledge or lode of limestone" which "renders said tract much more valuable for minerals than for agricultural or any other purpose;" that this was well known to claimant, and that his final proof testimony as to its non-mineral character "was and is untrue."

On March 30 following the claimant asked for sixty days in which to comply with the order of March 5, which was granted. On the same day—March 30—there was filed in the local office this statement by Isaksen—

I, Elias Isaksen being first duly sworn state that I am the same person who made homestead application No. 6800 on S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and lots 4 and 5, section 20, T. 10 north, range 10 west, Wil. Mer., and offered proof thereon the 2d day of February 1891; that the indications of lime referred to in said proof in my own affidavit crops out on lot 5 near the northern boundary and indications of the same are found in the immediate vicinity of said outcropping; that I was not at the time of giving said testimony and am not now informed of the full extent of said indications or crop-

pings of limestone; but am now informed that said limestone cropping is a mineral deposit of value and have become convinced of that fact since making said proof; that it is no part of my purpose to include in my homestead claim any mineral land or lands not properly and legally subject to such homestead entry, and that said proof was not intended to secure any mineral lands; that I hereby expressly consent to the exclusion of said ledge or mineral deposit from my said homestead entry, and ask that my homestead final receipt be issued so as to exclude such portions of lot No. 5 and 4 as includes said mineral deposit or any mineral claim located thereon.

On May 11, 1891, W. C. Kellum made application to purchase lot 5, under the timber and stone act.

On May 11, 1891, Samuel L. Tee filed a notice of the location of the "Little Bob" placer mining claim on May 6, preceding. This is described by metes and bounds, and is said to contain twenty acres in lot 5. On the same day Levi F. Hodge filed a similar notice of the location of the "Belle" placer, purporting to have been located on May 6, and to contain twenty acres in lot 5 also.

On October 27, 1891, Isaksen filed an affidavit sworn to July 11, preceding, in which he alleges that he cannot understand the English language well enough to talk it intelligently; that he is informed that a paper filed by him is a relinquishment of a part of his homestead entry; that he did not understand the object and effect of it when he signed it, and signed it under the advice of

counsel whom I understood to tell me that if I would sign said paper my entry on said land on which I had submitted final proof would be perfected thereby, and that existing obstacles to the allowance of said proof would be thereby removed;

that he never intended to relinquish his entry or any part thereof, and would not have signed the paper had he known it to be a relinquishment. He requests that he may be allowed to withdraw it.

On November 5, 1891, Hodge filed an affidavit of contest against lot 5 of Isaksen's homestead entry, alleging that the ground is "wholly unfit for cultivation and is solely valuable for the deposit of limestone thereon."

On the same day W. C. Kellum filed affidavit of contest against Isaksen's homestead entry of lot 5, alleging that it was "not subject to entry under the homestead laws, and was taken and was held for speculative purposes, and not for agricultural purposes."

For some reason unexplained by the record notice of contest was not issued until February 12, 1892, when it was issued on the Long contest. (The testimony shows that Long transferred his interest in the mining claim to Horatio J. Duffy, August 20, 1891, who does not appear anywhere in the case, except as a witness for contestant.) This notice was served on Isaksen, Kellum, Tee and Hodge, the testimony to be taken before a United States Commissioner at Astoria. Long and Isaksen appeared, but the others made default.

As a result of the hearing the local office recommended that the homestead entry of Isaksen should be canceled as to the land in lot 5 included in Long's mineral location. Isaksen, Hodge and Kellum

appealed, and your office, by letter of January 26, 1894, affirmed the action below, whereupon Isaksen prosecutes this appeal, assigning several grounds of error, among others, alleging that it was error to hold a ledge of limestone to be mineral within the meaning of the statute, and that the claimant executed and delivered the so-called relinquishment advisedly.

First, in regard to this so-called relinquishment: It is very questionable in my mind whether, under any circumstances, this instrument could be construed as a relinquishment. It will be observed that it does not contain words of grant; it does not in terms relinquish to the government any thing; he does not surrender to the United States any definite tract of land, but by the statement leaves it to be determined in the future whether there is any mineral that would reserve the land from homestead entry. He does not state that it does exist, but says he is "now informed that said limestone cropping is a mineral deposit of value;" that he has become convinced of that fact; that it was not his intention to include in his homestead claim "mineral land or lands not properly and legally subject to such homestead entry;" and by this statement consents "to the exclusion of said ledge or mineral deposit from my said homestead entry," and that it may be excluded from his final receipt.

It is apparent that the local office did not consider this such a relinquishment as authorized it to cancel any part of the entry. At least, they did not do so, and in refusing or neglecting to do so, as the case may be, I think they were fully justified.

But aside from this, I think the evidence clearly shows that it was not Isaksen's intention to relinquish any part of his land. It is shown that he is a native of Norway, and that he does not understand the English language sufficiently to transact business, and that one Olsen, who is called "Judge" Olsen, because of his having been probate judge of the county, was his friend, counselor, and interpreter. It was through the efforts of Olsen, with the assistance of Long, that this paper was secured. Long's contest had been filed on March 17, previous to the execution of this paper. It appears that Isaksen was anxious to get his final receipt, and he was informed by Olsen that if he would sign this paper Olsen and Long would at once procure the same. There can be no doubt as to Long's interest and anxiety in the matter. On the same day this instrument was signed, he located a lode claim on the land, "to be known as Bear River Lime and Cement Claim." It is also shown that he—Long—paid the expenses of the execution of this paper. Olsen swears that he interpreted the paper to Isaksen, and both Olsen and Long swear that they were present when the district clerk who took the acknowledgement asked Isaksen if he understood it, and he answered that he did. No one swears but Olsen that Isaksen understood this to be a relinquishment. Isaksen claims that he did not so understand it, and I think the circumstances

connected with the matter corroborate his statement. He swears that he did not know of any claim of relinquishment on his part until he saw a letter from an attorney in Vancouver, dated April 15, 1891, addressed to Olsen, evidently in reply to one Olsen had sent him, in which this attorney said the local officers could not cancel any part of Isaksen's entry, because no legal subdivision was specified, and until the mining claim was segregated by an official survey the matter would rest in *statu quo*. Isaksen swears that this was the first knowledge he had of relinquishment, and for the first time in their intercourse he mistrusted Olsen. He therefore immediately consulted another attorney, and the result was the filing of his disclaimer of any intention to relinquish.

I cannot escape the conclusion that Isaksen was acting in good faith in this matter, and that it was not his intention to surrender any part of his entry. The entire transaction on the part of Long and Olsen is so persuasive of an intent to advance their own interests at the sacrifice of Isaksen's, that one is justified in looking with suspicion upon their demeanor. The conduct of Olsen, who was the confidential friend and paid attorney of Isaksen in going upon the witness stand in behalf of Long and volunteering testimony of other transactions aside from this that was intended to cast discredit on his client, and which were not in issue, is not calculated to impress one with his entire disinterestedness.

For these reasons I cannot concur in the decisions below holding this instrument to be a relinquishment, or the conclusion that Isaksen intended to make a relinquishment. (*Vide Ficker v. Murphy*, 2 L. D., 135.)

Your office also decided in the case at bar (1) that the land in controversy is more valuable for the deposit of limestone than for agricultural purposes, and (2) that lime is a mineral within the purview of the statute, and on the latter proposition cite as authorities a letter by Commissioner Burdett, dated January 28, 1875 (2 C. L., O., 55), and *W. H. Hooper* (1 L. D., 560).

The letter of Commissioner Burdett, referred to, is addressed to H. C. Rolfe, and is in full as follows—

In reply to your letter of the 13th ult, I have to state that lands which are more valuable on account of deposits of limestone or marble than they are for purposes of agriculture may be patented under the mining acts of Congress.

If this expression of opinion could be dignified as the legal opinion of your predecessor upon the law involved in this proposition, it would not be binding on the Department. But this is evidently a letter in reply to an inquiry, the full nature of which we are not advised, and should not, in my judgment, be accepted as an authority, even by your office, warranting the location of limestone as a lode claim.

In the *Hooper* case the sole question was as to whether gypsum could be taken under the placer mining laws.

From my view of the matter neither of these authorities support the proposition decided by your office, nor do I find any decision of the Department wherein it is expressly held that a lode location may be made on a bed or ledge of limestone, but in every instance where it has been allowed it was under the placer law. On the contrary it was expressly held in *Shepherd v. Bird et al.* (17 L. D., 82), that a tract containing limestone "was not subject to location and entry as a lode claim."

I do not believe that a bed of limestone can be construed as a "vein or lode," or "vein, lode, or ledge," as those terms are used in sections 2320 and 2322, Revised Statutes. These terms are synonymous, and are used by Congress only in connection with such metals as are named when found in "rock in place."

In mining, ledge is a common name in the Cordilleran region for the lode, and for any outcrop supposed to be that of a mineral deposit or vein. (Century Dictionary.)

Where limestone, or any of the other substances mentioned in *Maxwell v. Brierly* (10 C. L. O., 50), and in the circular of January 30, 1883 (9 Id., 210), are permitted to be located and entered as a placer it must appear affirmatively that the land is more valuable for limestone than for agricultural purposes, or, as said in the circular above referred to, the applicant must "show that the lands are not valuable for any other purpose than the one for which application is made."

So far as shown by the testimony, there has never been a pound of the rock used for commercial purposes. The testimony as to its value is purely speculative; that is, the witnesses fix a value on the land on the hypothesis that the outcropping ledge is continuous and that the rock may be successfully used for cement or lime. The tests made of the rock to ascertain its properties are crude in the extreme, simply by pouring acid over it, and burning pieces of the rock in an open fire. The expert geologist or mineralogist says, when asked the proportion of the constituents,—“I only know that approximately, as I made no analysis. I only made home tests.”

In view of what has been done by the mineral claimant to test the rock and to develop his claim, it seems a little short of absurdity to assert, as do some of his witnesses, that the property is worth from seven thousand to ten thousand dollars, or, as said by one witness, "fifteen thousand dollars or more," for mining purposes. The value of the tract for agricultural purposes is estimated by contestant's witnesses, varying in amount from ten to forty dollars per acre for what they call the "tide lands."

The testimony for the defendant shows that all the lands included in the homestead entry are valuable for agricultural purposes. One of the witnesses held lots 4 and 5 where it is claimed mineral exists, for quite a number of years, under the pre-emption and homestead laws, and sold his improvements to Isaksen for \$150. His witnesses are men living in the neighborhood, who have an opportunity to judge of the

value of the lands, and they put the value of these lots for agricultural purposes at \$5,000. There is also testimony tending to show that this ledge of limestone has been practically tested, and that it is valueless; also that it has been worked in the past and abandoned, because unprofitable. The defendant has lived on the land, and probably has done as much improvement as his circumstances would permit. In fact, his good faith is in no wise impeached by any creditable evidence.

In my judgment the evidence signally fails to prove the land more valuable for mineral than for agricultural purposes.

Your office judgment is therefore reversed, and the local officers are directed to approve Isaksen's final proof.

JOEL FAY.

Motion for review of departmental decision of March 19, 1895, 20 L. D., 247, denied by Secretary Francis, October 3, 1896.

FINAL PROOF-PROTEST-HEARING-DECISION.

SPAULDING *v.* DAVIS.

In the disposition of a case arising on a protest against final proof, where a hearing is ordered to determine priority of right, and evidence duly submitted, the respective rights of the parties as well as the regularity of the proof should be considered.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 3, 1896. (J. A.)

The land involved herein is the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Section 15, T. 5 N., R. 21 W., Missoula, Montana, land district.

March 3, 1893, Robert Davis filed declaratory statement for said tract under the Act of June 5, 1872 (17 Stat., 226), providing for the sale of lands in the Bitter Root valley, Montana, to actual settlers. On May 7, 1894, Henry H. Spaulding filed a declaratory statement for the tract under the same act.

January 2, 1894, Davis gave notice of intention to make final proof on February 15, 1894, but for some reason not appearing from the record he failed to make proof. March 14, 1894, he gave notice of intention to make final proof on April 26, 1894. He appeared at the time set for taking final proof, but finding that Spaulding had appeared as protestant, failed to submit his proof. May 5, 1894, he again gave notice of his intention to make final proof. Notice for publication issued on the same date, directing final proof to be taken before a United States circuit court commissioner at Hamilton, Montana, on June 29, 1894, and specially citing Spaulding to appear and cross-examine Davis and his witnesses and to offer proof in answer. Instead of offering his proof

in accordance with the requirement of the circular of December 15, 1885 (4 L. D., 297), between the hours of 8:00 A. M. and 6:00 P. M. on June 29th, Davis offered his proof very early in the morning, according to the commissioner's affidavit on file in the case, between the hours of six and seven o'clock. The proof was carried away from the commissioner's office before seven o'clock and transmitted to the local officers, by whom it was received on the following day. Spaulding was thus deprived of the opportunity of cross-examining Davis and his witnesses.

July 2, 1894, Spaulding filed a protest against the acceptance of Davis' final proof, whereupon the local officers on July 11th ordered a hearing for August 31, 1894, to determine the question of prior right. In the notice of hearing they directed that testimony be taken on August 24, 1894, before a United States Circuit Court Commissioner at Hamilton, Montana. Both parties submitted testimony on the date appointed, and on October 4, 1894, the local officers rendered decision finding that Davis is the prior settler and recommending that his final proof be accepted and that the protest of Spaulding be dismissed. On Spaulding's appeal your office rendered decision June 7, 1894, finding that "almost every circumstance concerning Davis' relation to this land tends strongly to impeach the good faith of his claim," but holding that it is not necessary for the purpose of the decision to look beyond the facts concerning the submission of his final proof. As said proof was irregularly submitted, the decision of the local officers was reversed and the proof rejected.

Davis has appealed from said decision to the Department, contending that your office erred in not finding that he is the prior *bona fide* settler, and in not allowing him to submit new proof.

At the hearing which was had at Spaulding's request made after the irregular submission of Davis' final proof, the case was fully and fairly tried upon the merits. Your office therefore erred in not deciding the question of prior right. (Platt *et al. v. Graham*, 7 L. D., 229; Langford *v. Butler*, 20 L. D., 76.)

In the case of Langford *v. Butler* (*supra*), which is cited in the decision of your office in support of the holding that Davis' final proof must be rejected, and also apparently in support of the holding that it is not necessary for the purpose of said decision to look beyond the facts concerning the submission of Davis' final proof, the facts are as follows:

August 17, 1891, Langford made homestead entry for a tract of land, and on the same day Butler filed a pre-emption declaratory statement for a tract including part of the land entered by Langford. October 9, 1891, Butler made final proof before a United States circuit court commissioner. Langford appeared to cross-examine Butler and his witnesses and protested against the acceptance of his proof. November 7, 1891, before the final proof had been passed upon by the local officers, he filed an affidavit of contest as to the tract in controversy, alleging prior settlement. Hearing was had December 22nd and 23, 1891.

March 31, 1893, your office rendered decision awarding the land in controversy to Butler and holding Langford's homestead entry for cancellation as to said tract. On Langford's appeal the Department first considered the facts in regard to the submission of Butler's final proof and held that the same must be rejected for the reason that it was irregularly submitted, and directed your office to strictly enforce the circular regulation in regard to the submission of final proof. The contest between the parties was then considered and Langford was awarded the right to the land in dispute, being part of the land claimed by Butler, and it was further held that Butler's pre-emption declaratory statement must be canceled, for the reason that he had not established his residence upon the land.

That decision did not warrant the holding in the decision appealed from, that it is not necessary to consider the facts beyond the submission of Davis' final proof. The precedent established in *Platt et al. v. Graham*, cited *supra*, and followed in *Langford v. Butler*, of considering a case on the merits when a hearing was had after the irregular submission of final proof, should have been followed by your office in the case at bar. A decision on the merits would not have been incompatible with an observance of the directions given in *Langford v. Butler* to strictly enforce the regulation in regard to the submission of final proof.

Davis did not establish his residence on the land until January 22, 1894, after his first notice of intention to make final proof. He resided on the land continuously until July 6, 1894, one week after the submission of his final proof, with the exception of about five weeks in March and April. The cost of erecting his improvements on the land was about seventy dollars, although his estimate of their value is much higher.

Spaulding went on the land on January 8, 1894, and on that day laid the foundation for a log house. He did not complete the house, but returned to the land on January 19, and built a lumber house twelve by fourteen feet, in which he established his residence. He continuously resided in his house until shortly before the hearing, when he went away to work at "harvesting." His improvements are worth about as much as those of Davis.

The actions of Davis indicate that he is not a *bona fide* settler. His final proof must therefore be rejected and his declaratory statement canceled. The decision appealed from is accordingly modified.

WELCH v. PETRE ET AL.

Motion for review of departmental decision of June 9, 1896, 22 L. D., 651, denied by Secretary Francis, October 3, 1896.

RESTORATION OF LOST OR OBLITERATED CORNERS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., October 16, 1896.

The increasing number of letters from county and local surveyors received at this office making inquiry as to the proper method of restoring to their original position lost or obliterated corners marking the survey of the public lands of the United States, or such as have been willfully or accidentally moved from their original position, have rendered the preparation of the following general rules necessary, particularly as in a very large number of cases the immediate facts necessary to a thorough and intelligent understanding are omitted. Moreover, surveys having been made under the authority of different acts of Congress, different results have been obtained, and no special law has been enacted by that authority covering and regulating the subject of the above-named inquiries. Hence, the general rule here given must be considered merely as an expression of the opinion of this office on the subject, based, however, upon the spirit of the several acts of Congress authorizing the surveys, as construed by this office, and by United States court decisions. When cases arise which are not covered by these rules, and the advice of this office is desired, the letter of inquiry should always contain a description of the particular corner, with reference to the township, range, and section of the public surveys, to enable this office to consult the record.

An *obliterated* corner is one where no visible evidence remains of the work of the original surveyor in establishing it. Its location may, however, have been preserved beyond all question by acts of landowners, and by the memory of those who knew and recollect the true situs of the original monument. In such cases it is not a lost corner.

A *lost* corner is one whose position can not be determined, beyond reasonable doubt, either from original marks or reliable external evidence.

Surveyors sometimes err in their decision whether a corner is to be treated as *lost* or only *obliterated*.

Surveyors who have been United States deputies should bear in mind that in their private capacity they must act under somewhat different rules of law from those governing original surveys, and should carefully distinguish between the provisions of the statute which guide a Government deputy and those which apply to retracement of lines once surveyed. The failure to observe this distinction has been prolific of erroneous work and injustice to landowners.

To restore extinct boundaries of the public lands correctly, the surveyor must have some knowledge of the manner in which townships were subdivided by the several methods authorized by Congress. Without this knowledge he may be greatly embarrassed in the field,

and is liable to make mistakes invalidating his work, and leading eventually to serious litigation. It is believed that the following synopsis of the several acts of Congress regulating the surveys of the public lands will be of service to county surveyors and others, and will help to explain many of the difficulties encountered by them in the settlement of such questions.

Compliance with the provisions of Congressional legislation at different periods has resulted in *two* sets of corners being established on *township lines* at one time; at other times *three* sets of corners have been established on *range lines*; while the system now in operation makes but *one* set of corners on *township boundaries*, except on standard lines—i. e., base and correction lines, and in some exceptional cases.

The following brief explanation of the modes which have been practiced will be of service to all who may be called upon to restore obliterated boundaries of the public land surveys:

Where two sets of corners were established on township boundaries, one set was planted at the time the exteriors were run, those on the north boundary belonging to the sections and quarter sections north of said line, and those on the west boundary belonging to the sections and quarter sections west of that line. The other set of corners was established when the township was subdivided. This method, as stated, resulted in the establishment of two sets of corners on all four sides of the townships.

Where three sets of corners were established on the range lines, the subdivisional surveys were made in the above manner, except that the east and west section lines, instead of being closed upon the corners previously established on the east boundary of the township, were run due east from the last interior section corner, and new corners were erected at the points of intersection with the range line.

The method now in practice requires section lines to be initiated from the corners on the south boundary of the township, and to close on existing corners on the east, north, and west boundaries of the township, except when the north boundary is a base line or standard parallel.

But in some cases, for special reasons, an opposite course of procedure has been followed, and subdivisional work has been begun on the north boundary and has been extended southward and eastward or southward and westward.

In the more recent general instructions, greater care has been exercised to secure rectangular subdivisions by fixing a strict limitation that no new township exteriors or section lines shall depart from a true meridian or east and west line more than twenty-one minutes of arc; and that where a random line is found liable to correction beyond this limit, a true line on a cardinal course must be run, setting a closing corner on the line to which it closes.

This produces, in new surveys closing to irregular old work, a great number of exteriors marked by a double set of corners. All retracing

surveyors should proceed under these new conditions with full knowledge of the field notes and exceptional methods of subdivision.

SYNOPSIS OF ACTS OF CONGRESS.

The first enactment in regard to the surveying of the public lands was an ordinance passed by the Congress of the Confederation May 20, 1785, prescribing the mode for the survey of the "Western Territory," and which provided that said territory should be divided into "townships of six miles square, by lines running due north and south, and others crossing them at right angles" as near as might be.

Ordinance of the Congress of the Confederation of May 20, 1785, U. S. Land Laws, p. 349. Edition 1828.

It further provided that the first line running north and south should begin on the Ohio River, at a point due north from the western terminus of a line run as the south boundary of the State of Pennsylvania, and the first line running east and west should begin at the same point and extend through the whole territory. In these initial surveys only the exterior lines of the townships were surveyed, but the plats were marked by subdivisions into sections 1 mile square, numbered from 1 to 36, commencing with No. 1 in the southeast corner of the township, and running from south to north in each tier to No. 36 in the northwest corner of the township; mile corners were established on the township lines. The region embraced by the surveys under this law forms a part of the present State of Ohio, and is generally known as "the Seven Ranges."

The Federal Congress passed a law, approved May 18, 1796, in regard to surveying the public domain, which applied to "the territory northwest of the River Ohio, and above the mouth of the Kentucky River."

Act of May 18, 1796. U. S. Statutes at Large, vol. 1, p. 465. Section 2395, U. S. Revised Statutes.

Section 2 of said act provided for dividing such lands as had not been already surveyed or disposed of "by north and south lines run according to the true meridian, and by others crossing them at right angles, so as to form townships of 6 miles square," etc. It also provided that "one-half of said townships, taking them alternately, should be subdivided into sections containing, as nearly as may be, 640 acres each, by running through the same each way parallel lines at the end of every two miles; and by marking a corner on each of said lines at the end of every mile." The act also provided that "the sections shall be numbered, respectively, beginning with the number one in the northeast section, and proceeding west and east alternately through the township, with progressive numbers till the thirty-sixth be completed." This method of numbering sections is still in use.

An act amendatory of the foregoing, approved May 10, 1800, required the "townships west of the Muskingum, which are directed to be sold in quarter townships, to be subdivided into half sections of 320 acres each, as nearly as may be, by running parallel lines through the same from east to west, and from south to north, at the distance of one mile from each other, and marking

Act of May 10, 1800, U. S. Statutes at Large, vol. 2, p. 73. Section 2395, U. S. Revised Statutes.

corners, at the distance of each half mile on the lines running from east to west, and at the distance of each mile on those running from south to north. And the interior lines of townships intersected by the Muskingum, and of all townships lying east of that river, which have not been heretofore actually subdivided into sections, shall also be run and marked * * *. And in all cases where the exterior lines of the townships thus to be subdivided into sections or half sections, shall exceed or shall not extend six miles, the excess or deficiency shall be specially noted, and added to or deducted from the western or northern ranges of sections or half sections in such townships, according as the error may be in running the lines from east to west or from south to north." Said act also provided that the northern and western tiers of sections should be sold as containing only the quantity expressed on the plats, and all others as containing the complete legal quantity.

The act approved June 1, 1796, "regulating the grants of land appropriated for military services," etc., provided for dividing the "United States Military Tract," in the State of Ohio, into townships 5 miles square, each to be subdivided into quarter townships containing 4,000 acres.

Act of June 1, 1796.
U. S. Statutes at Large
vol. 1, p. 490.

Section 6 of the act approved March 1, 1800, amendatory of the foregoing act, enacted that the Secretary of the Treasury was authorized to subdivide the quarter townships into lots of 100 acres, bounded as nearly as practicable by parallel lines 160 perches in length by 100 perches in width. These subdivisions into lots, however, were made upon the plats in the office of the Secretary of the Treasury, and the actual survey was only made at a subsequent time when a sufficient number of such lots had been located to warrant the survey. It thus happened, in some instances, that when the survey came to be made the plat and survey could not be made to agree, and that fractional lots on plats were entirely crowded out. A knowledge of this fact may explain some of the difficulties met with in the district thus subdivided.

Act of March 1, 1800.
U. S. Statutes at Large,
vol. 2, p. 14.

The act of Congress approved February 11, 1805, directs the subdivision of the public lands into quarter sections, and provides that all corners marked in the field shall be established as the proper corners of the sections or quarter sections which they were intended to designate, and that corners of half and quarter sections not marked shall be placed as nearly as possible "equidistant from those two corners which stand on the same line." This act further provides that "the boundary lines actually run and marked" (in the field) "shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended, and the length of such lines as returned by either of the surveyors aforesaid shall be held and considered as the true length thereof. And the boundary lines which shall not have been actually run and marked as aforesaid shall be ascertained by running straight lines from the established

Act of February 11,
1805. U. S. Statutes at
Large, vol. 2, p. 318.
Section 2296, U. S. Re-
vised Statutes.

corners to the opposite corresponding corners, but in those portions of the fractional townships where no such opposite or corresponding corners have been or can be fixed, the said boundary lines shall be ascertained by running from the established corners due north and south, or east and west lines, as the case may be, to the water course, Indian boundary line, or other external boundary of such fractional township."

The act of Congress approved April 24, 1820, provides for the sale of public lands in half-quarter sections, and requires that

"in every case of the division of a quarter section the line for the division thereof shall run north and south," "and fractional sections, containing 160 acres and upwards, shall in like manner, as nearly as practicable, be subdivided into half quarter sections, under such rules and regulations as may be prescribed by the Secretary of the Treasury; but fractional sections containing less than 160 acres shall not be divided."

Act of April 24, 1820.
U. S. Statutes at Large,
vol. 3, p. 568. Section
2397, U. S. Revised
Statutes.

The act of Congress approved May 24, 1824, provides "that whenever, in the opinion of the President of the United States, a departure from the ordinary mode of surveying land on any river, lake, bayou, or water course would promote the public interest, he may direct the surveyor-general in whose district such land is situated, and where the change is intended to be made, under such rules and regulations as the President may prescribe, to cause the lands thus situated to be surveyed in tracts of two acres in width, fronting on any river, bayou, lake, or water course, and running back the depth of forty acres."

Act of May 24, 1824.
U. S. Statutes at Large,
vol. 4, p. 34.

The act of Congress approved April 5, 1832, directed the subdivision of the public lands into quarter-quarter sections; that in every case of the division of a half-quarter section the dividing line should run east and west, and that fractional sections should be subdivided, under rules and regulations prescribed by the Secretary of the Treasury. Under the latter provision the Secretary directed that fractional sections containing less than 160 acres, or the residuary portion of a fractional section, after the subdivision into as many quarter-quarter sections as it is susceptible of, may be subdivided into lots, each containing the quantity of a quarter-quarter section as nearly as practicable, by so laying down the line of subdivision that they shall be 20 chains wide, which distances are to be marked on the plat of subdivision, as are also the areas of the quarter quarters and residuary fractions.

Act of April 5, 1832.
U. S. Statutes at Large,
vol. 4, p. 503. Section
2397, U. S. Revised
Statutes.

These two acts last mentioned provided that the corners and contents of half-quarter and quarter-quarter sections should be ascertained as nearly as possible in the manner and on the principles prescribed in the act of Congress approved February 11, 1805.

GENERAL RULES.

From the foregoing synopsis of Congressional legislation it is evident—
1st. That the boundaries of the public lands established and returned

by the duly appointed Government surveyors, when approved by the surveyors general and accepted by the Government, *are unchangeable*.

2d. That the original township, section, and quarter-section corners established by the Government surveyors must stand as the true corners which they were intended to represent, whether the corners be in place or not.

3d. That quarter-quarter corners not established by the Government surveyors shall be placed on the straight lines joining the section and quarter-section corners and midway between them, except on the last half mile of section lines closing on the north and west boundaries of the township, or on other lines between fractional sections.

4th. That all subdivisional lines of a section running between corners established in the original survey of a township must be straight lines, running from the proper corner in one section line to its opposite corresponding corner in the opposite section line.

5th. That in a fractional section where no opposite corresponding corner has been or can be established, any required subdivision line of such section must be run from the proper original corner in the boundary line due east and west, or north and south, as the case may be, to the water course, Indian reservation, or other boundary of such section, with due parallelism to section lines.

From the foregoing it will be plain that extinct corners of the Government surveys must be restored to their original locations, whenever it is possible to do so; and hence resort should always be first had to the marks of the survey in the field. The locus of the missing corner should be first identified on the ground by the aid of the mound, pits, line trees, bearing trees, etc., described in the field notes of the original survey.

The identification of mounds, pits, witness trees, or other permanent objects noted in the field notes of survey, affords the best means of relocating the missing corner in its original position. If this can not be done, clear and convincing testimony of citizens as to the locality it originally occupied should be taken, if such can be obtained. In any event, whether the locus of the corner be fixed by the one means or the other, such locus should always be tested and confirmed by measurements to *known* corners. No definite rule can be laid down as to what shall be sufficient evidence in such cases, and much must be left to the skill, fidelity, and good judgment of the surveyor in the performance of his work.

EXCEPTIONAL CASES.

When new measurements are made on a single line to determine the position thereon for a restored lost corner (for example, a quarter-section corner on line between two original section corners), or when new measurements are made between original corners on two lines for the purpose of fixing by their intersection the position of a restored missing corner (for example, a corner common to four sections or four townships),

it will almost invariably happen that discrepancies will be developed between the new measurements and the original measurements in the field notes. When these differences occur the surveyor will in all cases establish the missing corner by proportionate measurements on lines conforming to the original field notes and by the method followed in the original survey. From this rule there can be no departure, since it is the basis upon which the whole operation depends for accuracy and truth.

In cases where the relocated corner can not be made to harmonize with the field notes in all directions, and unexplained error in the first survey is apparent, it sometimes becomes the task of the surveyor to place it according to the requirements of one line and against the calls of another line. For instance, if the line between sections 30 and 31, reported 78 chains long, would draw the missing corner on range line 1 chain eastward out of range with the other exterior corners, the presumption would be strong that the range line had been run straight and the length of the section line wrongly reported, because experience shows that west random lines are regarded as less important than range lines and more liable to error.

Again, where a corner on a standard parallel has been obliterated, it is proper to assume that it was placed in line with other corners, and if an anomalous length of line reported between sections 3 and 4 would throw the closing corner into the northern township, a surveyor would properly assume that the older survey of the standard line is to control the length of the later and minor line. The marks or corners found on such a line closing to a standard parallel fix its *location*, but its *length* should be limited by its actual intersection, at which point the lost closing corner may be placed.

The strict rule of the law that "all corners marked in the field shall be established as the corners which they were intended to designate," and the further rule that "the length of lines returned by the surveyors shall be held and considered as the true length thereof," are found in some cases to be impossible of fulfillment in all directions at once, and a surveyor is obliged to choose, in his own discretion, which of two or more lines must yield, in order to permit the rules to be applied at all.

In a case of an erroneous but existing closing corner, which was set some distance out of the true State boundary of Missouri and Kansas, it was held by this office that a surveyor subdividing the fractional section should preserve the boundary as a straight line, and should not regard said closing corner as the proper corner of the adjacent fractional lots. The said corner was considered as fixing the position of the line between two fractional sections, but that its length extended to a new corner to be set on the true boundary line. The surveyor should therefore preserve such an original corner as evidence of the line; but its erroneous position can not be allowed to cause a crook between mile corners of the original State boundary.

It is only in cases where it is manifestly impossible to carry out the literal terms of the law, that a surveyor can be justified in making such a decision.

The principle of the preponderance of one line over another of less importance has been recognized in the rule for restoring a section corner common to two townships in former editions of this circular. The new corner should be placed *on* the township line; and measurements to check its position by distances to corners within the townships are useful to confirm it if found to agree well, but should not cause it to be placed off the line if found not to agree, if the general condition of the boundary supports the presumption that it was properly alined.

TO RESTORE LOST OR OBLITERATED CORNERS.

1. *To restore corners on base lines and standard parallels.*—Lost or obliterated standard corners will be restored to their original positions on a base line, standard parallel, or correction line, by proportionate measurements on the line, conforming as nearly as practicable to the original field notes and joining the nearest identified original standard corners on opposite sides of the missing corner or corners, as the case may be.

(a) The term "standard corners" will be understood to designate standard township, section, quarter-section, and meander corners; and, in addition, closing corners, as follows: Closing corners used in the original survey to determine the position of a standard parallel, or established during the survey of the same, will, with the standard corners, govern the alinement and measurements made to restore lost or obliterated standard corners; but no other closing corners will control in any manner the restoration of standard corners on a base line or standard parallel.

(b) A lost or obliterated closing corner from which a standard parallel has been initiated or to which it has been directed will be reestablished in its original place by proportionate measurement from the corners used in the original survey to determine its position. Measurements from corners on the opposite side of the parallel will not control in any manner the relocation of said corner.

(c) A missing closing corner originally established during the survey of a standard parallel as a corner from which to project surveys *south* will be restored to its original position by considering it a standard corner and treating it accordingly.

(d) Therefore, paying attention to the preceding explanations, we have for the restoration of one or several corners on a standard parallel, and for general application to all other surveyed lines, the following proportion:

As the original field-note distance between the selected known corners is to the new measure of said distance, so is the original field-note length of any part of the line to the required new measure thereof.

The sum of the computed lengths of the several parts of a line must be equal to the new measure of the whole distance.

(e) As has been observed, existing original corners can not be disturbed; consequently, discrepancies between the new and the original field-note measurements of the line joining the selected original corners will not in any manner affect measurements beyond said corners, but the differences will be distributed proportionately to the several intervals embraced in the line in question.

(f) After having checked each new location by measurement to the nearest known corners, new corners will be established permanently and new bearings and measurements taken to prominent objects, which should be of as permanent a character as possible, and the same recorded for future reference.

2. *Restoration of township corners common to four townships.*—Two cases should be clearly recognized: 1st. Where the position of the original township corner has been made to depend upon measurements on two lines at right angles to each other. 2d. Where the original corner has been located by measurements on one line only; for example, on a guide meridian.

(a) For restoration of a township corner originally subject to the first condition: A line will first be run connecting the nearest identified original corners on the meridional township lines, north and south of the missing corner, and a temporary corner will be placed at the proper proportionate distance. This will determine the corner in a north and south direction only.

Next, the nearest original corners on the latitudinal township lines will be connected and a point thereon will be determined in a similar manner, independent of the temporary corner on the meridional line. Then through the first temporary corner run a line east (or west) and through the second temporary corner a line north (or south), as relative situations may suggest. The intersection of the two lines last run will define the position of the restored township corner, which may be permanently established.

(b) The restoration of a lost or obliterated township corner established under the second conditions, i. e., by measurements, on a single line, will be effected by proportionate measurements on said line, between the nearest identified original corners on opposite sides of the missing township corner, as before described.

3. *Reestablishment of corners common to two townships.*—The two nearest known corners on the township line, the same not being a base or a correction line, will be connected as in case No. 1, by a right line, and the missing corner established by proportionate distance as directed in that case; the location thus found will be checked upon by measurements to nearest known section or quarter-section corners north and south, or east and west, of the township line, as the case may be.

4. *Reestablishment of closing corners.*—Measure from the quarter-section, section, or township corner east or west, as the case may be, to the

next preceding or succeeding corner in the order of original establishment, and reestablish the missing closing corner by proportionate measurement. The line upon which the closing corner was originally established should always be remeasured, in order to check upon the correctness of the new location. See pages 8, 12, and 13 for details.

5. *Reestablishment of interior section corners.*—This class of corners should be reestablished in the same manner as corners common to four townships. In such cases, when a number of corners are missing on all sides of the one sought to be reestablished, the entire distance must, of course, be remeasured between the nearest existing recognized corners both north and south, and east and west, in accordance with the rule laid down, and the new corner reestablished by proportionate measurement. The mere measurement in any one of the required directions will not suffice, since the direction of the several section lines running northward through a township, or running east and west, are only in the most exceptional cases true prolongations of the alinement of the section lines initiated on the south boundary of the township; while the east and west lines running through the township, and theoretically supposed to be at right angles with the former, are seldom in that condition, and the alinements of the closing lines on the east and west boundaries of the township, in connection with the interior section lines, are even less often in accord. Moreover, the alinement of the section line itself from corner to corner, in point of fact, also very frequently diverges from a right line, although presumed to be such from the record contained in the field notes and so designated on the plats, and becomes either a broken or a curved line. This fact will be determined, in a timbered country, by the blazes which may be found upon trees on either side of the line, and although such blazed line will not strictly govern as to the absolute direction assumed by such line, it will assist very materially in determining its approximate direction, and should never be neglected in retracements for the reestablishment of lost corners of any description. Sight trees described in the field notes, together with the recorded distances to same, when fully identified, will, it has been held, in one or more States, govern the line itself, even when not in a direct or straight line between established corners, which line is then necessarily a broken line by passing through said sight trees. Such trees, when in existence and properly identified beyond a question of doubt, will very materially assist in evidencing the correct relocation of a missing corner. It is greatly to be regretted that the earlier field notes of survey are so very meager in the notation of the topography found on the original line, which might in very many instances materially lessen a surveyor's labors in retracement of lines and reestablishment of the required missing corner. In the absence of such sight trees and other evidence regarding the line, as in an open country, or where such evidence has been destroyed by time, the elements, or the progress of improvement, the line connecting the known corners should be run straight from corner to corner.

6. *Reestablishment of quarter-section corners on township boundaries.*—Only one set of quarter-section corners are actually marked in the field on township lines, and they are established at the time when the township exteriors are run. When double section corners are found, the quarter-section corners are considered generally as standing midway between the corners of their respective sections, and when required to be established or reestablished, as the case may be, they should be generally so placed; but great care should be exercised not to mistake the corners belonging to one township for those of another. After determining the proper section corners marking the line upon which the missing quarter-section corner is to be reestablished, and measuring said line, the missing quarter-section corner will be reestablished in accordance with the requirements of the original field notes of survey, by proportionate measurement between the section corners marking the line.

Where there are double sets of section corners on township and range lines, and the quarter-section corners for sections south of the township or east of the range lines are required to be established in the field, the said quarter-section corners should be so placed as to suit the calculation of areas of the quarter sections adjoining the township boundaries as expressed upon the official township plat, adopting proportionate measurements when the present measurement of the north and west boundaries of the section differ from the original measurements.

7. *Reestablishment of quarter-section corners on closing section lines between fractional sections.*—This class of corners must be reestablished according to the original measurement of 40 chains from the last interior section corner. If the measurements do not agree with the original survey, the excess or deficiency must be divided proportionately between the two distances, as expressed in the field notes of original survey. The section corner started from and the corner closed upon should be connected by a right line, unless the retracement should develop the fact that the section line is either a broken or curved line, as is sometimes the case.

8. *Reestablishment of interior quarter-section corners.*—In some of the older surveys these corners are placed at variable distances, in which case the field notes of the original survey must be consulted, and the quarter-section corner reestablished at proportionate distances between the corresponding section corners, in accordance therewith. The later surveys being more uniform and in stricter accordance with law, the missing quarter-section corner must be reestablished equidistant between the section corners marking the line, according to the field notes of the original survey. The remarks made under section 5, in relation to section lines, apply with full force here also; the caution there given not to neglect sight trees is equally applicable, since the proper reestablishment of the quarter-section corner may in some instances very largely depend upon its observance, and avoid one of the many sources of litigation.

9. *Where double corners were originally established, one of which is standing, to reestablish the other.*—It being remembered that the corners established when the exterior township lines were run, belong to the sections in the townships north and west of those lines, the surveyor must first determine beyond a doubt to which sections the existing corner belongs. This may be done by testing the courses and distances to witness trees or other objects noted in the original field notes of survey, and by remeasuring distances to known corners. Having determined to which township the existing corner belongs, the missing corner may be reestablished in line north or south of the existing corner, as the case may be, at the distance stated in the field notes of the original survey, by proportionate measurement, and tested by retracement to the opposite corresponding corner of the section to which the missing section corner belongs. These double corners being generally not more than a few chains apart, the distance between them can be more accurately laid off, and it is considered preferable to first establish the missing corner as above, and check upon the corresponding interior corner, than to reverse the proceeding; since the result obtained is every way more accurate and satisfactory.

10. *Where double corners were originally established, and both are missing, to reestablish the one established when the township line was run.*—The surveyor will connect the nearest known corners on the township line by a right line, being careful to distinguish the section from the closing corners, and reestablish the missing corner at the point indicated by the field notes of the original survey by proportionate measurement. The corner thus restored will be common to two sections either north or west of the township boundary, and the section north or west, as the case may be, should be carefully retraced, thus checking upon the reestablished corner, and testing the accuracy of the result. It can not be too much impressed upon the surveyor that any measurements to objects on line noted in the original survey are means of determining and testing the correctness of the operation.

11. *Where double corners were originally established, and both are missing, to reestablish the one established when the township was subdivided.*—The corner to be reestablished being common to two sections south or east of the township line, the section line closing on the missing section corner should be first retraced to an intersection with the township line in the manner previously indicated, and a temporary corner established at the point of intersection. The township line will of course have been previously carefully retraced in accordance with the requirements of the original field notes of survey, and marked in such a manner as to be readily identified when reaching the same with the retraced section line. The location of the temporary corner planted at the point of intersection will then be carefully tested and verified by remeasurements to objects and known corners on the township line, as noted in the original field notes of survey, and the necessary corrections made in such relocation.

A permanent corner will then be erected at the corrected location on the township line, properly marked and witnessed, and recorded for future requirements.

12. *Where triple corners were originally established on range lines, one or two of which have become obliterated, to reestablish either of them.*—It will be borne in mind that only two corners were established as actual corners of sections, those established on the range line not corresponding with the subdivisional survey east or west of said range line. The surveyor will, therefore, first proceed to identify the existing corner or corners, as the case may be, and then reestablish the missing corner or corners in line north or south, according to the distances stated in the original field notes of survey in the manner indicated for the reestablishment of double corners, testing the accuracy of the result obtained, as hereinbefore directed in other cases. If, however, the distances between the triple corners are not stated in the original field notes of survey, as is frequently the case in the returns of older surveys, the range line should be first carefully retraced, and marked in a manner sufficiently clear to admit of easy identification upon reaching same during the subsequent proceedings. The section lines closing upon the missing corners must then be retraced in accordance with the original field notes of survey, in the manner previously indicated and directed, and the corners reestablished in the manner directed in the case of double corners. The surveyor can not be too careful, in the matter of retracement, in following closely all the recorded indications of the original line, and nothing, however slight, should be neglected to insure the correctness of the retracement of the original line; since there is no other check upon the accuracy of the reestablishment of the missing corners, unless the entire corresponding section lines are remeasured by proportional measurement and the result checked by a recalculation of the areas as originally returned, which, at best, is but a very poor check, because the areas expressed upon the margin of many plats of the older surveys are erroneously stated on the face of the plats, or have been carelessly calculated.

13. *Where triple corners were originally established on range lines, all of which are missing, to reestablish same.*—These corners should be reestablished in accordance with the foregoing directions, commencing with the corner originally established when the range line was run, establishing the same in accordance with previously given directions for restoring section and quarter-section corners; that is to say, by remeasuring between the nearest known corners on said township line, and reestablishing the same by proportionate measurement. The two remaining will then be reestablished in conformity with the general rules for reestablishment of double corners.

14. *Reestablishment of meander corners.*—Before proceeding with the reestablishment of missing meander corners, the surveyor should have carefully rechaind at least three of the section lines between known

corners of the township within which the lost corner is to be relocated, in order to establish the proportionate measurement to be used. This requirement of preliminary remeasurement of section lines must in no case be omitted; since it gives the only data upon which the fractional section line can be remeasured proportionately, the corner marking the terminus, or the meander corner, being missing, which it is intended to reestablish. The missing meander corner will be reestablished on the section or township line retraced in its original location, by the proportionate measurement found by the preceding operations, from the nearest known corner on such township or section line, in accordance with the requirements of the original field notes of survey.

Meander corners hold the peculiar position of denoting a point on line between landowners, without usually being the legal terminus or corner of the lands owned. Leading judicial decisions have affirmed that meander lines are not strictly boundaries, and do not limit the ownership to the exact areas placed on the tracts, but that said title extends to the water, which, by the plat, appears to bound the land.

As such water boundaries are, therefore, subject to change by the encroachment or recession of the stream or lake, the precise location of old meanders is seldom important, unless in States whose laws prescribe that dried lake beds are the property of the State.

Where the United States has disposed of the fractional lots adjacent to shores, it claims no marginal lands left by recession or found by reason of erroneous survey. The lines between landowners are therefore regarded as extended beyond the original meander line of the shore, but the preservation or relocation of the meander corner is important, as evidence of the *position* of the section line.

The different rules by which division lines should be run between private owners of riparian accretions are a matter of State legislation, and not subject to a general rule of this office.

15. *Fractional section lines.*—County and local surveyors being sometimes called upon to restore fractional section lines closing upon Indian, military, or other reservations, private grants, etc., such lines should be restored upon the same principles as directed in the foregoing pages, and checked whenever possible upon such corners or monuments as have been placed to mark such boundary lines.

In some instances corners have been moved from their original position, either by accident or design, and county surveyors are called upon to restore such corners to their original positions, but, owing to the absence of any and all means of identification of such location, are unable to make the result of their work acceptable to the owners of the lands affected by such corner. In such cases the advice of this office has invariably been to the effect that the relocation of such corner must be made in accordance with the orders of a court of competent jurisdiction, the United States having no longer any authority to order any changes where the lands affected by such corner have been disposed of.

RECORDS.

The original evidences of the public-land surveys in the following States have been transferred, under the provisions of sections 2218, 2219, and 2220, United States Revised Statutes, to the State authorities, to whom application should be made for such copies of the original plats and field notes as may be desired, viz:

Alabama: Secretary of State, Montgomery.

Arkansas: Commissioner of State Lands, Little Rock.

Illinois: Auditor of State, Springfield.

Indiana: Auditor of State, Indianapolis.

Iowa: Secretary of State, Des Moines.

Kansas: Auditor of State and Register of State Lands, Topeka.

Michigan: Commissioner of State Land Office, Lansing.

Mississippi: Commissioner of State Lands, Jackson.

Missouri: Secretary of State, Jefferson City.

Nebraska: Commissioner of Public Lands and Buildings, Lincoln.

Ohio: Auditor of State, Columbus.

Wisconsin: Commissioners of Public Lands, Madison.

In other public-land States the original field notes and plats are retained in the offices of the United States surveyors general.

SUBDIVISION OF SECTIONS.

This office being in receipt of many letters making inquiry in regard to the proper method of subdividing sections of the public lands, the following general rules have been prepared as a reply to such inquiries. The rules for subdivision are based upon the laws governing the survey of the public lands. When cases arise which are not covered by these rules, and the advice of this office in the matter is desired, the letter of inquiry should, in every instance, contain a description of the particular tract or corner, with reference to township, range, and section of the public surveys, to enable the office to consult the record; also a diagram showing conditions found:

1. *Subdivision of sections into quarter sections.*—Under the provisions of the act of Congress approved February 11, 1805, the course to be pursued in the subdivision of sections into quarter sections is to run straight lines from the established quarter-section corners, United States surveys, to the opposite corresponding corners. The point of intersection of the lines thus run will be the corner common to the several quarter sections, or, in other words, the legal center of the section.

(a) Upon the lines closing on the north and west boundaries of a township, the quarter-section corners are established by the United States deputy surveyors at 40 chains to the north or west of the last interior section corners, and the excess or deficiency in the measurement is thrown into the half mile next to the township or range line, as the case may be.

(b) Where there are double sets of section corners on township and range lines, the quarter corners for the sections south of the township lines and east of the range lines are not established in the field by the United States deputy surveyors, but in subdividing such sections said quarter corners should be so placed as to suit the calculations of the areas of the quarter sections adjoining the township boundaries as expressed upon the official plat, adopting proportionate measurements where the new measurements of the north or west boundaries of the section differ from the original measurements.

2. *Subdivision of fractional sections.*—Where opposite corresponding corners have not been or can not be fixed, the subdivision lines should be ascertained by running from the established corners due north, south, east, or west lines, as the case may be, to the water course, Indian boundary line, or other boundary of such fractional section.

(a) The law presumes the section lines surveyed and marked in the field by the United States deputy surveyors to be due north and south or east and west lines, but in actual experience this is not always the case. Hence, in order to carry out the spirit of the law, it will be necessary in running the subdivisional lines through fractional sections to adopt mean courses where the section lines are not due lines, or to run the subdivision line parallel to the east, south, west, or north boundary of the section, as conditions may require, where there is no opposite section line.

3. *Subdivision of quarter sections into quarter quarters.*—Preliminary to the subdivision of quarter sections, the quarter-quarter corners will be established at points midway between the section and quarter-section corners, and between quarter corners and the center of the section, except on the last half mile of the lines closing on the north or west boundaries of a township, where they should be placed at 20 chains, proportionate measurement, to the north or west of the quarter section corner.

(a) The quarter-quarter section corners having been established as directed above, the subdivision lines of the quarter section will be run straight between opposite corresponding quarter-quarter section corners on the quarter section boundaries. The intersection of the lines thus run will determine the place for the corner common to the four quarter-quarter sections.

4. *Subdivision of fractional quarter sections.*—The subdivision lines of fractional quarter sections will be run from properly established quarter-quarter section corners (paragraph 3) due north, south, east, or west, to the lake, water course, or reservation which renders such tracts fractional, or parallel to the east, south, west, or north boundary of the quarter section, as conditions may require. (See paragraph 2 (a).)

5. *Proportionate measurement.*—By “proportionate measurement,” as used in this circular, is meant a measurement having the same ratio to that recorded in the original field notes as the *length of chain* used in

the new measurement has to the *length of chain* used in the original survey, assuming that the original and new measurements have been correctly made.

For example: The length of the line from the quarter-section corner on the west side of sec. 2, T. 24 N., R. 14 E, Wisconsin, to the north line of the township, by the United States deputy surveyor's chain, was reported as 45.40 chains, and by the county surveyor's measure is reported as 42.90 chains; then the distance which the quarter-quarter section corner should be located north of the quarter-section corner would be determined as follows:

As 45.40 chains, the Government measure of the whole distance, is to 42.90 chains, the county surveyor's measure of the same distance, so is 20.00 chains, original measurement, to 18.90 chains by the county surveyor's measure, showing that by proportionate measurement in this case the quarter-quarter section corner should be set at 18.90 chains north of the quarter-section corner, instead of 20.00 chains north of such corner, as represented on the official plat. In this manner the discrepancies between original and new measurements are equitably distributed.

S. W. LAMOREUX,
Commissioner.

DEPARTMENT OF THE INTERIOR,
October 16, 1896.

Approved:
DAVID R. FRANCIS,
Secretary.

PRACTICE—REVIEW—SECOND CONTEST—EVIDENCE.

STATE OF CALIFORNIA *v.* REEVES (ON REVIEW).

A contest allowed during the pendency, on appeal, of a prior suit involving the same land is without jurisdiction; and the evidence submitted therein cannot be considered in support of a motion for review of the decision rendered in the prior case.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
July 1, 1896. (A. E.)

Your office letter of May 25, 1896, transmits a motion for review of departmental decision in the above entitled cause, rendered February 17, 1896 (22 L. D., 203). The land involved is the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 18, T. 5 N., R. 10 W., S. B. M., Los Angeles, California. This motion is filed by one H. W. Duncan, who signs himself as attorney for the State of California.

In this motion it is admitted that there were no errors of law in the departmental decision referred to, but the motion is based upon the testimony alleged to have been taken in a contest case entitled Peter

B. Mathiason v. Harlan B. Sweet, assignee of *Albert F. Reeves*. As this contest involved the land in controversy between the State of California and *Reeves*, and the latter case was pending in this Department at the time said contest hearing was held, to wit, January 14, 1896, said hearing was irregular, erroneously allowed, and was without jurisdiction.

The mover of the motion under consideration files with his motion what he swears is a correct copy of the testimony taken at the hearing in the contest case referred to, but in view of the fact that said contest proceedings were illegal, the fact that the alleged copy is not certified and the testimony not sworn to is immaterial.

The motion is denied.

TIMBER CULTURE CONTEST—NOTICE OF CANCELLATION—APPLICATION.

WHITE *v.* LINNEMANN.

One who files an affidavit of contest against a timber culture entry, pending the disposition of a prior suit against the same entry, is not entitled to notice of cancellation if the entry is canceled under the prior proceedings; nor will an application to enter filed with the subsequent contest secure any right to the applicant if the successful contestant fails to exercise his preferred right.

Secretary Francis to the Commissioner of the General Land Office, October 16, 1896. (P. J. C.)

The land involved in this appeal is the SE. $\frac{1}{4}$ of Sec. 14, T. 22, R. 54, Alliance, Nebraska, land district.

The history of this tract as I glean it from the record is that on September 25, 1885, one David Freedom made timber culture entry of it; that on September 27, 1890, the same was canceled as the result of a contest initiated by one David T. Cummins; that subsequent to the initiation of this contest, and on September 27, 1889, one H. Paddock also filed a contest subject to that of Cummins; that on November 20, 1889, the plaintiff herein, Isaac White, filed a third contest, which was endorsed, "Filed Nov. 20, 1889,—9:15 A. M.—subject to Cummins and Paddock *v.* Freedom." Below this endorsement and apparently put there at a later period is this, "Entry canceled by first contest." White presented an application to make timber culture entry of the tract September 3, 1890. This application is endorsed, "Fees tendered and returned; application received and filed September 2, '90, and filed with his application to contest." On October 20, 1890, Tongers H. Linnemann made timber culture entry of the tract.

On June 9, 1891, White presented at the local office an affidavit showing his qualifications to perfect his entry; also that Cummins did not avail himself of his preference right under his contest; that he had not received notice from the local office of the cancellation of

Freedom's entry, and was not aware of it until informed by his attorney, who discovered the fact by an examination of the record. With this affidavit he again tendered the required fees. The local office rejected this tender of his fees, and his application to enter, for the reasons, (1) that the cancellation of Freedom's entry was not the result of White's contest; (2) that he did not deposit the one dollar "for notice of cancellation;" (3) that his application to enter was not filed with his contest, but ten months thereafter; (4) that the application conflicts with the entry of Linnemann, and (5) that the timber culture law has been repealed.

White appealed, and your office, by letter of October 14, 1891, held that it was error not to have notified White of the cancellation of Freedom's entry, and ordered that Linnemann be allowed sixty days in which to show cause why his entry should not be canceled and White's entry placed of record.

A hearing was thereupon had before the local officers, and as a result they decided in favor of Linnemann. White appealed, and your office, by letter of October 5, 1892, reversed their action, and held defendant's entry for cancellation, and that plaintiff be allowed to make his timber culture entry, whereupon Linnemann prosecutes this appeal.

There are several specifications of error, but they may be condensed into one proposition, that is, can a third contestant, whose application to enter the land involved did not accompany his contest, but was presented and filed with the contest before the cancellation of the entry and before the repeal of the timber culture law, have such an accruing right in the land as will entitle him to perfect the entry so tendered, when the prior contestants fail to exercise their preference rights?

Cummins did not exercise his preference right. It will be observed that before the expiration of the thirty days in which Cummins might have entered the land the defendant's entry was allowed.

It has been frequently decided by the Department that a preference right does not accrue to a second or third contestant where the entry in question is canceled as the result of the first contest. (*Armenag Simonian*, 13 L. D., 696; *Edwin M. Wardell*, 15 L. D., 375; *Adamson v. Blackmore*, 16 L. D., 111; *Owens v. Gauger*, 18 L. D., 6.) No preference right having accrued to White, he was therefore not entitled to notice of cancellation of Freedom's entry.

White could gain no advantage or right by his application to enter, because at that time the land was segregated by a prior subsisting entry. The rejection, therefore, of his application was not erroneous. (*Goodale v. Olney*, 13 L. D., 498; *Maggie Laird*, 13 L. D., 502.)

Your office decision seems to have been based largely on the case of *Heilman v. Syverson* (15 L. D., 184). That case has recently been overruled. *Shea v. Williams* (23 L. D., 119). In that case it was held that:

It is a fundamental principle that rights secured by an application filed with a timber culture contest, depend upon the establishment of the charge, and if the con-

test fails the application falls with it. It is also well established that the second contestant does not secure any preference right by reason of his contest, where the entry under attack is canceled in the prior contest of another. *Armenag Simonian* (13 L. D., 696).

Your office judgment is therefore reversed, and the entry of *Linne-mann* will remain intact.

RAILROAD GRANT—INDEMNITY SELECTION—SPECIFICATION OF LOSS.

NORTHERN PACIFIC R. R. CO. *v.* DREW.

In the case of an indemnity selection list where the losses are not arranged tract for tract, and a tract is included therein that is in fact not lost to the grant, any applicant for a tract embraced within said list is entitled to claim that the failure in the loss assigned relates to his tract.

Secretary Francis to the Commissioner of the General Land Office, October 16, 1896. (F. W. C.)

On November 1, 1887, L. B. Drew was permitted to make homestead entry for the SW. $\frac{1}{4}$ of Sec. 29, T. 55 N., R. 21 W., Duluth land district, Minnesota. This tract is within the second indemnity belt of the grant to the Northern Pacific Railroad Company. The company's right under its selections covering said SW. $\frac{1}{4}$ of Sec. 29 was considered in departmental decision of March 11, 1896 (not reported), in which your office decision of January 7, 1895, adverse to the company, was affirmed. The company filed a motion for review of said decision, as to the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said Sec. 29, which motion was duly entertained and returned for service. It has since been returned bearing evidence of service upon Drew.

It appears that the company first made selection of the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ in its list of April 23, 1883. This list contained a designation of losses equal in amount to the selected land, but the same were not arranged tract for tract with the selections. A re-arranged list was filed June 19, 1891.

In the previous decision of this Department your office decision was affirmed, upon the ground, as reported in your office decision, that there was a variance between the lists of 1883 and 1891 in the matter of the losses assigned as bases for said selections. The ground upon which the motion rests is that there was no variance between the lists of 1883 and 1891.

An answer to the motion has been filed on behalf of Drew, in which attention is called to the fact that in the list of 1883 the company specified as lost to the grant, and as a part of the bases on which said selection list rested, the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 25, T. 137, R. 28; that said tract does not appear among the losses contained in the list of June 19, 1891, but the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said section 25, T. 137, R. 28, is found designated as a basis, said last mentioned tract not being included in the list of 1883.

Upon inquiry at your office I learn that the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said Sec. 25 was not lost to the grant, the records showing that the company received patent therefor. It was presumably a clerical mistake in describing the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ instead of the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said Sec. 25, which last mentioned tract was lost to the grant by reason of the location of agricultural college scrip on October 10, 1867.

Within the second indemnity belt only certain losses will support a selection, namely, losses after the date of the passage of the act of July 2, 1864, and of land within the State in which the selection is made which cannot be satisfied from lands within the first indemnity belt.

It is clear, therefore, that the list of 1883 was unsupported as to eighty acres, that is, the bases stated in the list were eighty acres short of the amount selected. This circumstance evidences clearly the necessity of requiring the losses to be arranged tract for tract with the selected lands, for had this been done in the original list it would have been readily ascertained which of the tracts selected was based upon this alleged loss that did not exist.

By failing to arrange the losses tract for tract with the selections, it was within the power of any one attacking any part of the selection list to claim that the failure in the loss assigned related to his tract. Drew has called attention to the matter, and in my opinion is clearly entitled to claim that the loss wrongly assigned applied to his tract.

The previous decision of this Department, recognizing Drew's entry as against the company's selection, is, for the reasons hereinbefore given, adhered to, and the motion for review is accordingly denied.

GRANDIN ET AL. *v.* LA BAR.

Motion for review of departmental decision of August 29, 1896, 23 L. D., 301, denied by Secretary Francis, October 16, 1896.

RAILROAD GRANT—LANDS EXCEPTED—ADDITIONAL HOMESTEAD.

NORTHERN PACIFIC R. R. CO. *v.* WALLACE.

The occupancy of a tract in connection with land covered by an original homestead entry, with a view to establishing a claim thereto as an additional homestead, excepts the tract so occupied from the operation of a railroad grant on definite location.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 16, 1896. (C. J. W.)

On November 17, 1873, Robert Wallace made homestead entry, No. 232, for the W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 34, T. 18 N., R. 18 E., North Yakima, Washington, upon which final proof was submitted February 17, 1881, alleging settlement November 17, 1873, and establishment of residence

December 10, 1874, on which final homestead certificate issued February 17, 1881, and patent issued March 30, 1882.

On April 4, 1890, Wallace presented an application to make additional homestead entry for S. $\frac{1}{2}$ of SE. $\frac{1}{4}$, Sec. 27, T. 18 N., R. 18 E. The railroad company was duly notified of said application, and filed objections against the acceptance of the same May 23, 1890.

The land applied for is within the limits of the withdrawal upon the map of general route of the branch line of said road, filed August 15, 1873, but was restored in November, 1879, after the limits were adjusted to the line of the amended general route filed June 11, 1879. Upon the definite location of the road, as shown upon the map filed May 24, 1884, the land in controversy fell within the primary or granted limits of said road.

On July 28, 1887, said railroad company listed the land in question under acts of July 2, 1864 (13 Stat., 356), and May 31, 1870 (16 Stat., 378), per list No. 7.

The company filed a map of amended general route on June 11, 1879, which was the basis of the abrogation of the withdrawal of August 15, 1873, and of the restoration of the land then withdrawn, in November, 1879.

The hearing on Wallace's application to make additional homestead entry having been closed, on September 17, 1890, the register at North Yakima rendered the decision of the local office, holding that the claim of Wallace to the tract in August, 1873, was of such character as to except it from the operation of the grant to the company; that his continued claim and cultivation of the land up to the present, excepted it from the withdrawal of June 11, 1879, and also from the withdrawal for the definite location of the road, May 24, 1884. The company appealed from this decision, and on May 11, 1895, your office reversed the finding and held, that Wallace could not claim the benefit of any settlement rights antedating the perfection of his homestead entry, upon which patent issued March 30, 1882, and upon which his application to make additional homestead entry is predicated.

From this decision Wallace appeals.

Upon examination, it appears that Wallace was claiming the land in controversy as early as 1870; that he commenced to work upon it in the fall of 1873, and in 1874 planted several acres of it to crop, and has ever since claimed, cultivated and used it. His original occupancy, he states, was with a view to its acquisition under timber culture laws, but he does not seem to have placed such claim of record at any time, and inasmuch as he was not in the year 1873 residing upon it or contemplating settlement upon it, it would seem that his claim was not of such character on August 15, 1873, as to except it from the grant to the company, if the withdrawal of 1873 had been valid, but the route of 1873 was abandoned and all lands along that line released. (*Morrill v. Northern Pacific R. R. Co.*, 22 L. D., 536.) He continued to cultivat

and claim it, however, and upon the perfection of his homestead entry of the eighty acres adjoining it, he changed his purpose of acquiring title under timber culture laws, and adopted that of covering it by an additional homestead entry, his use and possession of it continuing.

Your office held in effect that he could have no lawful settlement upon this land while residing upon the eighty acres for which he had made homestead entry, and, inferentially, that when he commenced his cultivation and use of the land in question, it was in reservation. It may be safely said upon the authority of *Morrill v. Northern Pacific R. R. Co.*, already quoted, that it was not in reservation by either the withdrawal of 1873 or of 1879, and was not withdrawn, if at all, until May 24, 1884. Wallace's use and cultivation of the land covered the period from August, 1873, to May 24, 1884, the date of the company's definite location, and therefore a period during which such use and cultivation might ripen into a right in Wallace preceding the definite location of the road. Did Wallace predicate such right? The claim of the company to this land is based upon the act of July 2, 1864 (13 Stat., 365). The third section of said act grants to the company every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, subject to the following qualification, viz:

Whenever on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office.

The lands therefore covered by the granting act are subject to the lawful claims and rights of settlers existing at the time of the passage of the act or which may exist at the time the line of the road is definitely fixed, and the map of location filed. Wallace's claim on the land as a timber culture entry would have excepted the land from the grant, if it had been of record. He changed his purpose of entering it for timber culture and continued to cultivate and use it with a view to entering as additional homestead. Could he lawfully do this? This change of purpose seems to have occurred in March, 1882. At the time Wallace made his homestead entry in an even section within the limits of the company's grant, he was restricted to an entry of eighty acres only. The act of March 3, 1879, provides:

That from and after the passage of this act, the even sections within the limits of any grant of public lands to any railroad company, or to any military road company, or to any State in aid of any railroad or military road shall be open to settlers under the homestead laws to the extent of one hundred and sixty acres to each settler, and any person who has, under existing laws, taken a homestead on any even section within the limits of any railroad or military road land grant, and who by existing laws shall have been restricted to eighty acres, may enter under the homestead laws an additional eighty acres adjoining the land embraced in his original entry if such additional land be subject to entry; or if such person so elect, he may surrender his entry to the United States for cancellation, and thereupon be entitled to enter lands under the homestead laws the same as if the surrendered entry had

not been made. And any person so making additional entry of eighty acres, or new entry after the surrender and cancellation of his original entry, shall be permitted so to do without payment of fees and commission; and the residence and cultivation of such person upon and of the land embraced in his original entry shall be considered residence and cultivation for the same length of time upon and of the land embraced in his additional or new entry, and shall be deducted from the five years' residence and cultivation required by law: *Provided*, That in no case shall patent issue upon an additional or new homestead entry under this act until the person has actually, and in conformity with the homestead laws, occupied, resided upon, and cultivated the land embraced therein at least one year. (20 Stat., 472.)

It seems clear that when in March, 1882, Wallace commenced to use and cultivate the land with a view to its incorporation with his original homestead adjoining thereto, that he had a right under the law to do so, and that from that date his residence on and cultivation of his original homestead in connection therewith, would be deemed residence on and cultivation of this land. The right thus predicated existed when the company definitely located the line of its road, May 24, 1884, and the land was thereby excepted from the grant.

Your office decision is accordingly reversed, and Wallace's application to make additional homestead entry for the land in question is accepted, subject to his compliance with the law in such cases.

DREWICKE *v.* THE STATE OF MINNESOTA.

Motion for review of departmental decision of July 23, 1896, 23 L. D., 148, denied by Secretary Francis, October 16, 1896.

OKLAHOMA TOWN LOTS—TRANSFEREE—DEED.

HARRINGTON ET AL. *v.* HEGARTY.

The right of an assignee claiming through a town lot occupant, who has complied with the law, to receive a deed, is not affected by the fact that the application of such assignee is in the interest of one who was disqualified as an original lot occupant on account of being inside the Territory at the hour of opening.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 16, 1896. (C. J. W.)

John Harrington, William Reaves, Martha Blanchard, and Charles E. Hegarty, filed applications adverse to each other for a deed to lot 19, block B, Perry, Oklahoma, and on the 8th of October, 1894, a hearing was had between said parties before the townsite board, at which they found that one W. J. Taylor was the first legal occupant of the lot, and that his occupancy was maintained and was continuing at the date of the townsite entry, and that Hegarty was a *bona fide* purchaser from him, since that date, had made valuable improvements, and was therefore entitled to a deed. From this decision the losing applicants all appealed.

On July 1, 1895, your office affirmed the finding of the board. The losing applicants made further appeal, and on February 17, 1896, your office decision was affirmed here. On June 19, 1896, Harrington filed a motion for new trial, based on alleged newly discovered evidence, which alleged evidence is substantially—

That at the date of Hegarty's application for a deed J. E. Malone was owner of a half interest in said lot, and that since the application Hegarty has conveyed the other half to the wife of J. E. Malone; that said application is for the benefit of Malone, who was a "sooner" and disqualified.

The motion was entertained here, has been served, and is now to be considered.

It is not insisted that at the date of Hegarty's purchase from W. J. Taylor, who was found to be the occupant in his own right of the town lot in question, at the date of the townsite entry, Malone had any interest in it, but that after Hegarty's purchase from Taylor, and before Hegarty as assignee of Taylor applied for a deed, Malone became interested in the lot to the extent of one half. That the conveyance from Taylor to Hegarty was a valid transfer of his right to a deed seems free from doubt. The entry of the land for townsite purposes, by trustees, is by the law declared to be for the benefit and use of its occupants, at the date of such entry, according to their respective interests. Taylor then had earned a deed to the lot in question, nineteen days before the execution of his deed to Hegarty. Under date of November 30, 1894, the Secretary of the Interior promulgated certain rules for the guidance of township trustees in the execution of their trusts (19 L. D., 334). The first paragraph of Rule No. 7 thereof is as follows:

The entry having been made for the use and benefit of the occupants, only those who were occupants of lots at the date of entry, or their assignees thereafter, are entitled to the allotments hereinafter provided for.

Hegarty then, at the time he became the assignee of Taylor, was vested with the right to a deed for the lot in lieu of Taylor.

The motion presents this question—

Was Malone by reason of his presence inside the Territory to be opened, at the hour of opening, disqualified from becoming thereafter the owner by purchase of any land in the Territory, after title to the same had been earned by a qualified settler, acting for himself?

The last clause of the proviso to Sec. 13 of the act of March 2, 1889 (25 Stat., 980), is as follows:

And provided further, That each entry shall be in square form as nearly as practicable, and no person be permitted to enter more than one-quarter section thereof, but until said lands are opened to settlement by proclamation of the President, no persons shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands, or acquire any right thereto.

The town lot in question is in the Cherokee Outlet, and was opened to settlement September 16, 1893 (27 Stat., 612). The prohibitory clause in said act is as follows:

No person shall be permitted to occupy or enter upon any of the lands herein referred to, except in the manner prescribed by the proclamation of the President opening the same to settlement; and any person otherwise occupying or entering upon any of said lands shall forfeit all right to acquire any of said lands. (27 Stat., 643.)

In the proclamation of the President issued August 19, 1893, opening the Cherokee Outlet (28 Stat., 1222), the inhibition above quoted was set out in the precise language of the statute. It may be then said that the inhibition against "soonerism" applies to lands in the Cherokee Outlet. The words "any of these lands" used in said prohibitory clause include town lots, so that the inhibition applies to entry or occupancy of town lots in said Territory.

The prohibitory clauses quoted will be more fully understood by considering them in connection with the act of March 1, 1889 (25 Stat., 757), the act ratifying and confirming an agreement with the Muscogee (or Creek) Indians, whereby a large body of their lands had been ceded to the United States. The second section of the act is as follows:

That the lands acquired by the United States, under said agreement, shall be a part of the public domain, but they shall only be disposed of in accordance with the laws regulating homestead entries, and to the persons qualified to make such homestead entries, not exceeding one hundred and sixty acres to one qualified claimant. And the provisions of section twenty-three hundred and one of the Revised Statutes of the United States shall not apply to any lands acquired under said agreement. Any person who may enter upon any part of said lands in said agreement mentioned prior to the time that the same are opened to settlement by act of Congress shall not be permitted to occupy or to make entry of such lands or lay any claim thereto.

In the case of *Smith v. Townsend* (U. S., 148-490), the supreme court construed the prohibitory clause last quoted, together with the one contained in the act of March 2, 1889, and treated them as signifying the same thing, and that under them, presence in the Territory at the hour of opening, disqualified a person to take a homestead therein. The court declares it was

the evident intent of Congress by this legislation to put a wall around this entire territory, and disqualify from the right to acquire under the homestead laws, any tract within its limits, every one who was not outside of that wall on April 22. When the hour came the wall was thrown down, and it was a race between all outside, for the various tracts they might desire to take to themselves as homesteads.

It would therefore seem that the purpose of the prohibition was to secure fair play amongst all homeseekers under the homestead laws, and that the prohibition would cease to operate as to any particular tract when it ceased to be subject to the homestead or settlement laws. The town lot in question ceased to be subject to occupancy and settlement under townsite laws before Malone sought to acquire any interest in it; nor does it appear that he seeks to acquire any right to it through

homestead or townsite laws. The fact that he was inside the Territory, at the hour of opening, does not disqualify him as a purchaser from one who purchased from Taylor, who earned title to the lot by being its occupant at the date of the townsite entry. Hegarty is the applicant for this deed, is free from disqualification, and is entitled to a deed as assignee of Taylor.

The motion is accordingly denied.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

POWER v. OLSON ET AL.

The right of purchase under section 5, act of March 3, 1887, is limited to "the numbered sections prescribed in the grant," and therefore cannot be exercised to secure title to even numbered sections selected under the indemnity provisions of the act of June 22, 1874.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 16, 1896. (J. L. McC.)

On March 31, 1877, the Northern Pacific Railroad Company, per list No. 5, selected, under the act of June 22, 1874, the following described lands, to-wit: lots 1, 2, 3, and 4, and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, of Sec. 4; lots 1, 2, 3, and 4, the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the SE. $\frac{1}{4}$, of Sec. 6; the NW. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, of Sec. 8—all in T. 135, R. 52; also the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, and the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, of Sec. 34, T. 136, R. 52, Fargo land district, North Dakota.

On May 13, 1891, your office held said list for cancellation, with the exception of the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 6, and the NW. $\frac{1}{4}$ of Sec. 8, because made upon invalid bases.

No appeal was filed by the company from said decision; and said list of selections was, by your office letter of September 30, 1891, canceled—excepting as to the two tracts last named.

On December 18, 1891, James B. Power applied to enter all the tracts above described, under the 4th section of the act of March 3, 1887 (24 Stat., 556).

On December 2, 1891, Gunder Olson made homestead entry for the SE. $\frac{1}{4}$ of Sec. 34, T. 136, R. 52; and on December 8, 1891, Joseph A. Beeton made homestead entry for the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said Sec. 34.

On October 15, 1892, your office rejected Power's application, for the reason that the 4th section of the act of March 3, 1887, applied only to lands that had been erroneously certified or patented to railroad companies, and it was stated that, if he had any rights under said act, they would come under the 5th section thereof.

Power appealed to the Department, which affirmed said decision, on April 16, 1894 (L. & R. copybook No. 286, page 126); and on review, October 12, 1894 (L. & R. copybook No. 296, page 1).

While the case was pending certain other parties had applied to enter certain of the tracts hereinbefore described. Their applications were suspended pending the final disposition of Power's application.

On February 5, 1895, Power filed in the local office notice of his intention to submit proof in support of his claim to purchase under section 5 of said act. At the time appointed he introduced evidence showing that he was a native born citizen of the United States; that he purchased the lands in question from the Northern Pacific Railroad Company under contract in 1880 and 1881, receiving deeds therefor in January, 1883.

On January 12, 1895, the local officers held that his application to purchase should not be allowed.

Power appealed to your office, which, on April 11, 1896, affirmed the decision of the local officers, on the ground that

the grant made by the act of July 2, 1864, to the Northern Pacific Railroad Company was of odd numbered sections; the lands applied for by Power are within even numbered sections, and are therefore not within the sections prescribed by the grant.

Therefore your office affirmed the decision of the local officers.

Power has appealed to the Department, on the ground, in substance, that

said act of March 3, 1887, being remedial in character, should be liberally construed, and the provisions of the fifth section should apply to the case at bar.

In his argument in support of his appeal he contends:

No one will question the proposition that the design of said section is to afford protection to good faith purchasers of lands from railroad companies, to which such companies had no just claim; and there is no question but this appellant is such a purchaser. The evidence in the case shows that the appellant paid a valid consideration at the time of the purchase, and also that, instead of procuring the lands for the purpose of selling the same upon speculation, he at once after purchase entered into possession, and has ever since occupied and improved them as a farm and home. We are aware of the fact, as stated by the Hon. Commissioner in his decision, that section 5 of said act speaks of and in fact may relate to the numbered sections prescribed in the grant to the railroad company; but we say this does not of necessity limit the right to purchase to odd numbered sections alone, when we take into consideration the nature of the statute, the object for which it was enacted, and the rules of construction to be applied thereto The act, taken as a whole, clearly shows that Congress fully intended to protect all persons who, being citizens of the United States, or had declared their intention to become such, had in good faith purchased lands from railroad companies to which it was found, in the final adjustment of the grant, that such companies had no title or just claim. We can not believe that Congress ever intended to grant protection to one class of citizens, and deny its protection to another class equally innocent.

The language of section 5 of said act, in so far as it bears upon the question here in issue, is as follows:

That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the con-

structed parts of said road and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the *bona fide* purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands; and thereupon patents shall issue therefor to said *bona fide* purchaser, his heirs or assigns.

The language of the act is such that I see no escape from the conclusion that it was the intention of Congress to provide only for the purchase of such lands as are "the numbered sections prescribed in the grant" to a railroad company. It follows, therefore, that the local officers and your office were correct in denying Power's application to purchase lands in even numbered sections, which were never a part of the original grant to the Northern Pacific Railroad Company.

Your office decision was correct, and is hereby affirmed.

AMENDMENT OF ENTRY—NON-CONTIGUITY.

B. F. BYNUM ET AL. (ON REVIEW).

An entry cannot be amended under section 2372 R. S., if the certificate of the original purchaser has been assigned, or his right transferred.

An intervening adverse claim of record bars the allowance of an amendment under the provisions of said section.

A homestead entry embracing non-contiguous tracts, may be equitably confirmed, where the non-contiguity arises through the necessary cancellation of the entry as to one of the sub-divisions covered thereby, on account of a prior adverse claim thereto, and where said entry was made in ignorance of such adverse right.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 16, 1896. (F. W. C.)

July 26, 1860, Benjamin F. and James M. Bynum made graduation cash entry at the Huntsville land office, Alabama, for the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 11, T. 4, R. 5 E. Upon said graduation cash entry patent issued December 1, 1860.

Subsequently to the allowance of said entry the local officers permitted one William H. Hall to make homestead entry covering the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the "SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$," and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said section 11, upon which he made final proof and certificate issued.

Upon examination of said entry by your office the conflict as to the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ was discovered, and by your office letter "C" of March 22, 1882, the local officers were directed to call upon Hall to show cause why his entry should not be canceled. By letter of June 22, 1882, the local officers reported,

that we notified Mr. Hall on the 25th of March, 1882, and now transmit herewith an affidavit from B. F. Bynum showing that he intended to enter, has been paying taxes upon and cultivating, the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and stating that this is the land he has always claimed as his.

By your office letter "M" of November 13, 1882, the affidavit of Benjamin F. Bynum above referred to was returned, and the local

officers were advised that, as the graduation cash entry was made in the name of James M. and Benjamin F. Bynum, the affidavit for change in the entry must be made by both the parties interested, and further, that it must be supported by other corroborative evidence, as the affidavit of the party or parties interested is not deemed sufficient to authorize a change of entry under section 2372 of the Revised Statutes. This affidavit, it appears, was returned to the attorney who represented the parties in seeking to have the change in entry allowed, and it does not appear to have since been filed.

The second application to amend was made in March, 1893, the affidavit being made by William H. Hall, who signed as the assignee of James M. Bynum, deceased, and Benjamin F. Bynum. This application was held to be not sufficient, by your office decision of April 22, 1893, and appeal was duly taken to this Department, which appeal was considered under departmental decision of August 18, 1894 (19 L. D., 112), in which it was held that an application under section 2372 of the Revised Statutes, for the amendment of a graduation cash entry, must be supported by the affidavit of the original purchaser or his legal representatives.

A motion was filed for review of this decision, claiming that the Department did not have a complete record before it when the decision complained of was rendered. This motion was considered in departmental decision of February 10, 1896 (not reported), which granted the application as applied for. Said decision was, however, subsequently recalled, and has never been promulgated, and the case has been again considered by this Department.

The motion for review urges that the original application forwarded in letter of June 22, 1882, from the local officers, was the joint application of James M. and B. F. Bynum.

As before stated, the affidavit forwarded in 1882 was returned. From its description and the cause for its return, stated in your office decision of November 13, 1882, the statement upon which the motion is based is not supported by the record. In the affidavit filed in 1893 Hall signs as assignee of James M. Bynum, deceased. As to when the assignment was made does not appear from the record before me. With the papers is, however, the certificate of the judge and ex-officio clerk of the probate court in and for Jackson county, Alabama, which shows that on May 6, 1882, Benjamin F. Bynum did by deed convey the N. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section 11 to William H. Hall. Whether this transfer was prior or subsequent to the execution of his affidavit forwarded with the letter from the local office, dated June 22, 1882, does not clearly appear. But this is not material in view of the conclusion reached.

Upon the showing made and the entire record before this Department it does not appear that application for a change of the graduation cash entry was ever made by James M. Bynum or his legal representatives.

Further, as it is claimed that the rights of James M. and Benjamin F. Bynum, under their certificate of purchase, have been assigned, the amendment of the entry is not permissible under section 2372 of the Revised Statutes, which only authorizes an amendment "where the certificate of the original purchaser has not been assigned or his right in any way transferred," etc.

In this connection it might be noted that upon inquiry at your office I learn that the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section 11, which is desired to be included in the cash entry by amendment, is shown by your office records to have been entered under the homestead laws by one J. Harrison on November 21, 1867; which entry, although having expired, is still of record, uncanceled.

While it may be possible to clear the record of said adverse claim, yet so long as it remains of record it would bar the amendment as applied for under the section of the Revised Statutes before referred to.

For the reasons before given the motion must be and is accordingly denied, and the previous decision of this Department denying the application for amendment is adhered to. This must result in an order for cancellation of Hall's homestead entry as to said SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, which would leave the remaining tracts covered by said entry, namely, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, non-contiguous. As Hall is asserted to be the successor in interest to both James M. and B. F. Bynum he may be protected as to said SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ through the graduation cash entry. It is clear that his homestead entry was permitted to be made and perfected in ignorance of the conflicting cash entry as to the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$. This being so, it would appear that his homestead entry might be referred to the board of equitable adjudication for confirmation as to the remaining tracts covered by his entry, rendered non-contiguous by the graduating cash entry before referred to. (See *Akin v. Brown*, 15 L. D., 119.)

Herewith are returned the papers in the case for such further action as the same may warrant not in conflict with this decision.

DUNLAP *v.* SHINGLE SPRINGS AND PLACERVILLE R. R. Co.

Motion for review of departmental decision of July 7, 1896, 23 L. D., 67, denied by Secretary Francis, October 16, 1896.

RAILROAD GRANT—LAND EXCEPTED—DONATION CLAIM.

OREGON AND CALIFORNIA R. R. CO. *v.* BAGLEY.

Land embraced within an uncanceled donation notification is excepted thereby from the operation of a railroad grant on definite location.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 16, 1896. (W. A. E.)

The tract here involved, viz., the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 21, T. 9 S., R. 5 W., Oregon City, Oregon, land district, is within the primary limits of the grant made by act of July 25, 1866 (14 Stat., 239), to aid in the construction of the Oregon and California Railroad, and lies opposite the section of said road that was definitely located January 29, 1870.

By letter of December 18, 1894, your office held that said tract had been excepted from the grant to the company by reason of a donation claim existing therefor at date of definite location. The company's claim was accordingly rejected and the homestead entry of Andrew J. Bagley, made October 23, 1894, for this land, was held intact.

The appeal of the company brings the case before the Department.

It appears from the record that on the 10th day of February, 1854, one Israel D. Davis filed notification of his claim to this tract (together with adjoining land) under the Oregon donation act of September 27, 1850 (9 Stat., 496), section 4 of which provides:

That there shall be, and hereby is, granted to every white settler or occupant of the public lands, American half-breed Indians included, above the age of eighteen years, being a citizen of the United States, or having made a declaration according to law, of his intention to become a citizen, or who shall make such declaration on or before the first day of December, eighteen hundred and fifty one, now residing in said Territory, or who shall become a resident thereof on or before the first day of December, eighteen hundred and fifty, and who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act, the quantity of one half section, or three hundred and twenty acres of land, if a single man, and if a married man, or, if he shall become married within one year from the first day of December, eighteen hundred and fifty, the quantity of one section, or six hundred and forty acres, one half to himself and the other half to his wife, to be held by her in her own right.

Davis never, however, perfected title to the land, and by letter of March 11, 1887, from your office, said donation notification was canceled.

In the case of John J. Elliott, 1 L. D., 303, it was held that filing an original notification is an *ipso facto* segregation of the land described from the contiguous lands. Until, therefore, the notification is formally canceled on the records, the tract covered thereby remains in a state of segregation. The abandonment of the land by the claimant and his failure to submit the necessary proof may render his notification subject to cancellation, but can not in itself relieve the segregation.

On January 29, 1870, when the railroad claim attached, this tract was

covered by the uncanceled donation notification of Davis, and consequently was excepted from the operation of the grant.

Your office decision is affirmed, the railroad company's claim is rejected, and the homestead entry of Andrew J. Bagley will remain intact.

MCGOWAN ET AL. v. ALPS CONSOLIDATED MINING CO.

Motion for review of departmental decision of July 13, 1896, 23 L. D., 113, denied by Secretary Francis, October 16, 1896.

SURVEY—TIDE-WATER STREAM—MEANDER.

CHARLES AXFORD ET AL.

The manual of surveying instructions requires the meander of a tide-water stream on both sides, from its mouth up to the point where the tides cease.

Secretary Francis to the Commissioner of the General Land Office, October 16, 1896. (W. A. L.) (J. L.)

With your office letter "E" of April 11, 1896, was transmitted the appeal of Charles Axford, John McKenzie and Benjamin F. Armstrong from your office decision of March 11, 1896, approving an official survey of the meanders of the Querquillan river in section 35 of T. 14 N., R. 10 W., Vancouver land district, Washington.

In the year 1893, in pursuance of orders from your office, so much of the southeast corner of the township aforesaid (embracing sections 25, 26, 35 and 36), as had not been previously surveyed, was surveyed by deputy James C. Jeffrey. His field notes and plat were approved by the surveyor-general, and transmitted to your office. In the year 1895, Jeffrey's survey was examined by Special Agent John C. Brophy from your office, and his field notes and report are also on file. He found Jeffrey's survey, field notes and plat to be correct, and so reported to your office. Said surveys and field notes prove that Querquillan is a tidal river which meanders through section 35, and in which the tides of the Pacific Ocean ebb and flow. That said river has, in section 35, a mean right-angled width of about one chain up to the point where the tides cease and a mountain stream meets the tides. That at high tide the river, through three-quarters of section 35, has an average width of one and a half chains, and contains water from eight to ten feet deep as indicated by the high water mark. At low tide the bottom is exposed, except where the mountain stream flows in the channel. This river was meandered on both sides from its mouth up to the point where the tides cease.

On August 16, 1895, one hundred and six persons, representing themselves as citizens and residents of the town of "South Bend," and twenty-two persons representing themselves to be citizens and residents of the town of "Bay Center," Pacific County, Washington, filed two petitions, praying your office not to approve the meandering of Querquillan river. South Bend is the county seat, and Bay Center is a town about eight miles west. The petitioners represent that the county has laid out a road and has graded the same from South Bend almost to the river; and that the citizens are asking for and endeavoring to have a bridge built across said river in order that the road may be extended further; and they apprehend that the building of said bridge will be embarrassed and hindered, if the meander be approved, and the Querquillan river be recognized as a meandered stream.

The South Bend petition describes the river as "Quaitland slough, or what is more commonly known as Bone river."

The Bay Center petition describes the river as "Quaitland slough, commonly known as Bone river;" and then alleges that, "this slough known as Bone river, is a small inlet or indentation into the main land, at the head of which a small brook empties and forms said slough, and the tide ebbs and flows into it."

In the appeal from your office decision, the appellant's attorney alleges "as grounds for such appeal,"

1. That there is no navigable river and no navigable stream of any kind or name in said section, township and range: and
2. That there is no tidewater stream and no tide-water river in said section, township and range as Querquillan river.

These allegations are contradicted by the petitions which constitute the pleadings in the case; and also by the evidence furnished by two surveyors, of record in your office. It is idle to say, that a slough, inlet, indentation, fiith, or estuary, which twice a day, at high tide, contains water from eight to ten feet deep, and is commonly called a river, is not navigable for many useful purposes; and is not a tide-water stream.

The manual of surveying instructions, published June 30, 1894, in paragraph 2 on page 56, and paragraph 7 on page 5, prescribes as follows:

Tide-water streams, whether more or less than three chains wide, should be meandered at ordinary highwater mark, as far as tide-water extends.

In the survey of lands bordering on tide-water, meander corners will be established at the points where surveyed lines intersect high water mark, and the meanders will follow the high water line.

Querquillan river in section 35 was properly meandered. Your office decision is hereby affirmed.

MINING CLAIM—SURVEY—NOTICE—ADVERSE—CLAIM.

WHEELER ET AL. v. SMITH.

If a mining claim is not properly described in the official survey thereof it is incumbent upon the Secretary of the Interior, if the matter comes before him for disposition, to require a new survey, and new notice of application, and if during the period of republication an adverse claim is filed it is entitled to consideration. Land containing a ledge of limestone is not subject to location and entry as a lode claim.

A judicial determination that an adverse claimant is not entitled to possession is conclusive upon the Department, irrespective of any reasons the court may have assigned for its judgment.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 16, 1896. (P. J. C.)

The record in this case shows that Edward S. Smith located the "Orcas Island lime mine," in San Juan county, Washington, February 19, 1884; that on May 23, 1884, the official survey of said claim was approved by the surveyor general, designating it as survey No. 37. By said survey the lime mine is shown to be situated in sections 36 and 31, T. 37, Rs. 2 and 1 respectively, west, in the Seattle, Washington, land district. Mineral entry No. 10 was made November 29, 1884, and the papers forwarded to your office, where the matter was considered and on September 28, 1886, your office decided that the land was actually situated in "section 36, range 1 west," and "section 31, range 2 west, township 37 north," and "the entry being for other land than that located and actually claimed, and based upon an application and notices thereof correspondingly erroneous, is hereby held for cancellation." The applicant appealed and the Department, on May 8, 1888 (L. and R. No. 153, p. 331), thus modified your said office judgment—

Under these circumstances, and inasmuch as the mistake in description was a clerical error, the entryman should be allowed to make entry for the land he claims upon showing that he has given proper new notices and furnished a new plat and field notes properly describing the land.

Agreeably to this decision the applicant caused a new survey to be made, field notes and plats to be filed; and again presented his application for patent May 24, 1890, and during the period of publication adverse and protest was filed by Lee Wheeler and L. H. Wheeler. They allege the location of the "Ben. Harrison lime claim," and "The Seattle lime claim" on April 30, 1889, as placer claims, and that the Orcas Island lime mine lies wholly within the boundaries of their locations. They also charge that there is no vein or lode, or rock in place that can be located under the laws of the United States, as a vein or lode claim. Suit was instituted in support of the adverse, as prescribed by section 2326, Revised Statutes, within the statutory period, the plaintiffs alleging title in themselves, possession and right of possession by reason of their discovery and location as aforesaid. The prayer of

the complainant is that the Puget Sound Lime Company, which is shown to be the assignees of the original locators, be decreed to be entitled to the sole and exclusive possession of all the lands hereinbefore described, and every part thereof, and that the defendant be forever restrained and enjoined from proceeding further with his application for a patent therefor, etc.

The defendant answering, denies specifically the allegations of plaintiff's complaint not admitted, and then pleads affirmatively his title by reason of his discovery and location. His prayer is that the pretended placer locations of plaintiffs be adjudged a cloud upon his "rights, proprietary and possessory, in said land, and be wholly set aside and vacated;" and he "be adjudged to be entitled to the absolute and exclusive possession of said land," etc.; that the plaintiffs and their agents, etc., be restrained from claiming or asserting any right," etc., to the land, and also for an accounting and damages.

On the issues thus joined the court, without the intervention of a jury, filed its finding of fact and law, so far as pertinent to the issue here, as follows: That the land located by the Wheelers was at the time entirely unoccupied; that the defendant was "not in possession of any portion of the tract of land described in his application for a patent, nor has he been in possession of any portion of the same since the 20th day of November, 1884." As a conclusion of law the court held: "That intervenor, The Puget Sound Lime Company, is entitled to judgment herein for possession of said mining claims described," etc., and judgment was rendered in accord with said finding.

The defendant appealed, and the supreme court of Washington, on March 28, 1893, considered the case. (It is said by counsel that the case, *Wheeler et al. v. Smith*, is reported in 5 Wash., 704. I have not the volume, but a certified copy of the opinion.)

The court held (1) that although the disposition of the case they find it necessary to make does not require a discussion of the action of the Department, by its decision of May 8, 1888, requiring him to show that he has given proper new notices, etc., yet in the court's view

under no such circumstances should the claimant have been put to the trouble and expense of entirely new proceedings to entitle him to a patent in case his claim had been approved.

It then argues that the error was not his—Smith's—but the error of the deputy mineral surveyor and the surveyor-general; that the land was properly located by reference to a fixed and permanent natural object; the notice posted and published showing the location actually upon the ground,

and there was no reason why these could not have been accepted and the correction made in the land office without any further proceedings;

that under ordinary circumstances it would hold

that plaintiff's claim, initiated nearly five years after the completion of the necessary proceedings in the land office, ought not to be entertained in a suit in pursuance of the filing of an adverse claim under United States Revised Statutes section 2326. But this is not an ordinary mining claim, and its disposition depends upon other matters.

Having concluded that it was "not an ordinary mining claim," the court discusses the evidence to show that the location of the Orcas lode claim and both the placers were upon a deposit of lime stone, and for that reason it must

hold both parties in error, and that no valid location could be made of such land under the mineral laws, and that, therefore, neither party is entitled to a judgment in his favor.

The court says:

We are not unmindful of the fact that several decisions of the land office of the Interior Department have been promulgated, which hold that limestone lands may be patented as mineral claims, but as we view those decisions they are such a strained construction of the mineral laws as are unwarranted by their terms and by the spirit and intent of their enactment.

The court further holds that that part of the land in section 36, having been surveyed land at the date of these locations, under section 20 of the act of March 2, 1853 (10 Stat., 172), and section 10 of the enabling act of February 22, 1889 (25 Stat., 676), this land went to the State for school purposes. The judgment of the superior court was therefore reversed,

and the case remanded with instructions to enter a new judgment, decreeing neither party to be entitled to the possession of the lands in question, respondents to pay costs in the superior court and in this court.

Judgment was thereafter formally entered in the supreme court "that the judgment of the said superior court be, and the same is hereby reversed, with costs;" . . . "and it is further ordered that this cause be remitted to said superior court for further proceedings in accordance with the opinion herein filed."

Judgment was rendered by the superior court in accordance with the decision of the supreme court. The judgment roll was presented at the local office, together with a petition by Smith, which was in the nature of an application to purchase. It is set forth that the United States Land Office or Department of the Interior is not bound by the view taken by the supreme court of Washington; that the Wheelers were not adverse claimants, entitled to commence proceedings, because—

Our application for a patent was favorably passed upon by the Acting Secretary of the Interior many years ago and long before either of the Messrs. Wheeler attempted to enter in the Land Office any mining claim upon any part of the land covered by the Orcas Island lime mine. The proofs required by the Honorable the Acting Secretary in his decision upon our original application for a patent merely required formal proof on our part of publication and notice and no one was entitled to appear or claim to be an adverse claimant except a person who at the date when our original labor, improvements, proofs, and filing and payments were complete, which was in 1884 or 1885, was so entitled.

We respectfully request you to certify the proceedings and judgment roll to the Commissioner of the General Land Office, and request that a patent issue to Edward S. Smith according to his right; and that the view which the supreme court of the State of Washington has taken of the law, in holding that a mining claim for lime or lime stone cannot be entered as a lode or vein under the mining laws of the United

States, be disregarded as being contrary to the ruling and practice of the General Land Office, and that all the proceedings and judgment of said superior and supreme courts be disregarded, if it shall appear to the Honorable the Commissioner of the General Land Office that Messrs. Lee Wheeler, and L. H. Wheeler are, and were not, adverse claimants within the meaning and intent of sections 2325 and 2326 of the United States Revised Statutes.

And in transmitting the files and proceedings in this matter to the Honorable the Commissioner we respectfully request that you call his attention to this communication.

The register accordingly forwarded the entire record to your office, and on consideration thereof you decided, August 29, 1893, that the placer claimants were entitled to the land, holding that the decision of the supreme court of Washington was upon grounds not recognized by your office; that the judgment of the superior court was given on the merits of the controversy, and you accepted that judgment as conclusive under the circumstances.

Smith prosecutes this appeal, setting out eighteen specifications of error. These are too voluminous to give in full, but I think the material errors complained of may be treated without printing them in full.

It is contended by counsel that Smith had done everything required of him by law in his original application to entitle him to a patent; that this "must be deemed found both by the Honorable Commissioner and the Honorable Acting Secretary;" that he is entitled to "protection as against the Wheelers" in their adverse proceedings initiated under the provisions of section 2325, Revised Statutes. It is insisted with much earnestness that defendants could acquire no rights by reason of their subsequent locations which would give them standing as adverse claimants, because the order of your office "only required a new notice and a new plat;" "nothing but the correction of clerical error" in the description of the land; that the judgment of the supreme court of Washington was "that Smith was, in 1884, and ever since has been, entitled to his patent," if the land had been deemed mineral.

This position of counsel contemplates a review by the present Secretary of a judgment of his predecessor upon a question presented to and passed upon by him. It is needless to say, perhaps, that this cannot be done. It needs no argument or citation of authorities on this proposition. But aside from this, the judgment of the Department of May 8, 1888, was a proper one, and unassailable from any standpoint. The locus of the land was not correctly given, and it matters not whether it was wrongly described by accident or design, whether the error was the result of careless officials or otherwise, it was the duty of the officers charged with the disposition of the public lands to have the error corrected whenever discovered. This applies to the locus of a mining claim with peculiar force; it "should be fixed with mathematical accuracy, as well in the report of the official survey as upon the surface of the earth" (John K. Castner *et al.*, 17 L. D., 565).

The *dictum* of the supreme court of Washington in regard to the

action of the Department in reference to its order is without any force whatever. The power and authority of the Secretary of the Interior in the disposition of the public lands is derived solely from Congress, and in the exercise of his executive functions in the management thereof he will not be controlled by the action of a State court when, as in this matter, it attempts to invade the exclusive jurisdiction of the Interior Department of the government.

It should be borne in mind that the methods prescribed by Congress for obtaining patent to mining claims is different from any other class of public land, in that all adverse claimants are relegated to the local courts to settle all disputes as to possessory rights. The jurisdiction of the court in settling this question depends entirely upon the correct description of the land; that is to say, a court in a given judicial district, or circuit, only has jurisdiction over the lands or parties in that district or circuit. It can be readily seen, as in the *Castner* case, how a misdescription of the land, either as to the section, township, range, or county, as in that case, might oust the jurisdiction of the court and thus defeat the adverse claimants. Correctly fixing the locus of the land in the section, township or range, where the land is surveyed, is required by the rules as much as the placing of monuments on the ground.

Hence the order of my predecessor in requiring new notice and plat was strictly in conformity with the practice and justice to all parties, and therefore, if during the period of publication an adverse claim is filed, it is entitled to consideration.

It is pertinent to inquire at this point whether Smith could lawfully obtain title to this land under the mining laws as a lode claim. It is admitted that the location was made on a ledge of lime stone, and the land was taken for the lime therein contained; that there was no vein or lode of quartz, or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable metalliferous deposits.

It appears to me so plain that Congress only contemplated lands that were valuable for the more precious metals should be patented as lode claims that it needs no argument to convince one of the proposition. A reading of the sections of the statute (2318, 2319, 2320, *et seq.*, Revised Statutes), plainly and unmistakably shows that it was only veins or lodes upon which discovery of mineral had been made prior to location that could be patented as lode claims. In *Iron Silver Mining Company v. Cheseman* (116 U. S., 529), the United States supreme court defines a vein or lode as used in this statute to be "a body of mineral, or mineral-bearing rock, within defined boundaries in the general mass of the mountain."

I am clearly of the opinion that Smith could not obtain patent to the land in question as a lode claim, and that his location of it as such was a nullity.

But, it is contended by counsel that all questions in regard to Smith's

right to the land was submitted, passed upon and decided in his favor, except as to the description of the land, by the departmental decision of May 8, 1888. I do not so regard it. The only question discussed or decided by my predecessor was that regarding the misdescription. There was nothing in the record then that would necessarily cause the Department to pass upon this question; in other words, it was not apparent on the face of the papers that the land was sought because of its value for lime. For instance, the location certificate says it is located "along the course of this lead, lode, or vein of mineralized bearing quartz," and "on the east side of the middle of said lead, lode or vein."

The action brought by the placer claimants in support of their adverse was, by the supreme court of Washington, decided against them. This judgment in effect decided that the plaintiffs, the placer protestants and adverse claimants, were not entitled to the possession or right of possession of the land in controversy. It matters not by what course of reasoning the court may have arrived at this judgment; it is sufficient for the Department to know that the adverse claim of plaintiffs was not sustained.

It having been determined that the Orcas Island lime lode was a nullity, and the State court having rendered judgment against the adverse claimants, it follows that neither of the parties is entitled to the land in controversy; therefore your office judgment is modified, and the locations of Smith and Wheeler *et al.* will be canceled.

It is so ordered.

HILLIARD *v.* LUTZ.

Motion for review of departmental decision of March 16, 1896, 22 L. D., 324, denied by Secretary Francis, October 16, 1896.

HOMESTEAD CONTEST—PRIORITY OF SETTLEMENT.

HOPKINS *v.* WAGNER ET AL. (ON REVIEW).

There is no authority under the law, in cases of simultaneous settlement, for offering the right of entry to the highest bidder.

Rights of adverse entrymen, dependent upon priority of settlement, may be adjudicated in the absence of a formal contest as between them on evidence submitted by them in defense of their rights against a third party.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 16, 1896. (C. J. W.)

On December 5, 1895, the Department decided the case of Hopkins *v.* Wagner *et al.*, involving the SE. $\frac{1}{4}$ of Sec. 8, T. 16 N., R. 7 W., Kingfisher, Oklahoma (21 L. D., 485). In said decision it was held that—

In a case involving priority of settlement wherein it cannot be determined which of the parties was the first settler in fact, the claimants may make an amicable division of the land; or in the event of their inability to agree, the right to make entry may be awarded to the highest bidder.

Duncan and Hopkins each filed a motion for review of said departmental decision, which motions were entertained, and Wagner also filed a motion for review, which was not considered for the reason that the affidavit required by Rule 78 of the Rules of Practice was not filed with it. The omission was afterwards remedied by filing the required affidavit on April 14, 1896. Counsel for Duncan has filed a motion to dismiss Wagner's motion on account of the defect alluded to. Inasmuch as the motions of the other two parties have been allowed, and the defect in Wagner's motion had been cured before the objection to it was made the non-action of the Department upon it will be waived, and his motion will be considered with the others. The motion to dismiss it is overruled.

Accompanying these motions are several affidavits intended to cover omissions in, or to strengthen the testimony taken in behalf of, each of the parties at the hearing. To consider them would be to add to the record, without the privilege of cross-examination by the opposite parties, and they will not be considered. In their respective specifications of error, each of the parties *inter alia* alleges error in the action of the Department, wherein the right to make entry was directed to be sold to the highest bidder.

In *O'Toole v. Spicer* (20 L. D., 392), and some other cases, in which what appeared to be simultaneous settlements had been made, followed by improvements by each party, this power had been exercised, without any thorough inquiry as to its legality. In the case of *Sumner v. Roberts* (23 L. D., 201), it was held that the law does not justify forced division of homestead lands between claimants therefor; but in cases where the parties themselves voluntarily agree to a division of the land, they may properly do so. It was further held in said case that there is no authority under the law, in cases of simultaneous settlement, for offering the right to enter the land so settled upon to the highest bidder; as in cases of simultaneous applications to enter, after entry and after settlement, upon the theory that the settlements were simultaneously made, since that rule does not apply to cases where either party is a settler. Said decision does not purport to overrule final decisions in conflict with it theretofore made, but allows them to stand. The case indicates the rule thereafter to be followed.

The case at bar must, therefore, be decided on its merits, under the record as presented. It is not necessary to consider now what should be done in a case where there is no entry, and there is proof to show clearly settlements made by adverse claimants, absolutely simultaneously. Such is not the case under review.

The land involved is within the Cheyenne and Arapahoe reservation, which was opened to settlement at twelve o'clock M., on April 19, 1892.

On April 19, 1892, Duncan filed soldier's declaratory statement for the land. On April 20, 1892, Wagner made homestead entry for the tract; afterwards, but on the same day, Hopkins presented his application to enter it under the homestead laws, which was rejected for conflict with Wagner's entry. On May 11, 1892, Duncan was permitted to make homestead entry. On May 20, 1892, Hopkins filed his affidavit of contest against Wagner and Duncan, alleging prior settlement.

Before the trial was had Hopkins filed a supplementary affidavit, alleging that Duncan was disqualified to make entry for the tract, for the reason that he owned one hundred and sixty acres of land in Kansas.

On October 4, 1893, after a full hearing, the register and receiver held that it was impossible to determine from the evidence who was the first settler, but that the mere sticking of a stake in the ground and immediately leaving it did not constitute settlement upon the part of Wagner, so as to segregate the land. They recommended that Hopkins' contest be dismissed, Wagner's entry canceled, and Duncan's entry held intact. Hopkins and Wagner both appealed, and on June 25, 1894, your office reversed the decision of the local officers, held that Wagner's acts constituted acts of settlement, but agreed with the local officers that it could not be determined who made the first settlement, and directed that, upon failure of the parties to agree upon terms of compromise and division of the land, that it be disposed of to the highest bidder between the parties, as in case of simultaneous applications to enter. Your office further found that the charge of disqualification against Duncan was not sustained, and that Wagner's exception to the refusal of the local officers to allow him further opportunity to cross-examine Duncan was not well taken. This last ruling was correct.

It is not the purpose of this review to change the ruling of the Department as to all the parties being qualified settlers and as to the sufficiency of Wagner's acts of settlement. As to these matters the opinion heretofore rendered will stand.

The claim of Hopkins will be the first considered. The claim he presents is that his settlement was prior to either that of Duncan or Wagner. The burden was upon him to make good this allegation by a preponderance of the evidence. The local officers found that he had failed to do that. Upon an examination of the record it is believed that this finding was correct, and Hopkins' contest is dismissed.

This leaves the case to be considered as between Duncan and Wagner. Both of these parties have entries of record covering the land in dispute. Neither has formally contested the entry of the other. Without such formal contest, on the hearing of the case of Hopkins against both, each submitted proof to support the contention that his settlement was prior to that of the other, as well as to that of Hopkins. Under the circumstances, each will be held to have relied upon his acts of settlement as the basis of his claim, as it is manifest that if either

was prior to that of the other in point of time in performing the first acts of settlement, that fact will settle the controversy. Neither the local officers nor your office found that the parties made simultaneous settlement, but that the evidence was of such character that it could not be determined who reached the land first and made settlement. The number of persons participating in the race, the shortness of the distance to be traversed before the land was reached, and the slight disparity in the time within which it was reached by those making the race, combine to make it a task of some difficulty to determine which of the parties was the first in order upon it. After a careful examination of the record, however, the difficulty does not seem insuperable.

The strip of land to be crossed before reaching the line of the land in question was about thirteen rods wide. The point at which Wagner stopped and made his settlement is a little more distant from the starting point than the one at which Duncan stopped and made his settlement. Wagner had a horse believed to be faster than Duncan's. These facts are material only in so far as they afford the means of testing the reasonableness of the testimony of the witnesses who testified as to the order in which the parties actually reached the land and performed their respective first acts of settlement. It is to be remembered that the witnesses who were present at the time, and who were spectators of the race and testified at the hearing had a better opportunity of knowing which of these parties was first, than those who have to reach a conclusion through the testimony of these same witnesses. As they were sworn, and seem in the main to have been candid and fair witnesses, the conclusion indicated by a preponderance of their testimony should be adopted. But two of the witnesses appear in such light as to justify criticism of their testimony as unfair or unreasonable, and they are witnesses who testified for Wagner. About ten of these witnesses, including these two, give it as their opinion from what they saw that Wagner was first. Twenty-two witnesses testify with more or less directness that Duncan stopped first on the land and performed the first acts of settlement. The witnesses doubtless testified to the facts as they saw them, and the conflict in the testimony is not evidence of perjury upon the part of any of them. Weighing the whole of the testimony, together, it fairly preponderates in favor of the conclusion that Duncan was the first settler. That conclusion is accordingly adopted. He has evinced his confidence in the justice of his claim by placing improvements worth several hundred dollars upon it.

The departmental decision heretofore rendered is revoked. Your office decision appealed from is, therefore, reversed, Hopkins' contest dismissed, Wagner's entry canceled, and Duncan's entry held intact.

HEISKELL *v.* McDOWELL.

Motion for review of departmental decision of July 7, 1896, 23 L. D., 63, denied by Secretary Francis October 16, 1896.

SECOND HOMESTEAD ENTRY—ACT OF DECEMBER 29, 1894.

ALEXANDER BOWSMAN.

An application to make a second homestead entry under the act of December 29, 1894, must be denied where the first entry is canceled on a contest charging abandonment.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 16, 1896. (C. J. G.)

Alexander Bowsman, through his attorneys, has filed a motion for review of departmental decision of July 23, 1896, rejecting his application to make homestead entry of the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and lot 3, Sec. 1, and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, Sec. 12, T. 14 S., R. 29 E., Burns land district, Oregon.

Prior to making his said application Bowsman was defendant in a contest brought against homestead entry made by him for land in the same district, on the allegation of abandonment. The Department, under date of June 18, 1894 (*George v. Bowsman*, 288 L. and R., 272), held that said allegation was fully sustained and his entry was held for cancellation. In his appeal from your office decision of August 12, 1895, rejecting his application to make a second homestead entry for the land now in question, Bowsman alleged that the plaintiff and his witnesses swore falsely in the contest case when they testified that he had abandoned the land; that such false swearing amounted to an "unavoidable casualty" as contemplated by the act of December 29, 1894 (28 Stat., 599), amendatory of section 3, act of March 2, 1889 (25 Stat., 854).

In the departmental decision of which a review is asked it was held that as the charge of abandonment against Bowsman was sustained in the contest case, he was not entitled to the relief provided for in the above mentioned act, and should not therefore be permitted to make second entry.

It is now urged in support of the motion for review that the papers in the appeal case were "unskillfully drawn by one not at all familiar with the statute and that the nature of the remedy provided by said act was not understood." It is likewise urged that "the statement of facts by Bowsman was corroborated so far, at least, as the following allegations of his affidavit are concerned, to-wit:—"

That the absences from the said tract of land as shown in the trial of the said contest occurred by the reason of the fact that I was unable to wholly support my family on the said tract and was compelled to be absent for the purpose of working for wages. . . . That said land is grazing land and was used by me for pasture.

It will be observed that proof of these allegations was essential to offset the charge of abandonment in the contest case. Though given the opportunity the applicant failed to make a satisfactory showing.

The attorneys for applicant further state that

it is error to hold that a homestead claimant is not entitled to relief under said act of December 29, 1894, unless he could refute the charge of abandonment, it being quite apparent that no second entry would be necessary in such a case, and the act in question being intended for cases, just like this, where the charge of abandonment is sustained but where the *cause for the abandonment* is one of the grounds of absence named in the act of March 2, 1889.

It is true that there is such a distinction as the one referred to, and that there may be a forfeiture on the part of the entryman without sacrificing his right of second entry. But it must be made to appear that the abandonment was due to some of the causes named in the act of March 2, 1889. As the attorneys for applicant very truly state, if such a showing had been made at the hearing there would be no necessity for a second entry, for under such circumstances the applicant's absences would have been excusable and his entry would not have been canceled. But the record shows that he failed to refute the charge of abandonment; he now comes and acknowledges the fact of abandonment, but claims that the cause for the abandonment is one of the grounds of absence named in the act of March 2, 1889. The truth is, if claimant's application were allowed it would be a virtual admission, contrary to the conclusion heretofore reached, that he never abandoned the land, for if the claims he now sets up are true his admitted absences did not under the law amount to an abandonment.

Nothing is set out in the motion for review showing that there is any newly discovered evidence, or that he was prevented in any manner from substantiating his allegations at the hearing. The record shows that he was represented by an attorney, and that himself and witnesses were present at the hearing and testified.

It cannot be claimed with any degree of force that the plaintiff and his witnesses swore falsely at the hearing of the contest case in the absence of admissions to that effect or a conviction of perjury.

It has been the experience of the Department that it is difficult to establish any general or satisfactory rule to guide the local officers in the disposition of applications for second entry. It has been left to them to make application of the law to the particular cases presented, and they have been "enjoined to exercise their best and most careful judgment in the matter." For this reason their conclusions are entitled to much respect. Cases coming directly within the causes enumerated in section 3 of the act of March 2, 1889, are comparatively easy of disposition. But those arising outside of the causes so enumerated, or classed among "unavoidable casualties," must depend individually upon the peculiar circumstances surrounding each case.

The charge of abandonment in the contest case, and upon which the decision in the case at bar depends, went to the very essence of the homestead law. The term as used in the contest affidavit was employed in its usual sense. The charge was sustained. Bowsman either abandoned the land in the sense contemplated by the statutes or he did not.

If he abandoned the land in the sense contemplated by the statutes and the instructions issued relative thereto, then he is not entitled to second entry. If he did not so abandon the land then he should have made a showing to that effect when opportunity was afforded him. In this he failed, and as stated in the departmental decision of July 23, 1896, it is now too late to say that plaintiff and his witnesses swore falsely at the hearing of the contest case.

Notwithstanding the remedial character of the act of December 29, 1894, it is well established that the law allows but one homestead privilege, unless the applicant for second entry comes clearly within the provisions of said act. Such fact has not been made apparent in this case.

The said motion for review is hereby denied.

PRACTICE—MOTIONS FOR REVIEW AND REHEARING—RULE 114.

DEPARTMENT OF THE INTERIOR,

Washington, Oct. 24, 1896.

Rule 114 of Practice, see 18 L. D., 472, is amended to read as follows, to take effect as of the date hereof:

Rule 114. Motions for review, and motions for rehearing before the Secretary, must be filed with the Commissioner of the General Land Office within thirty days after notice of the decision complained of, and will act as a supersedeas of the decision until otherwise directed by the Secretary.

Such motion must state concisely and specifically the grounds upon which it is based, and may be accompanied by an argument in support thereof.

On receipt of such motion, the Commissioner of the General Land Office will forward the same immediately to this Department, where it will be treated as "special". If the motion does not show proper grounds for review or rehearing, it will be denied and sent to the files of the General Land Office, whereupon the Commissioner will remove the suspension and proceed to execute the judgment before rendered. But if, upon examination, proper grounds are shown, the motion will be entertained and the moving party notified, whereupon he will be allowed thirty days within which to serve the same together with all argument in support thereof, on the opposite party, who will be allowed thirty days thereafter in which to file and serve an answer; after which no further argument will be received. Thereafter the case will not be reopened, except under such circumstances as would induce a court of equity to grant relief against a judgment of a court of law.

All rules or parts of rules inconsistent herewith are rescinded.

DAVID R. FRANCIS,

Secretary.

RAILROAD LANDS—APPLICATION TO ENTER.

EMORY H. MARKER ET AL.

On the judicial vacation of a patent issued under a railroad grant, the Secretary of the Interior may lawfully fix a day when the lands embraced in such decree shall be open to entry; and in such case an application to enter filed prior to the time so fixed should not be allowed.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 8, 1896. (J. L. McC.)

On July 26, 1887, the Department directed your office to demand of the St. Paul and Sioux City Railroad Company and the State of Iowa, in accordance with Sec. 2 of the act of March 3, 1887 (24 Stat., 556), the relinquishment and reconveyance of certain lands in O'Brien county, Iowa, which the Department held had been improperly patented to said State for the benefit of said railroad company (6 L. D., 47, 54; on review, *ib.*, 162).

Demand was accordingly made by your office, which, on January 7, 1888, reported to the Department that the company and the State had failed to reconvey as requested. Thereupon, the Department requested the Honorable Attorney General to institute suit in the proper court to set aside the patents thus improperly issued, and for the restoration of the title to the United States (6 L. D., 481).

Suit was accordingly instituted in the circuit court of the United States for the northern district of Iowa, which, at the October term, 1890, rendered a decision in favor of the United States (43 Fed. Rep., 617).

The case was thereupon brought by appeal before the supreme court of the United States, which, on April 21, 1895, affirmed the decision of the circuit court (159 U. S., 349).

Your office, by letter of November 19, 1895 (which letter was approved by the Secretary of the Interior), transmitted to the local officers at Des Moines, Iowa, a list of the lands in controversy, embracing 21,979.85 acres, with instructions to them to publish notice to all persons, claiming any part thereof under the act of March 3, 1887 (*supra*), to come forward within ninety days from the first publication, and file notice of their claims and their intention to make proof in accordance with the circular of February 13, 1889 (8 L. D., 348).

Said list with notice to claimants under said act was published for thirty days from November 29, 1895, in the "Sheldon Eagle." The date set in said notice on which the lands in question should become "subject to entry under the law of the United States" was February 27, 1896.

Between the date of the first insertion of said notice (November 29, 1895), and that set for the opening of the lands to entry (February 27, 1896); a considerable number of persons filed applications to make homestead entries on said lands, which applications the local officers rejected,

on the ground that the lands were not yet open to entry. The applicants appealed to your office, which dismissed their several appeals, and accorded them twenty days within which to apply for a writ of certiorari. Emory H. Marker and eighty-eight others have filed applications for such writ.

Said applications, with the exceptions of names and dates, are all alike, and in printed form. They allege seven errors on the part of your office, the gist of the whole being

that the decree of the United States supreme court, dated October 21, 1895, vested the title of the land in question in the general government; and that thereafter, the lands having been previously surveyed and platted, and the survey and plats approved by the Commissioner of the General Land Office, the land in question was subject to entry by the first legal and qualified application to be filed subsequent to October 21, 1895.

A decision of the supreme court holding that certain lands belong to the United States does not necessarily open such lands forthwith to entry. The order opening the lands to entry on February 27, 1896, was one that the Secretary might lawfully and properly issue (*Crowley v. Ritchie et al.*, 22 L. D., 276). An application to enter land, to be valid, must be made at a time when the land is legally subject to entry (*Mills v. Daly*, 17 L. D., 345, and many other cases).

The applicants for certiorari have shown no error in the decision of your office, rejecting their applications to enter the lands in question.

Their petition is therefore denied.

RAILROAD GRANT—ACT OF MARCH 3, 1871—RELINQUISHMENT.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO. ET AL. *v.* BERGERUD.

The grant made by the act of March 3, 1871, did not take effect until the relinquishment provided for therein was duly filed and accepted by the Secretary of the Interior.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 17, 1896. (W. F. M.)

This case is again before the Department on review of the decision rendered on March 6, 1896 (unreported), granted on motion of the St. Paul, Minneapolis and Manitoba Railway Company. The land in controversy is the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 27, township 133 N., range 42 W., in the land district of St. Cloud, Minnesota, and lies within the primary limits of the St. Vincent Extension of the grant to the said company made by the act of March 3, 1871 (16 Stat., 588). The decision under review held that the land was excepted from the grant by the homestead entry of Charles P. Young, which was made August 14, 1868, and not canceled until December 14, 1871.

The contention of the company now is that the grant did not take effect at its date, but on December 19, 1871, and, therefore, that the

status of the land is not affected by Young's entry, which was canceled on the 14th of the same month.

The act making the grant is entitled:

An act authorizing the St. Paul and Pacific Railroad Company to change its line in consideration of a relinquishment of lands, [and contains the following proviso:] *Provided, however,* That this change shall in no manner enlarge said grant, and that this act shall only take effect upon condition of being in accord with the legislation of the State of Minnesota and upon the further condition that proper releases shall be made to the United States by said company, of all lands along said abandoned lines from Crow Wing to St. Vincent, and from St. Cloud to Lake Superior, and that upon the execution of said releases such lands so released shall be considered as immediately restored to market without further legislation.

In construing this act the supreme court has said:

The release required by the act of March 3, 1871, was not made by the St. Paul and Pacific Railroad Company until December 13, 1871, and a formal release to the United States by the company was not executed until the 19th of that month. It was only upon the execution of the release—whether that be deemed to have been on the 13th or 19th of December—that the act took effect. The act did not make a grant upon condition subsequent. There was no condition for a breach of which any forfeiture of a grant could be required, for no grant passed until the consideration for it, the relinquishment of old lines with the lands along them, was given. The transaction was in the nature of an exchange, by which the right was given to the company to construct new lines with proportionual grants, in consideration of its relinquishing certain old lines, with their accompanying lands. The new rights were to vest with the release of the old rights. The transfer was to be mutual and simultaneous. There was, therefore, no operative grant until there was an effective release, and whichever date be taken—whether December 13, or 19—it was subsequent to the definite location of the Northern Pacific Railroad Company in Minnesota. (St. Paul and Pacific R. R. Co. v. Northern Pacific R. R. Co., 139 U. S. 1.)

While the character of the grant, as whether one *in praesenti* or *in futuro*, is, therefore, no longer an open question, it will be observed that the court premitted the further question as to the precise date at which it became effective.

On December 13, 1871, the St. Paul and Pacific Railroad Company, through its president and secretary, after due authorization thereunto by the board of directors, made, sealed and signed the release required by the proviso of the act aforesaid. This instrument was filed in this Department on December 19, 1871, and was formally accepted by the Secretary of the Interior as a compliance with the requirement of the act on the day following. The release purports to convey and does convey land. It is, therefore, in effect, a deed, and must be treated as such. A deed has no effect until delivery by the grantor and its acceptance by the grantee. It was formerly the common law rule that the deeds of a corporation did not require delivery, but in the United States no distinction appears to have been made in that regard between individuals and corporations.

In this case, as has been shown, the grant could not become operative until the relinquishment of the lands along the abandoned line should take effect, and this did not transpire until the release was filed

and accepted here, six days after the cancellation of Young's entry. The land in controversy, therefore, was free when the grant became effective and passed with it.

The decision heretofore rendered is revoked and set aside, the decision appealed from is reversed, and it is ordered that Bergerud's homestead entry be canceled.

DESERT LAND ENTRY—UNSURVEYED LAND—FINAL PROOF.

JOHN W. PHILLIPS.

If final desert land proof, submitted on an entry of unsurveyed land, is found unsatisfactory, and the entryman fails to furnish supplemental proof as required, the proof already submitted may be rejected, and the entry canceled.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 26, 1896. (W. A. E.)

On March 17, 1884, John W. Phillips made desert land entry at the Las Cruces, New Mexico, land office, for a certain tract of unsurveyed land, which was described in the entry papers, however, as the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 34, T. 9 S., R. 8 E.

February 27, 1886, he submitted final proof, which was suspended by the local officers to await survey.

May 20, 1892, your office considered said final proof and found it unsatisfactory, for the reason that the location of the springs from which the entryman alleged he derived his water supply, and the manner of diverting the water, were not shown.

The register and receiver were accordingly instructed to notify the entryman that he would be allowed sixty days in which to furnish supplementary proof.

Notice was duly mailed to the entryman, but was returned uncalled for.

October 20, 1893, William C. McDonald filed affidavit alleging that he is the owner by deed from Phillips of the tract embraced in said entry; that he has recently learned that supplemental proof is required; that the entryman has not resided in the vicinity of this land for several years and his present whereabouts are unknown. McDonald accordingly asked for six months time in which to find the entryman and make the necessary additional proof.

By letter of February 26, 1894, your office allowed McDonald sixty days "in which to furnish the evidence called for or to appeal, failing to do one of which the entry will be canceled."

Appeal was thereupon taken to the Department.

The specifications of error alleged are:

1. In not allowing assignee six months as prayed for in which to find the original entryman.

2. In now taking final action in the case, the land not being surveyed, and there being no adverse claimant.

In regard to the first specification, it is to be said: (1) that as the required supplementary proof related to the location of certain springs and the manner of distributing the water from them, it was not necessary to find the entryman to make this proof—it could be made by the assignee himself; (2) that from October 20, 1893, to the expiration of the sixty days allowed by your office letter of February 26, 1894, was more than six months, the period asked for by the assignee on the first named date; and (3) that although three years have elapsed since the assignee asked for six months time in which to find the entryman, he has never intimated to the Department that he has found the entryman or that he is ready to furnish the required proof.

As to the second allegation, I find, upon inquiry at your office, that no portion of said township 9 south, range 8 east, has been surveyed.

The practice of the Department in regard to desert land entries upon unsurveyed land is as follows:

At the time of making the entry the land must be described as accurately as is possible without survey, so that it may be easily identified. Within the time prescribed by law final proof must be submitted as in other cases. If this proof is satisfactory to the local officers, they approve it and forward it to your office, without collecting the purchase money and without issuing the final papers. It is then considered by your office and if found satisfactory is suspended until the land shall have been surveyed. After the land has been surveyed, the entryman (or his heirs or assignee) is required to file a corroborated affidavit showing the legal subdivisions of his claim. The official records are then corrected to make them describe the land by legal subdivisions, and if no objection exists, final papers are issued upon payment of the amounts due. (See circular of April 20, 1891, 12 L. D., 376; case of C. B. Mendenhall, 11 L. D., 414.)

If, however, your office finds the proof to be unsatisfactory, it may call on the entryman for supplementary proof, and if he fails after due notice to furnish the necessary additional proof, the proof already submitted may be rejected and his entry canceled, without regard to whether the land is then surveyed or unsurveyed.

The proof submitted in this case is insufficient and unsatisfactory. The assignee has had full opportunity to furnish the necessary supplementary proof, and has failed to do so.

Your office decision is accordingly affirmed, the final proof is rejected and the entry will be canceled.

SULLIVAN *v.* McPEEK.

Motion for rehearing in the case above entitled denied by Secretary Francis, October 26, 1896. See departmental decision of October 14, 1893, 17 L. D., 402.

PRACTICE—APPEAL—NOTICE—TIMBER LAND ENTRY.

HENRY C. EVANS.

On appeal from the denial of an application to contest an entry the appellant is not required to serve the entryman with notice thereof.

The withdrawal of offered lands abrogates the offering and brings them within the category of unoffered lands, and hence subject to timber land entry, if restored to the public domain.

Secretary Francis to the Commissioner of the General Land Office, October 29, 1896. (J. A.)

May 8, 1893, Constance Howard made cash timber entry for the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, E. $\frac{1}{2}$ SE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 21, T. 49 N., R. 8 W., Ashland, Wisconsin, land district.

March 4, 1895, Henry C. Evans filed an affidavit of contest against said entry under the second section of the act of May 14, 1880 (21 Stat., 140).

The local officers, acting under rule 6 of practice, transmitted the affidavit to your office.

June 15, 1895, your office held that the affidavit of contest is insufficient, and denied the application for a hearing.

August 28, 1895, and within sixty days from notice of said decision, Evans' attorneys filed an appeal. The appeal was taken as in ex parte cases under rule 100 of practice, and without notice to Mrs. Howard.

Your office, on September 28, 1895, considered the appeal defective, and, acting under rule 82 of practice, allowed Evans fifteen days within which to file evidence of service on Constance Howard under rule 86 of practice.

October 15, 1895, Evans' attorneys filed a motion for review of said decision. The motion was denied October 24, 1895, and on the same day your office transmitted the papers in the case in order that the appeal may be dismissed by this Department under rule 82 of practice.

In cases of appeals from rejections of applications to enter this Department has uniformly held that an adverse claimant of record is entitled to service of notice of the appeal. The reason for this requirement is found in the fact that in such cases an entryman is, from the nature of the case, a party to the proceedings, and is therefore, under rule 70 of practice, entitled to service of notice. It is stated in instructions, 17 L. D., 325, that the holding that an adverse claimant is entitled to service of notice of appeal from the rejection of an application to enter "embodies a sound principle of law, and conduces to the ends of justice and fair dealing between claimants for the same land." This reasoning does not apply to cases of appeals from rejections of applications to contest, as in such cases the entryman is not a party to the proceeding. Nor do I find anything in the rules of practice to warrant the construction that such an appeal must be served on the entryman.

Your office held that under rule 86 of practice, which requires that, Notice of an appeal from the Commissioner's decision must be filed in the General Land Office and served on the appellee or his counsel within sixty days from the date of the service of notice of such decision,

it was necessary for Evans to serve notice of appeal on Mrs. Howard. That rule applies only to cases in which jurisdiction has been acquired over the entryman. In contest cases jurisdiction over an entryman can be acquired only by his voluntary appearance or by service of notice after hearing has been ordered. It follows that it was not necessary for the appellant to serve notice of his appeal on Mrs. Howard. The question presented by the appeal will therefore be considered.

The affidavit of contest alleges that the land has been offered and is therefore not subject to timber entry under the act of June 3, 1878 (20 Stat., 89), as amended by the act of August 4, 1892 (27 Stat., 348).

The land had been offered at public sale July 4, 1853. It is within the fifteen miles indemnity limits of the grant of June 3, 1856 (11 Stat., 20), for the benefit of the Chicago, St. Paul, Minneapolis and Omaha Railroad Company, and was selected by said company March 20, 1885. The selection was canceled January 8, 1891, for the reason that the grant to said company had been satisfied.

The land is also within the primary limits of the grant of May 5, 1864 (13 Stat., 66), for the Wisconsin Central Railroad Company, which grant took effect notwithstanding the fact that the land had been withdrawn under the grant of June 3, 1856 (Wisconsin Central R. R. Co. v. Forsythe, 159 U. S., 46). A withdrawal was made for the Central R. R. Co., but on the failure of said company to construct its road between Ashland and Superior the land was forfeited by the act of September 29, 1890 (26 Stat., 496).

In the case of *Anway v. Phinney* (19 L. D., 513) it was held that (syllabus),

The withdrawal of offered lands in aid of a railroad grant abrogates the original offering, and brings them within the category of unoffered lands, and hence, subject to timber land entry if restored to the public domain.

The land in controversy must therefore be considered as unoffered land and subject to timber entry.

The decision of your office holding that the affidavit of contest is insufficient is accordingly affirmed.

REPAYMENT—ENTRY ERRONEOUSLY ALLOWED.

LOUISE C. GROTHJAN.

An entry made during the pendency of an appeal involving the land is "erroneously allowed", and the purchase money should be repaid, if the entry in question cannot be confirmed.

Secretary Francis to the Commissioner of the General Land Office, October
(I. H. L.) 29, 1896. (P. J. C.)

Application for repayment of purchase money paid for pre-emption cash entry, No. 1044, SW. $\frac{1}{4}$ of Sec. 4, Tp. 9 N., R. 5 W., Boise City, Idaho, by Louise C. Grothjan, is presented by this appeal. The application is in due form and accompanied with her relinquishment.

Your office denied the application, on the ground that her entry was canceled because she "never resided upon the land or made her home thereon in good faith," and decided that "the law governing the return of purchase money does not apply to cases where parties attempt to secure title to public land through false testimony." The applicant's appeal brings the case before the Department.

The history of this entry, so far as material to the controversy, is as follows:

Grothjan filed her pre-emption declaratory statement for the tract July 7, 1886. February 9, 1887, Joseph L. Johnson filed his pre-emption declaratory statement, and on January 2, 1888, after publication of notice, submitted final proof, whereupon Grothjan protested. A hearing was had, and as a result the local officers decided in favor of the protestant. From this action Johnson appealed. Pending this appeal, Grothjan submitted final proof, and was permitted to make entry.

Your office, by letter of September 8, 1890, in passing upon this feature of that controversy, said:

Your action in accepting the final proof of Louise C. Grothjan, accepting her cash payment, and issuing to her a final certificate, was clearly improper, and such proceedings should not have been had while the appeal involving said land was still pending. (See Rule 53 of the Rules of Practice; *Laffoon v. Artis*, 9 L. D., 279; *Scott v. King*, 9 L. D., 299.)

It was also decided that she had not "resided upon this land and made her home thereon in good faith."

This judgment was affirmed by the Department, March 31, 1892 (L. and R., 239, p. 198). The subsequent history of this controversy will be found in 15 L. D., 195; 16 Id., 180; 22 Id., 29.

Section 2 of the act of June 16, 1880 (21 Stat., 287), provides, that in all cases where entries have been

canceled for conflict, or where, from any cause, the entry has been erroneously allowed, and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry the fees, commissions and purchase money.

It seems to me that this application comes clearly within the purview of this statute. It cannot be maintained with seriousness that the action of the local officers in accepting her final proof and payment, pending the appeal, was regular.

If the records of the local office, or the proofs furnished, should show that the entry ought not to be permitted, and yet it were permitted, then it would be "erroneously allowed." (General Circular, 1895, p. 97.)

That is the exact condition in this case. Johnson had appealed from the decision of the local officers. This had the effect of holding the land in *statu quo* until that appeal was disposed of.

The fact that your office and the Department subsequently decided that she had not complied with the law can cut no figure in this transaction. The entry was erroneously allowed before it had been determined that there was a failure on her part, and her money had been received anterior to that time. It is perfectly fair to assume that if the local officers had done their full duty in this matter, and held her final proof until the pending appeal had been finally disposed of, she would not have paid the money necessary to make her final entry. Contrary to the rule, they received the final payment, and "erroneously allowed" the entry. (See Ignatz Reitober, 22 L. D., 615.)

I am of the opinion that the application for repayment should be granted.

Your office decision is therefore reversed, and repayment will be made.

RAILROAD LANDS—ACT OF SEPTEMBER 29, 1890.

REITH *v.* NILES.

The right to purchase railroad lands forfeited by the act of September 29, 1890, under the acts amendatory thereof, is secured to persons entitled to exercise such right between the dates of September 29, 1890, and January 1, 1897, and no adverse claim can attach between said dates.

Secretary Francis to the Commissioner of the General Land Office, October 29, 1896. (C. J. G.)

This controversy is in relation to the SE. $\frac{1}{4}$ of Sec. 25, T. 3 N., R. 31 E., W. M., La Grande land district, Oregon.

This case has been before the Department once before and the details thereof are set out in 19 L. D., 449. It was decided therein that—

The right to purchase forfeited railroad lands under section 3, act of September 29, 1890, by persons holding under license from a railroad company, is inheritable, and may be exercised by an administrator for the benefit of the estate, where under the local law, he is given the control of the real and personal property of the deceased.

Your office, in a letter dated May 17, 1895, addressed to the local office, no motion for review of the above decision having been filed, closed the case, concluding as follows:

Notify Reith that he will be allowed sixty days to present payment for the land and in event of his so doing you will issue certificate to "the Heirs of B. J. Terven," cancel the entry of Niles and report the same to this office.

Under date of January 21, 1896, the local office reported that "the said Reith has taken no action pursuant to your said letter of May 17, 1895," and at the same time transmitted evidence of service of notice upon Reith.

Under date of February 1, 1896, your office, without further action, closed the case, this time holding Niles' entry intact.

From this decision Reith has appealed to this Department, alleging in substance that purchasers under section 3 of the act of September 29, 1890, are entitled to purchase the lands forfeited by said act at any time prior to January 1, 1897.

The act of Congress approved December 12, 1893 (28 Stat., 15), reads as follows:

That section three of an act entitled "An Act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes," approved September twenty-ninth, eighteen hundred and ninety, and the several acts amendatory thereof, be, and the same is, amended so as to extend the time within which persons entitled to purchase lands forfeited by said act shall be permitted to purchase the same, in the quantities and upon the terms provided in said section, at any time prior to January first, eighteen hundred and ninety-seven: *Provided*, That nothing herein contained shall be so construed as to interfere with any adverse claim that may have attached to the lands or any part thereof.

As to the proviso in the above act, relative to any adverse claim that may have attached to the land, it is evident that the defendant herein has gained no rights thereunder. He makes no claim of settlement prior to September 29, 1890; the only rights he alleges are those under his entry of September 1, 1891. The act of September 29, 1890 (26 Stat., 496), allowed persons qualified to purchase the lands forfeited by said act, two years from the date of its passage within which to purchase said lands. The act of June 25, 1892 (27 Stat., 59), extended the said right to purchase one year. The act of January 31, 1893 (27 Stat., 427), which was a special act having reference to lands forfeited by the act of September 29, 1890, upon the line of the Northern Pacific Railroad Company between Wallula, Washington, and Portland, Oregon, extended the time within which persons entitled to purchase said lands could purchase the same, to January 1, 1894. And the act of December 12, 1893, quoted above, still further extended the time of persons entitled to purchase said lands to January 1, 1897. On account of these various acts, original and amendatory, it will readily be seen that the right to purchase these lands is secured to persons entitled to purchase the same between the dates of September 29, 1890, and January 1, 1897, and that no adverse claim could attach between those dates.

By departmental decision of December 4, 1894, (19 L. D., 449, *supra*), Reith was adjudged to be qualified to purchase under section 3 of the act of September 29, 1890 (*supra*). Accordingly, the only question involved in the present appeal is as to the time within which Reith is entitled to consummate the purchase of this land for the benefit of the estate he represents.

From the language of the acts referred to, it being remembered that said acts are remedial in their nature, I am of the opinion that there was no authority for limiting the time within which Reith must purchase, to sixty days, as was done in your office letter of May 17, 1895. According to the provisions of said acts he has until January 1, 1897, within which to purchase the land in question, as claimed by him in his appeal.

Your office decision is accordingly reversed, and Reith will be notified of his right as herein indicated.

TOWN SITE—MINERAL LAND—ALASKAN LANDS.

GOLDSTEIN *v.* JUNEAU TOWNSITE.

A townsite settlement in Alaska prior to the act of March 3, 1891, confers no right that relieves the town site applicant from the burden of proof in a controversy as to the character of the land between such applicant and a mineral claimant, where the mining claim is of record at the date of the townsite application. Land must be held mineral in character if mineral has been found thereon, and the evidence shows that a person of ordinary prudence would be justified in further expenditures, with a reasonable prospect of success in developing a valuable mine.

Secretary Francis to the Commissioner of the General Land Office, October 29, 1896. (C. J. W.)

John Olds, acting as trustee for the occupants of the land applied for, filed application for patent for one hundred and twenty-one and fifty-two-hundredths acres of land described in his application by metes and bounds, which application was made on the 10th of June, 1893, and under the provisions of the townsite laws. The land is located in a mining district, but was alleged to be non-mineral. Notice of intention to offer proof in support of the application was given by publication in the "Alaska Journal" at Juneau, Alaska, and by posting copies of said notice in three conspicuous places on the land, as required in such cases, the time therein fixed for the submission of proof being the 15th day of August, 1893. Pursuant to the notice proofs were submitted, and on October 13th, 1893, cash entry No. 1 for the townsite of Juneau was allowed and the purchase price for the land covered by the entry was paid. On May 19, 1894, a paper protesting against the issuance of patent to the trustee for the land covered by the entry was filed in the name of Anna Goldstein, in your office, through her attorney, J. H. Hickock, Jr., alleging her ownership of a mineral claim in conflict with said townsite, and alleging the mineral character of the land. Various papers accompanied the protest, tending to show that the mine claimed by protestant was, in June, 1886, located by O. L. Sandstone and Louis Cotta on Bonanza lode in Harris mining district, Alaska; that the location was made in accordance with law; that it had been

duly recorded and that the title to the same had passed to her. By office letter of date December 8, 1894, your office directed the local officers to order a hearing to determine the character of the land embraced in the mineral claim of protestant, and in conflict with the entry. A hearing was accordingly ordered. In pursuance of said order the parties appeared, in person and by their attorneys, before Henry Melten, U. S. commissioner, at Juneau, Alaska, and submitted testimony touching the character of the land. The taking of testimony was commenced April 29, 1895. The evidence so taken was duly certified and filed in the office of the register and receiver at Sitka, Alaska, on May 31, 1895. On June 22, 1895, the local officers rendered a joint decision, in which they found that the land in controversy was non-mineral in character. On July 15, 1895, the mineral claimant appealed to your office. On September 16, 1895, your office, in substance, affirmed the decision of the local officers. A motion was made for review of this decision, which was by your office overruled, on January 8, 1896. On February 8, 1896, appeal from your office decisions of September 16, 1895, and January 8, 1896, was duly filed, and the case is now to be considered here under said appeal.

The only vital question in the case is, the mineral or non-mineral character of the land. Certain other questions, however, arose in the trial and argument of the case, and will be disposed of as preliminary to the main question.

The affidavit of Anna Goldstein, which was the ostensible predicate for the hearing, was objected to before the local officers as insufficient for such purpose, mainly for the reason that it was not in fact her affidavit. The same point was insisted upon before your office, and is insisted upon here. It is unnecessary to consider in detail the criticisms made upon this paper. It is sufficient to say that any defects, which may have existed in its original execution, were cured by her subsequent ratification and acknowledgment of it as her act. The mineral character of the land was alleged in a number of other affidavits, and the fact of the mineral location and survey were record facts of which your office had knowledge. The facts thus made to appear were sufficient not only to justify the ordering of a hearing, but to require such hearing to be ordered. Such hearing was in fact ordered, and in fact had, and both parties to the controversy appeared, both in person and by attorneys, and submitted testimony in support of their respective contentions, as to the character of the land. The opportunity was not only thus afforded to each side to be heard fully on the merits of the case, but each side availed itself of that opportunity, and mere informalities preceding the hearing have become inconsequent and without significance.

One other question, which may be regarded as preliminary to the main one, is as to which party should bear the *onus probandi*.

In your office letter of December 8, 1894, ordering a hearing in the

case, the rule to be observed by the local officers in passing upon the character of the land, was suggested, and that suggestion seems to have been followed by them. Your office referring to record facts relating to the land in controversy then said:

The land being held and claimed for mineral purposes long prior to the townsite entry, it was error on the part of your office to have allowed the entry until after due notice to the mineral claimants and no objections, and the allowance of such entry does not impair the right of the mineral claimant. See *Piru Oil Company* (16 L. D., 117).

Therefore in a contest to determine the character of the land it rests upon the townsite claimant to prove that the land is non-mineral in character, its value for town lots being an immaterial question. The *State of Washington v. McBride* (18 L. D., 199).

It was unusual to predetermine a question to be passed upon at a hearing thereafter to be had, and the language used is not quoted for the purpose of questioning the right of your office to change the view therein expressed on consideration of the case after the hearing, but for the reason that it is believed that the rule therein expressed is in substance correct, notwithstanding it was receded from in the later decision of your office. The location notice of the mineral claimants was duly recorded, June 30, 1886, in the office of the district recorder of the Harris mining district, and has remained of record. The townsite claimant was charged with notice of the claim, and the record abounds with evidence of the fact that its existence was public, and very generally known to the people of the vicinity long prior to the date of the townsite application. Looking, therefore, to the record evidence and the notoriety of the mineral claim, and its priority in existence to the townsite application, it would seem that the burden of proof was upon the townsite applicant to show the non-mineral character of the land. In opposition to this view, however, is one presented by counsel for the townsite claimant, which is not without force and leaves the matter almost in doubt. It is insisted that most of the area in conflict was settled upon by different occupants of town lots, who recognized a plat and survey made in 1881 by Master Hanus, U. S. N., and that the mineral claimant had notice of these claims and settlements before the date of the mineral location. If at the time of these settlements the townsite laws had been operative and of force in Alaska there would be no question but that the townsite should be treated as a prior claimant, and the burden of proof put upon the mineral claimant. The only way out of the confusion is to follow the law, wherever it may lead. The act of May 17, 1884 (23 Stat., 24), provided for a government for the district of Alaska, and made it a land district of the United States, over which was extended only the mineral laws of the United States; preserved the *status quo* as to use and occupancy for other than mining purposes, until Congress should act, and declared that nothing in the act should be construed to put in force, in said district, the general land laws of the United States. Section 2387, Revised Statutes, was

not operative in Alaska until March 3, 1891 (26 Stat., 1099), and no entry of land for townsite purposes could be made before the passage of said act. The entry in contest was made under said act of March 3, 1891. Section 11 of that act provides

That until otherwise ordered by Congress lands in Alaska may be entered for townsite purposes for the several use and benefit of the occupants of such townsites by such trustee or trustees as may be named by the Secretary of the Interior for that purpose, such entries to be made under the provisions of section twenty-three hundred and eighty-seven of the revised statutes as near as may be, etc.

Section 16 of the same act is as follows—

That townsite entries may be made by incorporated towns and cities on the mineral lands of the United States, but no title shall be acquired by such towns or cities to any vein of gold; silver, cinnabar, copper, or lead, or to any valid mining claim or possession held under existing law. When mineral veins are possessed within the limits of an incorporated town or city and such possession is recognized by local authority or by the laws of the United States the title to town lots shall be subject to such recognized possession and the necessary use thereof, and when entry has been made or patent issued for such townsites to such incorporated town or city, the possessor of such mineral vein may enter and receive patent for such mineral vein and the surface ground appertaining thereto: *Provided*, that no entry shall be made by such mineral claimant for surface ground, when the owner or occupier of surface ground shall have had possession of the same before the inception of the title of the mineral vein applicant.

Looking to the provisions of the act of May 17, 1884, and of the act of March 3, 1891, it seems to have been the purpose of Congress to permit and authorize mineral prospecting and mining upon lands owned by the United States, and merely occupied by others, for some purpose other than mining, provided that such mining operations did not interfere with such occupancy. There is no complaint that the mineral claimant in his discovery and development work interfered with the occupancy of any person in possession at the date of the passage of the act of May 17, 1884, or at the time the work was done. The townsite application and entry made pending the mineral location, and with a view to obtaining patent to the entire interest in all the land included in said mineral location, puts the townsite in the attitude of asserting the non-mineral character of all of said land, and of assuming the burden of establishing that fact by proof.

One other fact appearing from the record seems to require mention here. There appears to have been a government reservation for naval purposes, with three buildings erected upon it, made prior both to any occupancy for residence purposes and to the mineral location, which is included both in the mineral location and the townsite entry. So far as appears neither party can lay any just claim to this area, but further data would be necessary to adjust the rights of the parties so as not to interfere with this reserved area, which is not now proposed. The illegality, however, of allowing the entry which includes it, to go to patent as it now stands is apparent. These preliminary questions being disposed of, it remains to be considered, whether or not the townsite has

successfully carried the burden of establishing the non-mineral character of the land, by proof, the application being for non-mineral land.

On the hearing, the townsite assumed the burden of proof and introduced ten witnesses, whose testimony was addressed to the character of the land, and of the developments on it by the mineral claimant. Much of this testimony was negative in its character, and based upon limited inspection and examination. It appears from undisputed testimony that near the southeasterly end of the claim there is a shaft twenty-five to thirty feet in depth and a tunnel thirty to forty feet in length, running northwesterly, and some stripping along the formation from the surface, and that these showed gold and silver in stringers of quartz in varying quantities. The presence of what is termed stringers of mineral bearing ore is not seriously disputed, but the chief controversy is as to whether there is a vein, and whether the ore is in sufficient quantity, and of a quality to pay for mining. The witnesses for the townsite (most of whom made but one short visit to the shaft and tunnel) state that they saw nothing which they would term a vein, and give it as their opinion that the claim is valueless as a mine, but most of them decline to swear that there is no vein there or upon the claim. The opinions expressed in nearly every instance are based upon the slight examinations made during a single short visit. One of these witnesses, Mr. Thorpe, swears positively that no vein or lode exists upon the claim. The substance of the testimony of most of the witnesses for the townsite is that from present developments they do not believe that a vein or lode exists on the claim, but that that fact can only be determined by further development. The mineral claimant introduced eight witnesses. Some of these had been upon the claim frequently, and some of them had worked in the shaft. One of these witnesses, Richard A. Matschman (pp. 230-235 of record), states that he saw and desired to locate this claim thirteen years ago, and expresses the opinion that it is a valuable mineral claim and warrants further development. He describes the bottom of the shaft as then disclosed as showing three or four stringers covering about half the shaft, the rock being quartz, bearing free gold, and some silver. Also that he had seen rock in place bearing free gold. John G. Tripp the contractor, who was doing contract work in the shaft, at the time of the hearing, testifies that there is gold bearing rock clear across the bottom of the shaft, in some of which gold can be seen with the naked eye, and that he has, at different times and different places on the claim, seen quartz bearing free gold. He states that at that time there was a lode or vein in the bottom of the shaft about four feet wide, struck four or five days prior to that time, and expresses the opinion that it would pay to operate the mine. Two witnesses, E. H. Perry and William Nelson, were afterwards called to rebut this testimony, who stated that a few days previously they had gone down into the shaft and did not see any vein or lode in the bottom. It was about seven o'clock in the evening and a part of the bottom of the shaft was covered with water. Some others of the witnesses testified to seeing

quartz at different times on the claim which showed gold to the natural eye. Samples of ore properly identified accompany the record. As these have been submitted to no test here, they can serve no purpose. The record shows the results of a number of assays of ore taken from the claim. The townsite claimants had two assays, though only one is produced. As to the one not produced, Duncan (one of the witnesses) said it showed nothing of any value. The other was made by Valentine, a jeweler, and showed a value of twenty cents in gold per ton.

One of the assays put in proof by the mineral claimant showed thirty-one dollars of gold and twenty-two and a half ounces of silver per ton. The second one dollar and sixty-five cents in gold and three and eight-tenths ounces of silver. The third one, made for Mr. Kerr and of different specimens, showed of one of them eight dollars and forty-seven cents of gold and twelve and one-quarter ounces of silver per ton, and of the other two dollars and twenty seven cents of gold and forty-four ounces of silver per ton. The evidence indicates that the specimens used for the assays were taken from the dump and bank as average specimens of the quartz. This cannot be considered as conclusive evidence of the value of the ore remaining, but tends to show the then mineral character of the vein or stringers. It appears from the testimony that the claim in question known as the Bonanza, is on a definite mineral belt, and in near proximity to other mines. Olson, McCulty and Matschman, all name the Willoughby, the Traction, the Early Bird and the Sea Gull as lying along the same mineral belt, one of these being not more than five hundred feet from the Bonanza tunnel or shaft. It cannot be said that the testimony offered by the mineral claimant, taken as a whole shows a defined vein of mineral, in quantity and quality such as to make it a present paying mine, but it is strongly suggested that with further development it would be a paying mine. The testimony offered by the two sides, which was intended to show the present character of the land is pretty nearly balanced. It is to be observed that the mineral claimant is not putting in issue any right of hers as a purchaser from the locators of the claim, to be now passed upon, but is protesting against the townsite entry being passed to patent, and insisting that the townsite claimant be held to proof of the non-mineral character of the land, which fact has been alleged by said claimant. The townsite has suggested a failure upon the part of the mineral claimant to comply with the law fully as to the survey of the location and the annual assessment work required. In the recent case of the Aspen Consolidated Mining Company v. John R. Williams, it was said—

Considerable evidence was introduced upon the question of the compliance with law by the mineral claimants in various and sundry particulars and especially in reference to the annual assessment work required. That question, however, is not material to the present controversy inasmuch as it could not avail the agricultural entryman, even if it were shown that there was a failure in these respects. They are matters so far as this case is concerned between the government and the mineral claimants (23 L. D., 48).

No inquiry is now necessary as to whether the mineral claimant has complied with the law in the present case in respect to the matters referred to, or has not.

It is apparent that if it should now be decided on the showing made, that the character of the land is non-mineral the effect would be to withdraw and seal from mining enterprise what reasonably promises to be a valuable mine with further developments. In one of the later decisions rendered here, where a like condition of affairs appeared, a rule was announced, which seems to be applicable to this case. In the case of *Castle v. Womble* (19 L. D., 455), the Secretary said—

After a careful consideration of the subject it is my opinion that where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine, the requirements of the statute have been met.

Interpreting the testimony offered by both sides in the light of this rule, it must be held that the land involved is *prima facie* mineral in character, and not subject to unrestricted entry for townsite purposes.

Your office decision is reversed, and the townsite entry will be canceled as to the land covered by the mineral location.

SCHOOL INDEMNITY—MINERAL LANDS—FORFEITED RAILROAD LANDS.

STATE OF CALIFORNIA.

The act of February 28, 1891, amending Sections 2275, and 2276, R. S., is applicable to all the public land States, and operates as a repeal of all special laws theretofore enacted, so far as in conflict therewith; and under the provisions thereof the State of California is entitled to select indemnity for school sections lost to the State by reason of their mineral character.

The decision of the Department in the case of the State of California, 15 L. D., 10, overruled.

The return of sections sixteen and thirty-six by the surveyor-general as mineral land is sufficient evidence of its mineral character to entitle the State to select indemnity therefor, in all cases where said return is not overcome by competent evidence to the contrary.

Lands lying within the limits of a railroad grant forfeited by the act of September 29, 1890, are subject to selection as indemnity for school lands lost in place.

Secretary Francis to the Commissioner of the General Land Office, October 29, 1896. (W. M. W.)

By your office letter of April 18, 1896, you submitted to the Department for consideration three questions respecting the right of the State of California to select, as indemnity in lieu of lands returned as mineral lands by the surveyor-general, certain tracts of land within the limits of a railroad grant forfeited by the act of September 29, 1890.

Said questions are as follows:

First. Whether the State is entitled to indemnity for school sections lost to the State by reason of their mineral character.

Second. Whether the return of said sections by the surveyor-general as mineral land is sufficient evidence of its mineral character to authorize the State to select indemnity therefor.

Third. Whether lands lying within the limits of a railroad grant forfeited by the act of September 29, 1890, are subject to selection as indemnity by the States for school lands lost in place.

These questions will be considered in their order.

(1) On the 28th day of February, 1891, Congress passed an act amending sections 2275 and 2276 of the Revised Statutes (26 Stat., 796).

Section 2275, as amended by said act, embodies the conditions under which States, in whose favor sections sixteen and thirty-six have been or shall be granted, reserved, or pledged for the use of schools or colleges, in the States or Territory in which they lie, other lands may be selected in lieu of lands lost in sections sixteen and thirty-six. In regard to mineral lands lost in said sections, it is provided:

And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land.

In view of this language, it is clear that the State is entitled to select indemnity for sections sixteen and thirty-six lost to the State by reason of their mineral character, if the act is applicable to the State of California.

In the case of the State of California, 15 L. D., 10, Secretary Noble held that section 2275 of the Revised Statutes, as amended by the act of February 28, 1891, is not applicable to the State of California; that said State takes its right to indemnity school land under the act of March 3, 1853 (10 Stat., 244), as construed by the 6th section of the act of July 23, 1866 (14 Stat., 218). It is not necessary, in passing on the question here presented, to enter into a discussion of these acts, further than to say that they were both special acts, and confined in their operation to the State of California.

In construing a statute the first and chief purpose is to ascertain the intention of the law making power in enacting the law. The Congressional Record shows that when the act of February 28, 1891, was considered in the House, Mr. Payson, who was chairman of the House Committee on Public Lands, said, among other things:

The bill simply covers that condition which has been found to exist in the Department by which certain States or Territories suffer the loss of these lands which happen to be in fractional townships and where no adequate provision for indemnity selection is made in their stead. . . . This bill is of great importance to the people of the public land States of the northwest. It has been asked for, as I have said, by the Secretary of the Interior and the Commissioner of the General Land Office for several years. While somewhat voluminous in its details, there is really no change of existing law except in one particular, and that is that it gives to the school fund of the different States and Territories an increase in the land allotted for that purpose in case of reservations made by Congress for schools or colleges; that is, general grants of land for schools and colleges and other similar reservations. (See Congressional Record, Vol. 22, pp. 3464, 3465.)

The report of the House Committee on Public Lands was unanimous in favor of the passage of the bill, saying:

That the facts and reasons for the passage of this bill fully appear in the Senate report thereon, No. 502, of this Congress, which is appended hereto.

The Senate report says:

The sections of the Revised Statutes proposed to be amended by this bill are those which embody the general law with respect to the selection of indemnity lands in lieu of the sixteenth and thirty-sixth sections of each township granted to the States, and reserved to the Territories, for school purposes.

In the administration of the law, it has been found by the Land Department that the statute does not meet a variety of conditions, whereby the States and Territories suffer loss of these sections without adequate provision for indemnity selection in lieu thereof. Special laws have been enacted in a few instances to cover in part these defects with respect to particular States or Territories, but, as the school grant is intended to have equal operation and equal benefit in all the public land States and Territories, it is obvious the general law should meet the situation, and partiality or favor be thereby excluded. . . . The provision for indemnity for mineral lands is in no sense an additional grant to the States. The intent of Congress has always been to give every school section or its equivalent area. . . . Recognition of the right to indemnity for mineral school sections does not, therefore, add an acre to such grant, as the United States retain the mineral sections and dispose of the same under the mineral law. . . . The bill as now framed will cure all inequalities in legislation; place the States and Territories in a position where the school grant can be applied to good lands, and largest measure of benefit to the school funds thereby secured. (See Cong. Rec., Vol. 22, p. 3465.)

The bill, with amendments, was referred to the Department, and by it referred to the Commissioner of the General Land Office for report. On February 7, 1890, Commissioner Groff, in his report to the Secretary of the Interior, used this language:

The only increase in the amount granted by this bill over the original, so far as I can see, is in making the right to select in lieu of mineral lands applicable to all the States and Territories, instead of confining it to a few, as heretofore.

Secretary Noble, in transmitting the Commissioner's report to the Senate Committee on Public Lands, said: "I concur in the views of the Commissioner, and recommend passage of the bill."

The general rule of construction of statutes is that an earlier special act is not repealed by a later general act by mere implication. The legislature is usually presumed to have only general cases in view, and not particular cases which have been already provided for by special act. This presumption does not prevail where there is something which shows that the attention of the legislature had been turned to the special act, and that the general one was intended to embrace the special cases within the previous law; or something in the general act making it unlikely that an exception was intended as regards the special act.

An intention to supersede local and special acts may be gathered from the designs of an act to regulate, by one general system or provision, the entire subject matter thereof, and to substitute for a number

of detached and varying enactments one universal and uniform rule applicable to all cases. See Endlich on Interpretation of Statutes, Secs. 223 and 231.

Applying these rules in construing the amendatory act of February 28, 1891, by taking into consideration the history of said act, the reports of the committees of Congress, the report of the Commissioner of the General Land Office, and the concurrence in his views by the then Secretary of the Interior, as well as the language used in said act, it is clear that Congress, in passing said act, intended that it should be applicable to all public land States alike, and intended that it should operate as a repeal of all special laws theretofore passed, in so far as they conflicted with its provisions.

This construction finds support in the departmental instructions issued on April 22, 1891 (12 L. D., 400), wherein said act was construed as repealing the provisions in the act of February 22, 1889 (25 Stat., 676), admitting North Dakota, South Dakota, Montana, and Washington, in so far as said act conflicted with the act of 1891, *supra*. See also *State of Nebraska v. The Town of Butte*, 21 L. D., 220.

In the case of *Johnston v. Morris*, 72 Federal Reporter, 890, the United States circuit court of appeals held, that the act of February 28, 1891, *supra*, was intended to provide a uniform rule for the selection of indemnity school lands, and is applicable to all States and Territories having grants of school lands. And that the State of California is entitled to make indemnity selections in the place of lands lost from its school sections by reason of being mineral lands.

In view of what has been said I am of opinion that the act of February 28, 1891, amending sections 2275 and 2276 is applicable to the State of California; and that under said act the State of California is entitled to select indemnity for school sections lost to the State by reason of their mineral character.

The case of the State of California, 15 L. D., 10, in so far as it conflicts with the views herein expressed, is hereby overruled.

(2) The Manual of Surveying, 1894, p. 11, section 99, paragraph 7, is as follows:

Every surveyor shall note in his field-book the true situations of all mines, salt licks, salt springs, and mill-seats, which come to his knowledge; all watercourses over which the line he runs may pass; and also the quality of the lands.

In the case of *Sutton v. State of Minnesota*, 7 L. D., 562, the Department held that the field notes of survey are presumptively correct, and should be taken as true until disproved by competent evidence. Also see *John W. Moore*, 13 L. D., 64.

In the case of *Johnston v. Morris*, *supra*, the circuit court of appeals for the 9th circuit held, that the return of the surveyor-general that sections sixteen and thirty-six were mineral land is sufficient to entitle the State to make selection in lieu of such mineral land.

In view of this decision, and of the uniform rulings of this Depart-

ment as to the effect of the return of surveyors, it is held that the return of sections sixteen and thirty-six by the surveyor-general as mineral land is sufficient evidence of its mineral character to entitle the State to select indemnity therefor in all cases where said return is not overcome by competent evidence to the contrary.

(3) The first section of the act of September 29, 1890 (26 Stat., 496), declares the forfeiture to, and the resumption of the title by, the United States of all lands heretofore

granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain.

In so far as the question under consideration is concerned, it is clear that forfeited railroad lands under said act occupy precisely the same position as any and all other public lands of the United States, and are subject to like disposition as public lands that never have been granted by Congress, or otherwise reserved or disposed of by the government.

The 6th section of said act provides:

That no lands declared forfeited to the United States by this act shall by reason of such forfeiture inure to the benefit of any State or corporation to which lands may have been granted by Congress, except as herein otherwise provided; nor shall this act be construed to enlarge the area of land originally covered by any such grant, or to confer any right upon any State, corporation, or person to lands which were excepted from such grant.

In the first place, it is clear that this section refers solely to rights which a State or corporation might seek to acquire by reason of any grant made by Congress for railroad purposes; that no State or corporation shall acquire any right or title to lands, forfeited under one railroad grant, under any other grant to it for railroad purposes.

The evident purpose of Congress was to forever remove from the claim of either a State or corporation any claim under a forfeited grant to all lands covered by such grant, and to restore them to the public domain, free, unincumbered and unfettered from all grants to such State or corporation for railroad purposes. This construction has been applied by the Department on principle in construing a statute somewhat similar in its terms to the act of September 29, 1890, *supra*. Ontonagon and Brule River R. R. Co. (13 L. D., 463, 476).

There is nothing in the act of September 29, 1890, *supra*, tending to show that Congress intended by it to affect in any respect the school grants theretofore made to the respective States.

Section 2275 of the Revised Statutes, as amended by the act of February 28, 1891, specifically appropriates and grants to the public land States and Territories "other lands of equal acreage," and says they

may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States.

In the case of the State of Oregon, 18 L. D., 343, the several acts of Congress relating to the subject of school land indemnity were carefully examined and reviewed in connection with the act of February 28, 1891, amending section 2275. On page 348, it is said:

It is to be observed that in all these laws there are no words of exception, save in the last cited, and that is of mineral land, so it follows that selections may be made of any public lands subject to disposal by Congress. Mineral lands had previously been excepted by construing the mineral laws *in pari materia* with school grants, but now they are specifically mentioned in amended section 2275, R. S. The power of Congress to provide for the disposal of the remaining alternate sections within railroad grants can not be disputed, for they are public lands, and as such subject to its disposal. In fact, they have been disposed of and are being disposed of under the public land laws, so, if the intent be clear, as announced in the laws providing for school indemnity selections, and I think it is, that the law was meant to allow selections of school lands lost in sections sixteen and thirty-six, acre for acre, regardless of price, whether single minimum, or double minimum, then it follows that lands within the granted limits of a railroad are subject to selection, if not mineral.

In said case it was further said, on page 350:

In view of the growing liberality of Congress in the disposal of the public lands, I can not believe that it intends any backward step to be taken, particularly with respect to the grants for the benefit of the public schools.

Concurring in these views, it is accordingly held that lands lying within the limits of a railroad grant forfeited by the act of September 29, 1890, are subject to selection as indemnity by the public land States for school lands lost in place.

RAILROAD GRANT—TERMINAL LINE—ADJUSTMENT.

NORTHERN PACIFIC R. R. Co.

The terminal line of the Northern Pacific grant at Duluth must be fixed at right angles to the last section of twenty five miles of the road.

Between Thomson and the city of Duluth the Northern Pacific company will not be entitled to indemnity for any lands to which the Lake Superior and Mississippi company may have been entitled under its grant.

All selections by the Northern Pacific company of lands east of the terminus established at Duluth should be canceled.

Secretary Francis to the Commissioner of the General Land Office, October 29, 1896. (F. W. C.)

With your office letter of September 26, 1896, is transmitted for the consideration and approval of this Department a diagram prepared under the decision of this Department of August 27th last, wherein the city of Duluth, in the State of Minnesota, was held to have been the eastern terminus or initial point of the Northern Pacific Railroad grant. Said decision held, upon the showing made, that there had been a confederation, consolidation or association between the Northern Pacific Railroad Company and the Lake Superior and Mississippi Railroad Company as contemplated by the provisions of section 3 of the act of July 2, 1864 (13 Stat., 365).

Between Thomson and Duluth the two grants are upon the same line. There had been a previous grant to the State of Minnesota for the Lake Superior and Mississippi Railroad, which was a grant of the alternate sections, designated by odd numbers, to the amount of five alternate sections per mile on each side of the line of said railroad within the State of Minnesota. This grant was made by the act of May 5, 1864 (13 Stat., 64), which provided for the adjustment of the road in twenty mile sections. The grant for the Northern Pacific Railroad provides for the adjustment in twenty-five mile sections.

Your office letter states,

as the terminal for the prior grant had already been established, that terminal, in fixing the final eastern terminal of the Northern Pacific grant, has been retained, but has been extended to meet the requirements of such grant.

I am unable to approve of the terminal as established, which, under the uniform rulings of this Department, should be at right angles to the last section of road. For the terminal established to the Lake Superior and Mississippi grant the last twenty miles was made the basis to which the terminal was adjusted, while under the Northern Pacific grant it is necessary to take the last twenty-five miles as the basis in adjusting the terminus, and I have to direct that a new terminal be established as the eastern terminus of the grant in accordance with the direction given.

The act of July 2, 1864, provides:

That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act.

As before stated, under the construction of this Department the line of both roads is the same between Thomson and Duluth. A line of the same character as a terminal line should therefore be established upon the Lake Superior and Mississippi Railroad at Thomson; and between the line thus established, and the eastern terminus of the Northern Pacific grant, when established under the directions herein given, the Northern Pacific Company will not be entitled to indemnity for any lands to which the Lake Superior and Mississippi Railroad Company may have been entitled under *its* grant.

This seems to me to be the purpose of the language above quoted, the intention of Congress evidently being to provide against making a double grant where two land grant railroads were found to be upon the same general line. This can only be arrived at by charging to the Northern Pacific all lands received by the company to which the first grant was made opposite the portion of the lines which are similar.

You request instructions as to the action which should be taken upon selections by the Northern Pacific Railroad Company lying east of the terminus established at Duluth, that is, whether they should be canceled outright or held for cancellation subject to appeal.

I can see no good reason for holding them for cancellation, the Department having fully considered and determined upon the eastern terminus, and all selections found east thereof will be canceled.

As to the lists to which you refer which were held for cancellation prior to August 27, 1896, it is presumed that the same refer to selections east of the terminus as established, and that the cases are now pending before this Department on appeal from your action. If this be so, the proper course to pursue will be to advise the Department of the particular facts in each case, to the end that such appeals may be speedily disposed of.

Herewith is returned the diagram submitted, for correction in accordance with the directions herein given.

APPLICATION FOR SURVEY—RES JUDICATA.

G. A. BURNS ET AL.

A decision of the Department directing a hearing on an application for survey of lands lying between the shore and meander line of a lake, in which the doctrine of riparian ownership is considered and held not applicable to the matters involved, renders such question *res judicata*, and the Department will not thereafter consider the same in the disposition of the case on the facts submitted at the hearing.

Secretary Francis to the Commissioner of the General Land Office, October 29, 1896. (E. M. R.)

This case involves a quantity of land estimated to contain about 1202 acres, lying in sections 2, 3, 4, 9, 10 and 11, of T. 57 N., R. 17 W., of the 4th p. m., Duluth land district, Minnesota, on and around the margin of Cedar Island lake, or Ely lake.

The petitioners claim that they are and have been for a long time, *bona fide* settlers upon different portions of the said land and ask that the same be surveyed and platted in order that they may make entry under the homestead laws.

On the other hand, the defendants claim that under patents issued, and swamp land grants made by the government, they have become by mesne conveyances, owners of the following fractional sub-divisions delineated on the map filed in your office, to wit, lots 1, 2, 3, 4, 5 and 6, of Sec. 2, containing 147.10 acres; lots 1 and 2, of Sec. 3, containing 74.75 acres; lots 1, 3, 5, 6, 7 and 8, of Sec. 4, containing 224.37 acres; lots 1, 2, 3 and 4, of Sec. 9, containing 148.10 acres; lots 1, 2, 3 and 4, of Sec. 10, containing 139.26 acres; and lots 1, 2 and 3, of Sec. 11, containing 125.80 acres, aggregating 859.38 acres, in the township aforesaid, forming a cordon of contiguous sub-divisions exterior to the lake aforesaid, and distant from its margin or water line, from one mile to a quarter of a mile at different points.

They claim that as the patentees of the above described 859.38 acres, they are entitled to the 1202 acres lying between said subdivisions and the lake.

January 28, 1895, a decision was rendered in this case (20 L. D., 28), ordering a hearing to be had to determine the facts involved in the controversy, and on April 8, 1895, a motion for review of that decision was denied (20 L. D., 295).

A hearing took place before the United States surveyor-general in Minnesota, in June, 1895; a number of witnesses were examined and the deposition of Simon J. Murphy was taken and considered.

On June 21, 1895, the surveyor-general transmitted his report upon the record, in which he finds:

I am of opinion and report, that the land between Lake Ely, as it actually exists; and the meander line of Cedar Island lake as noted in the field notes of Deputy Howe and as platted upon the government map, was actually in existence as high, rolling, and heavily timbered land, of good agricultural quality, at the time of the pretended survey of Deputy Howe in 1876. I have the honor to recommend that a survey of said land be directed as prayed for in the petition in this proceeding, for I am of opinion that said land was government land in existence at the time of the pretended survey, which has never been surveyed by the government.

On October 31, 1895, your office decision affirmed the recommendation of the surveyor-general and directed him to enter into a contract for the survey of the land in controversy, from which action the defendants appealed.

It is clearly shown by the record that no portion of the interior of this township has ever been surveyed by a government surveyor. The report of Deputy Howe in 1876 was absolutely and unqualifiedly false, and the courses and distances therein given did not represent an actual survey and had no stronger foundation in fact than his imagination. Consequently, the meander line of Cedar Island lake was never actually run, and the 1202 acres of land that now exist, did then exist, between the meander line established by him and the true meander line of said lake, and was never a portion of Cedar Island lake, but was high land, rolling and heavily covered by timber.

The Department has had some difficulty in arriving at a correct conclusion on the question as presented.

The hearing in this case went to two points: whether the physical facts as alleged in the submitted affidavits actually exist on the ground; and second, to establish fraud in the original survey and meander of Cedar Island Lake as executed by Deputy Howe.

The plat made in pursuance of the survey by Deputy Howe in 1876, was adopted and approved by the government as the official plat of this township. All the land in this township between December, 1879, and March, 1887, has been patented. Prior to the issuance of such patents, to wit, in 1879, complaints were made to your office as to the correctness of the survey as made and on June 11, 1879, despite such complaints, an investigation was denied and the plat approved.

On January 19, 1895 (20 L. D., 28), this Department rendered a decision in this case overruling your office decision of October 6, 1893, in

which it was held in reference to the decisions in the cases of *Mitchell v. Smale* (140 U. S., 371), and *Hardin v. Jordan* (*idem.*, 401), that—

The doctrine announced in those cases is not applicable to the one at bar, in that there is no question of riparian ownership here; there has been no recession of the waters of the lake; hence no accretions beyond the meander line, but it is insisted that the land between the meander line and the shore line is not, and never has been, a lake-bed, and by reason of the fraudulent survey, an area of about 1,200 acres of land has been included in the lake that is and was actually government land, and subject to homestead entry as such at the time the official map is alleged to have been made; that the rule that attaches accretion or reliction to the riparian title cannot be applied to this case, for the reason that meander lines were not run to and connected with the true shore line, but were so described as to leave a large area between these two points.

I am disposed to think this contention of counsel is sound. The showing made here is amply sufficient, in my judgment, to justify the belief that the survey by Howe was a palpable fraud upon the government; that there was no attempt made to make the meander lines conform to the shore line; and that government land does and did exist at the time the survey was made, reported and approved.

Under these facts, as they appear, I do not think the doctrine of riparian ownership is applicable to the question involved.

While the *ex parte* statements submitted are not sufficient in themselves to warrant an order for a re-survey, yet they are deemed sufficient to require a hearing to determine whether the physical facts actually exist on the ground, and also to establish the alleged fraud in the survey. This determination renders it unnecessary to discuss at this time any other question suggested.

Motion for review of this decision having been filed on April 8, 1895, the Department denied the motion for review in which it was said (305 L. and R., 486):

Review of this decision is now asked by *Murphy et al.*, who claim to own some of the abutting lots, and their contention is that the Department is without jurisdiction in this matter, for the reason that the land has been patented.

I deem it unnecessary to discuss this question at this time at any length, for the reason that all matters may be presented at the hearing and may be then fully considered in the light of all the facts.

It is only necessary to say that the Department does not seek to obtain jurisdiction over the patented lands; it is only those lands which it is alleged the government was deprived of by a fraudulent survey that can be affected by this hearing. The other question of riparian proprietorship was for the purpose of ordering a hearing, fully considered in the first instance, under the showing made, and it was determined that this doctrine did not apply to the case at bar.

An opportunity, however, was, by the order, given to all parties to be heard, so that all questions might be presented and considered in the final determination.

It is unnecessary to argue at length as to whether these decisions made the question of riparian proprietorship *res judicata*.

The only questions submitted by the original decision for hearing were the questions of fact as has been set out. The legal questions involved became *res judicata* by reason of the decision, nor can it be said that anything contained in the decision on review affected this status because the motion for review was denied. It is true it was said—"That all questions might be presented and considered in the

final determination" but clearly what must have been meant was all questions other than of riparian proprietorship; in other words, the questions of fact as to whether the survey was fraudulent and as to the actual existence of this land between the meander line and the true shore line of the lake. It could not have meant that the question of riparian proprietorship was left open because in the very motion for review it says:

The other question of riparian proprietorship was for the purpose of ordering a hearing fully considered under the showing made and it was determined that this doctrine did not apply to the case at bar.

The doctrine of *res judicata* is one recognized by all judicial tribunals and the correctness or incorrectness of a ruling made in such a case will not be considered.

A decision of one executive officer is binding upon his successor, except upon the grounds that would be sufficient for the ordering of a rehearing. *United States v. Bank of Metropolis* (15 Pet., 377); *Union Logging Co. v. Noble* (147 U. S., 165); *Stone v. U. S.* (2 Wall., 525); *Ex parte Michael Dermody* (11 L. D., 504).

The Department will not therefore go into a discussion of the question of riparian proprietorship and it appearing that counsel for the defendants admit that the facts alleged as a basis for the original ordering of a hearing are in fact true, the decision of your office appealed from is affirmed.

RAILROAD GRANT—LANDS EXCEPTED—JURISDICTION.

NEEDHAM *v.* NORTHERN PACIFIC R. R. Co.

An application to enter, erroneously rejected and pending on appeal, serves to defeat a railroad grant on definite location as to the land covered thereby.

Where lands have been erroneously awarded to a railroad company by decision of the General Land Office, the Secretary of the Interior may review such action without regard to the manner in which the matter is brought before him.

Secretary Francis to the Commissioner of the General Land Office, October 29, 1896. (W. A. E.)

The tract here involved, viz., the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 19, T. 13 N., R. 19 E., North Yakima, Washington, land district, is within the limits of the withdrawal of June 11, 1879, on amended general route of the branch line of the Northern Pacific Railroad, and on definite location of the road, as shown by map filed May 24, 1884, it fell within the primary or granted limits of said road.

February 6, 1891, John H. Needham filed homestead application for said tract, which was rejected for conflict with the railroad company's claim.

On appeal, the action of the register and receiver was affirmed by your office on May 22, 1895.

Needham then attempted to appeal to the Department, but for some reason that does not clearly appear, he did not file said appeal until after the time allowed therefor had expired. Your office accordingly declined to forward the appeal, whereupon Needham filed application for writ of certiorari.

It appears that on January 29, 1884, one John C. McCrimmon filed application to make timber culture entry for this land; that his application was rejected for the reason that the land had been withdrawn for the benefit of the railroad company; that he appealed and his appeal was pending before your office on May 24, 1884, when the map of definite location was filed; and that on March 21, 1885, your office affirmed the action of the register and receiver in rejecting his application.

It has been held by the Department that the withdrawal on amended general route of the Northern Pacific Railroad was without sanction of law and invalid. *Northern Pacific R. R. Co. v. Miller*, 7 L. D., 100; *Northern Pacific R. R. Co. v. Cole*, 17 L. D., 8.

The right of the company to the land in question did not attach, therefore, until May 24, 1884, the date of definite location, and at that time McCrimmon's application to make timber culture entry was pending before your office.

In the case of *Weeks v. Bridgman*, 159 U. S., 541, certain lands in Minnesota fell within the primary limits of a railroad grant, as shown by map of definite location filed December 30, 1857. Prior to that time, to wit, on August 7, 1857, one George F. Brott applied to file pre-emption declaratory statement for these lands, his application was rejected, he appealed, and his appeal was pending before your office at date of definite location. Held, that his pending application excepted the land covered thereby from the operation of the grant. It was said by the court:

The line of the road was definitely fixed December 30, 1857; the lands within the place limits then subject to the grant were thereby segregated from the public domain; and the grant took effect thereon. But under the granting act, lands to which pre-emption rights had attached, when the line was definitely fixed, were as much excepted therefore as if in a deed they had been excluded by the terms of the conveyance. And this was true in respect of applications for pre-emption rejected by the local land office and pending on appeal in the land department at the time of definite location, since the initiation of the inchoate right to the land would prevent the passage of title by the grant, and the determination of its final destination would rest with the government and the claimant.

McCrimmon's timber culture application was filed at a time when the land was legally subject to entry. It was made in proper form and was accompanied by an affidavit showing that the applicant was qualified to enter. The only ground on which it was rejected was that the land had been withdrawn for the benefit of the railroad company. His appeal from the rejection was pending before your office at the date of definite location of the road. In its essential features this seems to be a parallel case with the one just cited. The filing of a valid applica-

tion to make entry, at a time when the land was legally subject to entry, gave to McCrimmon an inchoate right to the land—a right that was still existing at the date of definite location of the road—and, as said by the supreme court,

the initiation of the inchoate right to the land would prevent the passage of title by the grant, and the determination of its final destination would rest with the government and the claimant.

It thus appears that the tract in controversy is now public land of the United States, subject to entry, and that the local office and your office erred in rejecting Needham's application to make homestead entry therefor.

In the case of the Sioux City and Pacific R. R. Co. *v.* Wrich, 22 L. D., 515, it was held that the Secretary of the Interior is charged with the adjustment of railroad grants, and should withhold from other disposition lands granted for such purpose, even though the grantee may fail to appeal from an erroneous adverse decision of the General Land Office.

It follows as a corollary from this ruling that where lands have been erroneously awarded to a railroad company by decision of your office, the Secretary of the Interior may review such action without regard to the manner in which the matter is brought before him. (See in this connection the case of Knight *v.* United States, 142 U. S., 181.)

You are accordingly directed to certify the record to this Department.

RAILROAD GRANT—WITHDRAWAL—ACT OF APRIL 21, 1876.

BRISKEY *v.* NORTHERN PACIFIC R. R. Co.

The provisions of section 1, act of April 21, 1876, protect a homestead settlement right acquired within the limits of a railroad grant prior to the time when the notice of withdrawal is received at the local office.

Secretary Francis to the Commissioner of the General Land Office, November 12, 1896. (W. F. M.)

The land involved in this case is in the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 13, township 24 N., range 17 E., in the land district of Waterville, Washington, and lies within the primary limits of the grant to the Northern Pacific Railroad Company as shown by the map of general route, branch line, filed August 15, 1873, and by the map of definite location filed December 8, 1884.

On March 7, 1893, George W. Briskey made homestead application for the land, alleging settlement in 1885.

A hearing was held to determine its status at the date of the withdrawal on general route and definite location. The register and receiver found for the plaintiff, who has brought the case here on appeal from

the decision of your office, reversing that of the local office and rejecting his homestead application for conflict with the company's grant.

The rights of the company under the withdrawal of August 15, 1873, have been held to have been abandoned (*Morrill v. Northern Pacific R. R. Co.*, 22 L. D., 636), and notice of the withdrawal on account of definite location was not received at local land office until January 7, 1888, long after Briskey's settlement in 1885.

The remedial features of the act of April 21, 1876 (19 Stat., 35), have been so extended by this Department as to protect persons who have settled on lands within the limits of any grant prior to notice of the withdrawal at the local land office (*Kimberland v. Northern Pacific R. R. Co.*, 8 L. D., 318), and though in that case a filing had been made of record after the said notice, and is in that respect distinguished from the present case, no difference is distinguishable in the equitable attitude of the parties.

I think, therefore, that Briskey is protected by the act, *supra*, and the decision of your office is accordingly reversed.

PERRY ET AL. *v.* HASKINS.

Motion for review of departmental decision of July 7, 1896, 23 L. D., 50, denied by Secretary Francis, November 12, 1896.

RAILROAD GRANT—DESERT ENTRY—SETTLEMENT CLAIM.

NORTHERN PACIFIC R. R. CO. ET AL. *v.* CANADAY.

A desert land entry made prior to the receipt of notice of withdrawal at the local office, by an actual settler, is protected under the provisions of section 1, act of April 21, 1876; and the operation of the statute is not defeated in such case by the fact that the entry was made after the passage of the act.

An adverse settlement claim will not defeat a desert entry if due priority of right is not shown thereunder.

A claim of occupancy and settlement is not effective as against a railroad grant if the claimant is not a qualified settler.

Secretary Francis to the Commissioner of the General Land Office, November 12, 1896. (I. H. L.) (J. L. McC.)

On March 15, 1886, Ira Canaday made desert-land entry for the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 27, and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 34, T. 22 N., R. 21 E., Waterville land district, Washington.

On February 12, 1889, he applied to make final proof; which, after due notice, was made April 15, 1889.

Upon making proof he was confronted by protests from the Northern Pacific Railroad Company, and from one Alfred Thomas.

By your office letter of June 12, 1889, a hearing was ordered to determine the rights of the parties. The hearing was had on August 11, 1890. All parties were represented.

As the result of the testimony taken at said hearing, the local officers recommended the acceptance of Canaday's final proof. Both Thomas and the railroad company appealed to your office.

On May 20, 1895, your office affirmed the decision of the local officers in favor of Canaday.

A motion for review was filed; but your office, on August 26, 1895, announced that it found no reason for disturbing its previous decision.

Both Thomas and the railroad company have appealed to the Department.

I.—Canaday and the Railroad Company.

The claim of the Northern Pacific Railroad Company to the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 27, conflicting with Canaday's claim, will be first considered.

The land is within the forty-miles limit of the branch line of said company's road, as shown by the map of definite location filed December 8, 1884. It was also embraced in the withdrawal on the map of general route, filed August 15, 1873; but it fell outside of said withdrawal on the map of amended route, filed June 11, 1879. It was "listed" by the company, per list 2, on April 8, 1893.

The railroad company alleges, in substance, that inasmuch as Canaday claims by virtue of a desert-land entry, he could acquire no right by virtue of settlement made prior to entry; that the withdrawal of 1873 was of continuing force and effect, and reserved said land from settlement and entry; hence that the settlement of Canaday in 1883, and his desert-land entry of 1886, were alike illegal—the first because of the withdrawal on general route; the second because of withdrawal on definite location.

The Department has decided, in the case of *Morrill v. The Northern Pacific Railroad Company* (22 L. D., 636), that the route of 1873 was abandoned by the company, and the Department duly notified thereof as early as 1876; and that the withdrawal of 1873 can not be pleaded as against parties who settled upon or entered lands prior to the filing of the map of definite location. Canaday's settlement (in 1883) was made before, and his desert-land entry (on March 15, 1886,) was made after, the date of the filing of the map of definite location (December 8, 1884); but notice of the filing of said map was not received at the local office until January 26, 1888; hence until the latter date the land was free from any valid claim by the company as against a prior entryman or settler, and there was nothing to prevent Canaday's claim from attaching by virtue of his entry of March 15, 1886 (*supra*). The fact that it was a desert-land entry does not alter the case, inasmuch as the act of April 21, 1876 (19 Stat., 35), saves "all pre-emption and homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith, by actual settlers," prior to the time when notice of the withdrawal was received at the local office. The fact that said entry was made subsequently to the

passage of said act does not prevent its applicability to the case at bar—Canaday having been shown to be an actual settler. (*Northern Pacific Railroad Co. v. Crosswhite*, 20 L. D., 526; *Offutt v. Northern Pacific R. R. Co.*, 9 L. D., 407.)

For the reasons above given, that part of your office decision which holds for cancellation the company's claim to so much of the land in the odd section (27) as is in contest between said company and Canaday is hereby affirmed.

II.—Canaday and Thomas.

Alfred Thomas, on April 18, 1893, filed application to enter the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 27, and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 34, alleging settlement in October, 1883.

This claim conflicts with that of Canaday as to the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 27, and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 34.

Your office decision appealed from rejected his claim because at the hearing had on August 11, 1890, he had testified as follows:

Q.—Have you ever taken any lands under the United States land laws?—A. Yes.

Q.—Under what law did you take them?—A. Homestead, pre-emption, and timber-culture laws.

The above would seem to be sufficiently explicit; but his application to make homestead entry was accompanied by an affidavit to the effect that he had never before made any entry under the homestead laws of the United States; and his application to your office for a review of its decision of May 20, 1895, and in his appeal to the Department, he insists that he never said he had exercised his homestead, pre-emption, and timber-culture rights, and that if the record so states he had been mis-reported; and he asked for a hearing, asserting that he can show conclusively that he has not exhausted his homestead right.

It appears to me that the question as between him and Canaday can be decided irrespective of the question as to whether or not he had previously exhausted his rights.

In his testimony at the hearing he stated that he "first knew the land in the fall of 1883, about October." In his motion for a rehearing (on the ground of newly discovered evidence) he supported his application by affidavits of several persons, who stated that they saw him in the vicinity of the land in October or November of 1883.

On the other hand, Canaday testified that he first went upon the land, and selected it, in May, 1883—remaining upon it at that time about four days; that he returned in October, said Thomas accompanying him, and took actual possession of the land selected and settled upon in May preceding. This testimony is not denied. He testified further:

Thomas proposed to divide the land. . . . We divided the land and I gave him his choice. He said he would take the S. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 27, and the N. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 34. I then took the S. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 27, and the N. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 34, T. 22 N., R. 21 E.

The above testimony is not denied, and is corroborated by that of a witness who states that Thomas told him that such a division had been made.

In view of the facts shown, the local officers and your office both found that Canaday had established a prior and paramount right to the land in controversy between the two; and I see no reason for disturbing said decision in so far as regards said land.

III.—Thomas and the Railroad Company.

The conflicting claims of Thomas and the railroad company to the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 27 still remain to be considered.

In regard to this branch of the case the local officers said:

From the testimony we find that Thomas went on the land he now seeks to enter in October, 1883, and located a ditch to convey water upon the land, and set up a notice. In the spring of 1884 he fenced about twenty-five acres, and plowed six acres.

The above refers to the entire one hundred and sixty acres which Thomas applied to enter. Then the local officers go on to speak of the specific forty-acre tract now under consideration:

About fifteen acres of the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ was enclosed in said fence, and about one and a half acres put in wheat in the spring of 1884.

Therefore they held that his settlement and occupancy excepted the land from the operation of the grant.

The decision of your office upon this branch of the case was as follows:

Whatever rights Thomas may have had as against the railroad company, by reason of settlement on the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 27, the evidence in support of which, being of the most unsatisfactory character, he has attempted to perfect such claim by application to make homestead entry, alleging that he had not previously exercised his right, while the record before me shows that in 1890 he swore that he did. The said application is accordingly rejected.

In my opinion the local officers were correct in finding that Thomas's settlement and occupancy of the forty acres now in question was such as to except it from the operation of the grant—*provided* he was a qualified settler. Inasmuch as he insists that he has never exercised his homestead right, and that he was misreported in the testimony in which he is represented as saying that he had, I see no way of deciding this branch of the case intelligently with the question of his qualifications left undecided and uncertain. I have therefore to direct that a hearing be ordered, as prayed for by Thomas, at which he shall be afforded opportunity to show whether he has or has not hitherto exhausted his homestead right. In case it shall appear that he has not done so, his application to enter so much of the land claimed by him as has not hereinbefore been awarded to Canaday will be allowed.

The decision of your office is modified as above indicated.

HOMESTEAD CONTEST—SETTLEMENT CLAIM—SECOND ENTRY.

SMITH ET AL. *v.* TAYLOR.

A homestead settlement, made by one who has at such time an existing homestead entry for another tract, must be held valid where the settler is entitled to make a second entry; and a second entry based on such settlement, and allowed prior to the actual cancellation of the first, though irregular, may stand.

Secretary Francis to the Commissioner of the General Land Office, November 12, 1896. (I. H. L.) (E. B., Jr.)

This is a contest for the NE. $\frac{1}{4}$ of section 35, T. 22 N., R. 1 W., Perry, Oklahoma, land district, under the homestead law. The tract is within what was formerly known as the Cherokee Outlet which was opened to settlement and entry under the homestead law at noon of September 16, 1893. It lies three and one half miles north of Perry and twelve and one half miles north of the southern boundary of said outlet.

William J. Taylor made homestead entry No. 12 for the tract on the day of the opening at 2:45 p. m. On September 20, David R. Smith, and on October 9, 1893, William L. Maupin initiated contests against said entry, alleging, each, that he was the first settler on the land. On March 20, 1894, Maupin filed his supplemental affidavit alleging that Taylor had a homestead entry on file at the Guthrie, Oklahoma, land office, for the NE. $\frac{1}{4}$ of Sec. 17, T. 15 N., R. 3 W., at the time he made said entry No. 12. The cases were consolidated and went to trial June 21, 1894. January 15, 1895, the local office decided in favor of Smith holding, that he was the first settler on the tract, and followed up his settlement according to law, that Maupin's claim to the tract was subordinate to those of the other parties, he never having established residence upon the land up to the day of the trial, and that Taylor "obtained no rights whatever by reason of his homestead entry" for the land, in view of the fact that he had then a subsisting homestead entry as alleged by Maupin.

Upon appeal by Taylor and Maupin your office decided, August 10, 1895, that Taylor was the first settler on the land and established his residence thereon, improved and cultivated the same as required by law, and held his entry, though irregularly made, to be intact. It appearing that the entry made by Taylor at the Guthrie office April 30, 1889, had been finally canceled on the records of your office, November 22, 1893, under decisions of the Department dated February 24, 1893, and September 23, 1893 (the latter on a motion for review), awarding the land covered thereby to the successful contestant Nicholas Jackson, on the ground of his prior settlement, your office held that such entry did not invalidate Taylor's entry of the tract in controversy.

Smith and Maupin each prosecutes an appeal to the Department. The numerous assignments of error in these appeals may be reduced to two:

1. Error in holding that Taylor was the first to make settlement on said tract;

2. Error in holding that Taylor was not disqualified to make settlement and entry for the tract involved in this contest by reason of the entry previously made by him at Guthrie.

The testimony is very voluminous, and somewhat conflicting. It shows, however, that Taylor and Maupin began the race for a homestead in the Cherokee Outlet at the hour appointed for the opening from about the same point on the southern boundary thereof, a little west of south from the said tract, and about thirteen miles from where they stuck their stakes thereon, and that Smith began the race from a point on the same boundary a little east of south from the said tract and about fourteen miles from where he struck his stake thereon. They all made the race on horseback. Taylor had an advantage over his competitors in that he was to some extent familiar, while they were not, with the country over which they traveled and had been over the particular region of the tract in controversy just prior to the inhibited period of entry upon these lands, which commenced March 3, 1893. I find the other material facts to be substantially as found by your office and set out in its decision. They need not be recited here in detail.

The precise moment at which Taylor stuck his flag on the land can not be determined, as he had no watch and no one, apparently, saw him in the act. Two Otoe Indians testify that they saw him on or near the tract riding rapidly away from it toward Perry at about one o'clock P. M., as near as they could tell from the sun, on the day of the opening. They had no watch. One of them testifies explicitly to seeing then a flag at about the point where Taylor's was stuck. Taylor arrived at the Perry land office, as is shown by his own testimony and that of U. S. Deputy Marshal Pulse, of whom he asked the time and who aided him in securing a place in the line there, at 1:07 P. M. Smith admits that he saw a flag on tract as he rode by and before he stuck a stake thereon, or laid claim thereto, at about the point where Taylor testifies that he stuck the flag. Smith and his witnesses testify that Smith stuck or attempted to stick his stake at about 12:48 P. M. But his admission as to seeing the flag, and the testimony of the Otoe Indians, as well as that showing the time of Taylor's arrival at the land office, are all strongly in favor of the latter. The conclusions of the local office and your office, that Maupin's rights are subordinate to those of the other parties, are fully sustained by the evidence.

Unless the first entry made by Taylor disqualified him for making settlement on said tract his settlement was prior to that of either Smith or Maupin. He was first on the land and first laid claim thereto in the manner recognized and approved by the custom in Oklahoma Territory, and warranted by the law, and has shown full compliance with the law in the matters of residence and cultivation since. It must be conceded that his second entry, while the first was yet uncanceled—and perhaps his settlement also for the same reason—was irregular. But were both settlement and entry, or either of them, nullities—absolutely void—on that account? The Department does not so hold in view of all the

circumstances of the case. Judgment of cancellation on the ground already indicated had been entered by the Department against his first entry February 24, 1893 (262 L. and R., 359). This judgment would have been executed by the cancellation of the entry upon the records, but for Taylor's motion for review which only suspended its operation. The testimony shows that subsequent to the filing of such motion Taylor manifested an intention to accept and acquiesce in said judgment. In his homestead affidavit filed September 16, 1893, he swears that his application for the tract in contest

is honestly and in good faith made for the purpose of actual settlement and cultivation and in good faith to obtain a home for myself.

This is only consistent with the view that he regarded his former entry as lost to him and to all intents and purposes the same as if then already canceled.

His first entry was defeated through no fault of his, but by reason of a superior right in another to the land covered thereby. It is well settled doctrine that he did not therefore lose his homestead right. The Department has frequently upheld the right to make a second entry in cases where the equities were, to say the least, no stronger than in this case (James M. Frost *et al.*, and cases cited therein, 18 L. D., 145). If the right to make a second entry were not lost to Taylor he certainly was not disqualified to make settlement on the tract. His settlement being valid and prior to the alleged settlements of Smith and Maupin, his right to the tract in controversy must be held superior to their claims. So far as they are concerned, standing upon his settlement alone, he must prevail. The irregularity of his second entry would not defeat his superior right as a settler. If that entry should be canceled for such irregularity it would be without prejudice to his right to make again entry for the same tract. Cancellation under these conditions would be a vain act.

The entry will be allowed to stand. The decision of your office is affirmed.

ALASKAN LANDS—APPROVAL OF SURVEY.

THE LYNDE AND HOUGH COMPANY.

The government is not bound by an erroneous approval of field notes and plat of survey, under section 13, act of March 3, 1891, to issue patent contrary to the provisions of said act requiring land to be taken as nearly as practicable in a square form.

Secretary Francis to the Commissioner of the General Land Office, November 12, 1896. (I. H. L.) (J. A.)

This is an appeal by the Lynde and Hough Company, a corporation, from the decision of your office of July 31, 1895, holding for cancellation the final certificate issued to said corporation December 5, 1893, for

the "tract of land embraced by United States survey No. 55, at and near Humboldt harbor, on Popoff Island, in Alaska, containing 135.07 acres."

The said survey was made on the application of the Lynde and Hough Company to the ex-officio surveyor general of Alaska under sections 12 and 13 of the act of March 3, 1891 (26 Stat., 1095), and covers a narrow strip of land of irregular form running along the coast of Humboldt harbor and of Popoff straits for a distance of about three miles. The survey was approved by the ex-officio surveyor general of Alaska on December 26, 1892, and by your office on June 12, 1893. August 12, 1893, the company filed its application to purchase the land and on the same day gave notice of intention to make final proof. December 5, 1893, final proof taken in California on a commission issued by the local officers was submitted, whereupon the ex-officio register issued final certificate for the land to said company.

July 31, 1895, your office considered the case on the papers transmitted by the local officers and held that the final proof is insufficient for reasons which it is not necessary here to set out, and that final proof for lands in Alaska can not be made before other officers than the ex-officio register and receiver. Your office further held that patent can not issue to said company for the reason that the survey was made in violation of section 12 of said act of March 3, 1891, which provides that the land must be taken as near as practicable in square form. The final certificate issued to the company was therefore held for cancellation.

The appellant contends that the irregularities in the final proof can be cured by supplemental proof and therefore did not warrant the order of cancellation, and that your office is estopped by the approval of the field notes and plat from objecting to the form of survey.

Section 13 of said act of March 3, 1891, after making provision for the survey of lands upon the application of the occupant, and for the transmission of certified copies of the maps and plats of survey to the General Land Office, provides as follows:

That when the said field notes and plats of said survey shall have been approved by the said Commissioner of the General Land Office, he shall notify such person, association, or corporation, who shall then within six months after such notice, pay to the said United States marshal, ex officio surveyor-general, for such land, and patent shall issue for the same.

The issuance of patent for a strip of land like the tract in controversy was not contemplated by the act of March 3, 1891. The provision of section 13 of said act, above quoted, did not estop your office, on an application for patent, from considering the fact that the survey is irregular. The insufficiency of the final proof and its irregular submission does, therefore, not enter into a consideration of the case.

The action of your office in cancelling the final certificate amounts, in effect, to a revocation of the approval of June 12, 1893, of the field notes and plat of survey. The government has control over the public

lands until patent has issued, and it is not bound by an erroneous approval of the field notes and plat of survey under section 13 of the act of March 3, 1891, to issue patent contrary to the provisions of said act. The decision appealed from is accordingly affirmed.

WEEDIN *v.* LANGER.

Motion for review of departmental decision of August 28, 1896, 23 L. D., 248, denied by Secretary Francis, November 12, 1896.

FINAL PROOF—AMENDED RULE 53 OF PRACTICE—PROTEST.

KEAGY *v.* WILCOX.

When final proof is submitted under amended Rule 53 of Practice, pending the disposition of a contest involving the land, it should be held for appropriate action in the event the entry is adjudged valid, and until such time no action can be legally taken thereon by way of proceedings on protest in the local office.

Secretary Francis to the Commissioner of the General Land Office, November 12, 1896. (I. H. L.) (C. J. W.)

In transmitting the motion of Elba O. Wilcox, to set aside the decision of the register and receiver, in which on considering his final proof, they found that he had abandoned the land to which said proof related, and recommended the cancellation of his entry, your office makes the following statement:

I will state that in the matter of a former proceeding had between the same parties on the issue of prior settlement, the land involved (SE. $\frac{1}{4}$ Sec. 4, T. 25, R. 2 W., Perry land district) was awarded to Wilcox, by departmental decision rendered March 28, 1896, and case closed by this office July 22, 1896.

October 28, 1895, Wilcox submitted commutation proof. On the date set for making proof, Keagy filed affidavit of protest, alleging non-compliance with the law as to residence, and the case went to trial on such issue. Decision was rendered by the local office June 12, 1896, recommending the cancellation of the entry, personal service of such decision being made on the parties June 13, 1896. On July 28, 1896, the within motion was filed. It appears that Keagy's motion was never filed. See statement of plaintiff's attorney, and report from the local office, also transmitted herewith. There is no record of receipt by this office. Action on the case is held waiting the disposition of the motion transmitted herewith.

Keagy files motion to dismiss the motion to set aside the decision of the local officers and declare the same final because not appealed from, which is overruled.

The original motion denies the authority of the local officers to take action on the final proof of Wilcox, made pending the contest between him and Keagy then before the Department, and their jurisdictional authority to hear any further testimony in the nature of a contest pending said original case. This position is well taken, and is in

accordance with the ruling of the Department in the recent case of *The State of California v. Reeves* (23 L. D., 377), wherein it was held that pending a contest before the Department, the local office was without jurisdiction to entertain another contest against the same party involving the same land, and that evidence submitted at such second hearing could not be considered in determining the first contest.

Rule 53 of Practice, as amended March 15, 1892 (14 L. D., 250), permits an entryman after trial of a contest before the local office and before the entry is finally adjudged valid to submit final proof and complete the same, with the exception of the payment of the purchase money or commissions as the case may be, but directs that said final proof be retained in the local office to be disposed of after the entry is finally adjudged valid.

Under Rule 53 as it originally stood the local officers could have taken no additional action whatever affecting the status of the land pending appeal from that office, and as the rule is enlarged by amendment, only to the extent of allowing the entryman to submit his final proof to be held in the office for action after the entry is finally adjudged valid, it confers no authority for action on a protest or other additional proceeding against the entry. It follows that the action of the local officers in rejecting the final proof of Wilcox, and recommending the cancellation of his entry based on proof taken in unauthorized protest proceedings, was illegal and should be set aside.

Your office will direct the local officers, after giving due notice of this decision, to consider said final proof as offered by the entryman, and take appropriate action thereon, without reference to the testimony prematurely submitted by protestant, allowing him, if he desires to do so, to be now heard on his protest, and to submit testimony in support of it.

RAILROAD GRANT—ACT OF MARCH 2, 1896.

WASMUND *v.* NORTHERN PACIFIC R. R. CO.

The joint resolution of May 31, 1870, was in the nature of a new grant, and only such lands as were in a condition to pass under the terms of the grant to the company, at the date of the passage of said resolution, were intended to be granted thereby.

Where the title of a purchaser of lands excepted from a railroad grant is confirmed by the act of March 2, 1896, demand should be made upon the company for the minimum government price of the land, with a view to judicial proceedings for the recovery of the value thereof as contemplated by said act.

Secretary Francis to the Commissioner of the General Land Office, November 12, 1896. (F. W. C.)

With your office letter of November 7, 1895, you transmitted the papers in the case of *Carl Wasmund v. Northern Pacific Railroad Company*, involving the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of

Sec. 1, T. 19 N., R. 4 E., Olympia land district, Washington, on appeal by Wasmund from your office decision of May 25, 1895, in favor of the company.

This tract is within the primary limits of the grant for the altered branch line and also opposite that portion of the main line of said company extending northward from Portland, Oregon, to Puget Sound, to aid in the construction of which a grant was made by the joint resolution of May 31, 1870 (16 Stat., 378).

The map showing the line of definite location of the main line opposite this land was filed May 14, 1874, and that showing the definite location of the branch line opposite this land was filed on March 26, 1884. The company included the tract in its list of June 30, 1888, upon which patent issued December 13, 1894.

The present case arose upon an application tendered by Wasmund in August, 1885, which was rejected by the local officers for conflict with the grant; from which action he appealed, the papers being forwarded with registered letter on August 29, 1885. Upon the allegations made in said appeal hearing was ordered by your office letter of January 2, 1889, which was duly held, the local officers recommending the allowance of Wasmund's application. From this action the company appealed to your office, and the matter was thus pending at the time the tract was included in a clear list by your office and submitted for approval.

The records show that one W. H. Fleetwood on November 23, 1872, filed preemption declaratory statement for this land, alleging settlement August 1, 1870. Upon his offer of proof thereon the matter was contested by the company and Fleetwood's filing was canceled June 16, 1877, for illegality; your office finding that he was a minor and not the head of a family at the time of his settlement in November, 1870, which was subsequent to the filing of the map of general route of the main line of said company, August 13, 1870, the withdrawal upon which included this land.

Upon the evidence adduced at the hearing ordered upon Wasmund's application, your office decision held as follows:

While the evidence in this case shows that Stilly settled and resided upon this land from the fall of 1868 until the fall of 1870, as what he terms "a squatter," without having made or announced any formal claim thereto; that fact alone, in the absence of affirmative evidence that he was, at the date of the withdrawal made on the map filed August 13, 1870, qualified to assert a claim to the land under the settlement laws, would not be sufficient to except it from the operation of the grant, and there is no evidence in this case to show that Stilly was so qualified at that time, except by an affidavit made by him September 14, 1894, and filed in this office November 27, following, after service of same on October 2, upon the resident attorney of the company.

It is shown by a certified copy of a deed, dated May 30, 1878, that the Northern Pacific Railroad Company on that day conveyed to one Isaac W. Anderson the land in question, reserving for the right of way of its road four hundred feet in width through the same, and by certified copy of another deed, dated December 3, 1881, that said Anderson conveyed same land to Carl Wasmund.

The question of the competency of Stilly's affidavit as evidence to prove his qualifications during his occupancy of this land need not be gone into in this case, as Wasmund has a deed to the land flowing from the company's title, and the land has been patented to the latter, which divested this Department of jurisdiction over it; and reversed the judgment of the local officers in favor of Wasmund, who appeals to the Department.

It appears from the record in the case of *William Fleetwood v. Northern Pacific R. R. Co.*, which is by stipulation a part of the record in the case under consideration, that Fleetwood took the deposition of Stilly before the local officers, which shows that he was a duly qualified settler and was claiming the land as a preemptor at the date of the passage of the joint resolution of May 31, 1870 (*supra*). This renders it unnecessary to pass upon the question as to whether the affidavit of Stilly filed in your office November 27, 1894, can be properly considered as a part of the record in the disposition of this case. With Stilly's qualification established it is clearly shown that this land was, by reason of Stilly's claim, appropriated at the date of the passage of said joint resolution. It is true that Stilly had not filed for the land, but this he could not do because the land was then unsurveyed, the plat of survey of said township not having been filed in the local office until 1870.

In the case of the *United States v. Northern Pacific R. R. Co.* (152 U. S., 284), in referring to the joint resolution of May 31, 1870, it was stated that:

By the resolution of 1870 it was declared that if at the time of the final location of the company's main line or branch there were not enough lands per mile within the prescribed limits, the deficiency could be supplied from lands within ten miles beyond those limits, other than mineral and other lands as excepted in the charter of the company "to the amount of the lands that have been granted, sold, or reserved, occupied by homestead settlers, pre-empted or otherwise disposed of subsequent to the passage of the act of July 2, 1864." It is therefore clear that no public land disposed of after the passage of the act of July, 1864, was intended to be embraced in the grant of May 31, 1870.

In the case of *Corlis v. Northern Pacific R. R. Co.* (23 L. D., 265) it was held, that in determining what lands passed to the altered main or branch line, as provided for by the joint resolution of May 31, 1870, said resolution must be considered as in the nature of a new grant, and that only such lands as were in a condition to pass under the terms of the grant to said company at the date of the passage of said resolution were intended to be granted thereby. Said resolution provided for the selection of indemnity

to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of subsequent to the passage of the act of July 2, 1864.

It is plain that Stilly's claim was included in the exception from the grant provided for under the resolution before referred to, and this being the condition of the land at the date of the passage of said resolution, it is excepted from the grant to said company upon either its

altered main or branch line. This being so, it follows that the cancellation of Fleetwood's filing on account of the grant for said company was therefore erroneous. There is no claim pending before the Department on account of said filing, however, and a further consideration at the present time of any rights on account thereof is unnecessary.

Your office decision holding that the tract passed to the company under its grant is accordingly reversed.

Wasmund not only claims the land under his application presented in 1885, but also holds the tract through mesne conveyances from the company. This being so, as between Wasmund and the United States a suit for the recovery of title would be unnecessary, as his claim would seem to be confirmed by the provisions of the act of March 2, 1896 (29 Stat., 42), I have therefore to direct that demand be made upon the company for the minimum government price of the land, to the end that, should it refuse, steps may be taken looking to the institution of suit to recover the value thereof through the courts, as contemplated by said act.

STONE ET AL. *v.* CONNELL'S HEIRS.

Motion for review of departmental decision of August 4, 1896, 23 L. D., 166, denied by Secretary Francis, November 16, 1896.

JURISDICTION—SECOND CONTEST—EVIDENCE.

STATE OF CALIFORNIA *v.* REEVES.

During the pendency of an appeal the local office has no jurisdiction to entertain contest proceedings affecting the land involved, and evidence submitted at such a hearing can have no effect as against the entry under attack.

Secretary Francis to the Commissioner of the General Land Office, November 16, 1896. (I. H. L.) (A. E.)

On September 12, 1896, Peter Mathiason, by his attorney H. W. Duncan, filed in the local office a motion, alleging errors in departmental decisions, dated July 1, 1896, rendered in a case entitled *State of California v. Albert F. Reeves* (23 L. D., 377). The land involved in the last-named case was the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 18, Tp. 5 N., R. 10 W., S. B. M., Los Angeles, California.

The record relating to this land shows that one Cora L. Mathiason secured the cancellation of desert land entry covering the N. $\frac{1}{2}$ and the SE. $\frac{1}{4}$ of said section above mentioned.

On August 10, 1894, before Mathiason was notified of her preference right by reason of securing the cancellation of the entry on the land, one Albert Reeves applied to make desert land entry of the N. $\frac{1}{2}$ of the section. This application was held to await the expiration of the thirty days within which Mathiason had to exercise her preference.

Mathiason was duly notified of her right on August 16, 1894.

On September 13, 1894, the State of California presented its selection of the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the same section. Action on this was also suspended to await the pleasure of Mathiason.

On the same day, but subsequent to the selection of the State, Mathiason made entry of the SE. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section. This left the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the section vacant.

The local office then notified Reeves, and on October 16, 1894, he came in and made entry of as much land covered by his application as was vacant, which was the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said section.

The State selection for the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ was then rejected. The State then appealed, and from your office decision of December 28, 1894, upholding the local office, it appealed to this Department.

In this appeal the State was represented by one H. W. Duncan, who signed himself as attorney for the State. While this appeal was pending here the Secretary received a letter from Mr. Duncan requesting that action on the case of *California v. Reeves* be deferred until testimony, being taken reflecting on the entry of Reeves, could be forwarded.

In answer to this letter the First Assistant Attorney, under direction of the Secretary, on January 31, 1896, sent the following reply (Miscel. letter book, 323):

I am directed by the Secretary to say to you, in answer to your letter of January 22, 1896, requesting him to defer action on the case of the State of California *v. Albert F. Reeves*, that the case referred to is now under consideration, and should the same result in a decision in favor of the State, the testimony you refer to could not be considered. Should, however, the entry of Reeves be upheld, any evidence indicating that the entry should be canceled must be presented to the officers of the district land office, in accordance with the rules relating to contests.

On February 17, 1896, the Department affirmed the decision of the General Land Office in rejecting the State's selection, and allowed the entry of Reeves to remain intact.

On May 25, 1896, the General Land Office transmitted a motion for review of this last above mentioned decision filed by H. W. Duncan, who signed himself attorney for the State of California. With this motion Mr. Duncan filed what was alleged to be testimony taken in a contest case entitled *Peter B. Mathiason v. Harlan B. Sweet*, assignee of Albert F. Reeves. This was presumably the same testimony referred to by Mr. Duncan in his letter of January 22, 1896, and which the Secretary had directed must be presented to the local land office "in accordance with the rules relating to contests."

This testimony, having been taken when the Secretary had exclusive jurisdiction of all matters relating to the land in controversy, and the local officers no jurisdiction, and not therefore being presented at the local office "in accordance with the rules relating to contests," was not considered. The Department, by decision dated July 1, 1896, referred

to the hearing as "irregular, erroneously allowed, and was without jurisdiction."

Your office now transmits a motion by H. W. Duncan, as attorney for Peter B. Mathiason, asking that the decision of July 1, 1896, holding that the hearing in the case of Mathiason v. Sweet was "irregular, erroneously allowed, and was without jurisdiction," be reviewed.

As no reason is shown wherein this holding was incorrect, the motion must be denied. The reasons for this are as follows:

When the State appealed, and by that act the entry of Reeves became suspended and the local office lost jurisdiction, there was no contestable entry of record, nor did any tribunal have jurisdiction to conduct a hearing. The testimony taken before the local officers was therefore void, so far as it could affect the entry of Reeves. Mr. Duncan, attorney for Mathiason, admits in the motion under consideration that Mathiason was the real party in interest in the first case, therefore it was by Mathiason's appeal that the local office lost its jurisdiction.

It is noticed that a copy of the motion now under consideration is not served upon Reeves, but only on Sweet, therefore so far as the record shows, Reeves has no notice of this proceeding. In view of the conclusion reached, however, this neglect is not material.

The papers are herewith returned, and the judgment rendered in the decisions of February 17, and July 1, 1896, will remain as handed down.

DESERT ENTRY—PRICE OF LAND—ACT OF MARCH 3, 1891.

FREDERICK W. LAWRENCE.

The act of March 3, 1877, did not reduce the price of desert land within the limits of railroad grants to single minimum; nor did the amendatory act of March 3, 1891, operate to reduce the price of such lands embraced within entries under the original act, but on which final proof had not been submitted at the passage of the amendatory act.

Secretary Francis to the Commissioner of the General Land Office, November 16, 1896. (I. H. L.) (E. M. R.)

This case involves the S. $\frac{1}{2}$ and the SW. $\frac{1}{4}$ of Sec. 32, T. 36 S., R. 25 E., Visalia land district, California.

The record shows that on April 2, 1877, Frederick W. Lawrence made desert land entry for the above described tract and final certificate was issued on January 17, 1896.

On April 23, 1896, your office decision was rendered suspending the entry for the reason that only \$1.25 per acre had been paid and holding that unless an additional payment of that amount was made within sixty days, or appeal taken, the entry would be canceled without further notice. From this action Lawrence appealed.

The land embraced by this entry covers four hundred and eighty acres and is situated within the twenty miles limits of the grant to aid in the construction of the Southern Pacific railroad company.

Section 2357 of the Revised Statutes is as follows:

The price at which the public lands are offered for sale shall be one dollar and twenty-five cents an acre; and at every public sale, the highest bidder, who makes payment as provided in the preceding section, shall be the purchaser; but no lands shall be sold, either at public or private sale, for a less price than one dollar and twenty-five cents an acre; and all the public lands which are hereafter offered at public sale, according to law, and remain unsold at the close of such public sales, shall be subject to be sold at private sale, by entry at the land office, at one dollar and twenty-five cents an acre, to be paid at the time of making such entry; *Provided*, that the price to be paid for alternate reserved lands along the line of railroads within the limits granted by any act of Congress, shall be two dollars and fifty cents per acre.

A circular was issued on June 27, 1887 (5 L. D., 708), in which it was stated that the price which desert lands were to be paid for would be the same as established by the pre-emption law; that is, minimum land at \$1.25 an acre and double minimum at \$2.50 per acre. Subsequently, on September 15, 1887 (6 L. D., 145), these instructions were modified. It was said:

The former rulings of the Department which had been in existence from the date of the act (1877) until the date of the present circular, had, while it existed, the force and effect of law so far as rights acquired under it are concerned; was a construction of the law by the head of the Department charged with the execution of it. The law was administered according to this construction.

The ruling then in force was \$1.25 per acre, and in the opinion, *supra*, it was held to be all that was required to be paid, despite the fact that the land was within double minimum limits.

The act of March 3, 1877, under which this entry was made (19 Stat., 377), enacted that any qualified citizen of the United States upon payment of twenty-five cents per acre, might file a declaration under oath, with the proper authorities, that he intended to reclaim a given tract by conducting water thereon within three years, and that at any time within said period, after making proof of said reclamation and the payment of the additional sum of \$1.00 per acre, he should be entitled to receive patent for the same.

It was held by this Department (14 L. D., 74), in instructions issued by Secretary Noble that

the price of desert land entered under the act of March 3, 1877, as amended by act of March 3, 1891, is one dollar and twenty-five cents per acre without regard to the situation of the land with relation to the limits of railroad grants.

The holdings of the Department thus appearing to be conflicting, the supreme court in the case of *United States v. Healy* (160 U. S., 136), proceeded to determine the question and Mr. Justice Harlan in delivering the opinion of the court, says:

Giving effect to these rules of interpretation, we hold that Secretaries Lamar and Noble properly decided that the act of 1877 did not supersede the proviso of section 2357 of the Revised Statutes, and, therefore, did not embrace alternate sections reserved to the United States by a railroad land grant.

It results that prior to the passage of the act of 1891, lands such as those here in suit, although within the general description of desert lands, could not properly be disposed of at less than two dollars and fifty cents per acre.

And in conclusion the court said:

We are of opinion that cases initiated under the original act of 1877 but not completed by final proof until after the passage of the act of 1891, were left by the latter act—at least as to the price to be paid for the lands entered—to be governed by the law in force at the time the entry was made, so far as the price of the public lands was concerned, the act of 1891 did not change but expressly declined to change, the terms and conditions that were applicable to entries made before its passage. Such terms and conditions were expressly preserved in respect to all entries initiated before the passage of that act.

In *ex parte* Holcomb (22 L. D., 604), it was held (syllabus)—

An entry of desert land within railroad limits at double minimum price is not an entry "erroneously allowed" on which repayment of the first instalment of the purchase price can be made, where the entry is canceled for non-compliance with law.

The entry was made in that case on December 24, 1881, and was canceled September 22, 1885, because of failure to make proof within the time required by the act. The contention was that the entry was erroneously allowed under the act of 1877 because that act did not include lands which could not be sold for less than double minimum price.

It will thus be seen that the question at issue has been judicially determined.

The act of 1877 did not fix the price of double minimum desert lands at \$1.25 per acre, or to speak more specifically did not lower the price of lands situated within railroad grants to that price. It was not in conflict with section 2357 of the Revised Statutes; the act of 1877 and section 2357, *supra*, had appropriate fields of action and there being no actual or necessary controversy in giving effect to them both, it was done.

The conclusion is therefore reached that the requirement of your office for the payment of the additional sum of \$1.25 per acre so that the sum total shall amount to \$2.50 per acre, is a proper demand and the decision of your office in so holding is affirmed.

APPLICATION TO ENTER—FINAL REJECTION—REINSTATEMENT. -

FRANK LARSON.

An application to enter properly rejected by final decision of the Department, under the rulings then in force, can not be reinstated with a view to favorable action under a changed construction of the law. The applicant in such case may make a new application if he is qualified, and no intervening rights have attached.

Secretary Francis to the Commissioner of the General Land Office, November 16, 1896. (I. H. L.) (F. W. C.)

With your office letter of September 17, 1896, was forwarded an application, filed on behalf of Frank Larson, for the reinstatement of his homestead application covering the NE. $\frac{1}{4}$ of Sec. 29, T. 134 N., R. 40 W., Minnesota.

Said letter reports as follows in relation to said tract:

The NE. $\frac{1}{4}$ of section 29, T. 134 N., R. 40 W., Minnesota, is within the primary limits of the grant to the Northern Pacific Railroad Company, the right of which attached to lands within said limits by definite location of its line of road November 21, 1871.

The records of this office show that one Charles W. Zenky filed D. S. No. 228, for the said tract June 24, 1870, alleging settlement the same date. He never perfected his claim under this filing and the same is still of record and uncanceled.

On July 10, 1883, one Frank Larson applied to enter the said tract as a homestead, which was rejected by the local officers because the tract was within the limits of the grant to the Northern Pacific Railroad Company.

Larson appealed from that action alleging as ground therefor that the land was excepted from the company's grant by the pre-emption filing of Charles W. Zenky.

Larson's application was examined and rejected by this office October 9, 1889, for conflict with the prior right of the said company.

Larson appealed therefrom; and on September 12, 1891, the Secretary of the Interior affirmed the action of this office and the case was closed against Larson September 19, 1891.

Under the rule of construction prevailing at the time the above recited action was taken upon Larson's application the same was proper, but under the recent decision of the supreme court in the case of *Whitney v. Taylor* (158 U. S., 85), as construed by this Department in the case of *Fish v. Northern Pacific R. R. Co.*, on review (23 L. D., 15), the filing by Zenky being of record, uncanceled, at the date of the definite location of said road, served to except the tract covered thereby from the operation of the grant.

This later construction can not, however, affect the previous disposition made of Larson's application. Said application had never been accepted and permitted to go of record as an entry, consequently there was nothing to reinstate; but as the tract, as it would appear, was excepted from the company's grant I can see no objection to his making a new application to enter this land, if he is duly qualified and no intervening rights have attached thereto.

A similar question was presented for the consideration of this Department in the matter of the application for reinstatement of the application of William A. Reynolds, which under later rulings should have been allowed, but the rejection of which was in accordance with the ruling which prevailed at the date of the action taken thereon. This application was denied in the departmental decision of March 21, 1894 (not reported), and review of said decision was also denied December 6, 1894 (19 L. D., 459).

Larson's application is accordingly denied.

RAILROAD GRANTS—OVERLAPPING INDEMNITY LIMITS—PRIORITY OF SELECTION.

NORTHERN PACIFIC R. R. CO. *v.* ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

Priority of selection determines the right as to odd numbered sections within the overlapping indemnity limits of the St. Paul, Minneapolis and Manitoba Ry. Co., St. Vincent Extension, and the Northern Pacific R. R. Co., and not within the withdrawal on general route of the latter company.

Secretary Francis to the Commissioner of the General Land Office, November 23, 1896. (I. H. L.) (E. M. R.)

This case involves the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 13, T. 130 N., R. 37 W., St. Cloud land district, Minnesota.

The above described tract is within the overlapping indemnity limits of the grants for the St. Paul, Minneapolis and Manitoba railway company, St. Vincent Extension, and the Northern Pacific railroad company.

On June 21, 1895, your office decision was made awarding the tract to the St. Paul, Minneapolis and Manitoba company, from which action the Northern Pacific company appealed.

The record shows that the withdrawal for the St. Paul, Minneapolis and Manitoba company took effect on February 12, 1872. This tract did not fall within the limits of the withdrawal of 1870 upon the general route of the Northern Pacific railroad. The St. Paul, Minneapolis and Manitoba railway company included this tract in its list of selections of July 31, 1884, but did not designate a loss as a basis for its selection. Subsequently, on July 1, 1885, it applied to select 760.05 acres, including this tract and designated a loss in bulk of equal amount. Both of these lists were rejected by the local officers and list No. 9, of the company's selections, in which the losses were arranged tract for tract, was accepted by the local office on October 28, 1890.

May 10, 1892, the Northern Pacific company selected the same tract for indemnity purposes designating losses tract for tract, but this was rejected.

The appeal alleges error as follows:

First. Error to hold that this tract inured to the St. Paul, Minneapolis and Manitoba railway company because it made the first selection thereof for indemnity purpose. Second. Error to hold that the withdrawal of this land upon definite location of November 21, 1874, for the Northern Pacific railroad company was inoperative. Third. Error not to have held that the withdrawal of this land for indemnity purpose on definite location was a legal withdrawal and was in full force and effect when the withdrawal for the St. Paul, Minneapolis and Manitoba railway company was made, and when said company selected said land; hence, that said selection was illegal. Fourth. Error not to have ruled that as between two railroad companies where there is not sufficient land in the indemnity limits to satisfy the land lost in place, no selection of the land is necessary as they pass to the earlier grant. Fifth. Error not to have ruled that as the Northern Pacific Railroad Company is the earlier grant, and there is a deficiency in the indemnity of its grant, this company has the better right to the land.

This Department has determined that the only withdrawal authorized by law, on account of the Northern Pacific grant, was that of 1870, upon general route, and this tract of land was not embraced in said withdrawal, all withdrawals for indemnity purposes were null and void and without effect.

Upon the other questions raised by the appeal, contained in the assignment of errors four and five, it would seem that the contention of counsel was based upon the case of the St. Paul & Pacific railroad company *v.* Northern Pacific railroad company (139 U. S., 1). An examination of that case does not show the position of counsel to be well taken. The lands therein involved were within the limits of the grant for the St. Paul and Pacific railroad company, but were included in the withdrawal of the Northern Pacific R. R. Co. on general route, which withdrawal operated to defeat the claim of the junior company.

This is not the status of the lands involved in this case, and it is unnecessary to further discuss the holding made in the case before the court. It has been a well settled doctrine of this Department and the courts that no rights attach within indemnity limits, except by selection. This land being situated so that it was within the indemnity limits of each road, and without the withdrawal on general route of the Northern Pacific railroad, it was right for your office to hold that the company first selecting has the superior right.

The decision appealed from is affirmed.

BUCKNAM *v.* BYRAM ET AL.

Motion for review of departmental decision of August 28, 1896, 23 L. D., 251, denied by Secretary Francis, November 23, 1896.

PETITION TO VACATE DECISION—RES JUDICATA.

MEE *v.* HUGHART ET AL.

A decision of the Supreme Court in which a departmental construction of a statute is held erroneous does not warrant the Department in vacating and reversing final decisions rendered in accordance with such construction.

Secretary Francis to the Commissioner of the General Land Office, November 23, 1896. (I. H. L.) (C. W. P.)

On January 10, 1895, the Department rendered a decision (20 L. D., 2), denying a petition of Louis Stegmiller, one of the defendants in the case of Edward W. Mee *v.* S. W. T. Hughart and others, to vacate and set aside the decision of the Department of June 18, 1894, in said case, affirming the decision of your office of December 19, 1892, sustaining Mee's contest of soldier's additional homestead entry, made in the name

of said Hughart, July 15, 1889, and recommending the cancellation of said entry, which involves the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 35, T. 63 N., R. 13 W., Duluth land district, Minnesota.

July 11, 1896, the attorneys of said Stegmiller filed a petition to vacate and set aside the decisions of the Department in said case of November 2, 1891 (13 L. D., 484), of June 18, 1894, and of January 10, 1895.

In the decision of November 2, 1891, it was held by the Department that the soldier's additional entry of the land in question, made July 15, 1889, in the name of said Hughart, if made after his death, was a nullity; and that being a nullity it was not confirmed or affected by the proviso contained in the 7th section of the act of March 3, 1891 (26 Stat., 1095). Said decision reversed the decision of your office and granted Mee's application to contest the entry.

The decision of June 18, 1894, affirmed the decision of your office affirming the judgment of the local officers sustaining Mee's contest of said entry.

The petition under consideration calls the attention of the Department to a recent decision of the supreme court in the case of *Webster v. Luther*, 163 U. S., 331, in which that court held that the right of entry given to a soldier who had heretofore entered, under the homestead laws, less than one hundred and sixty acres, to enter enough more to make up that quantity, was assignable before entry.

It is true, as stated in the petition, that the decisions of the Department of November 2, 1891 (13 L. D., 484), and June 18, 1894, were based upon the previous ruling of the Department, in a long line of decisions, that the right to make soldier's additional homestead entry is a personal right and not assignable, which construction of the law is now held by the supreme court to be erroneous.

It is admitted that the decisions of November 2, 1891, and June 18, 1894, were in accordance with the established ruling of the Department; and the fact that such ruling is now held by the supreme court to be erroneous is not deemed a sufficient reason for reversing and annulling decisions which have become final.

The petition must, therefore, be denied.

HILLEBRAND *v.* SMITH.

Motion for review of departmental decision of May 23, 1896, 22 L. D., 612, denied by Secretary Francis, November 23, 1896.

PATENT—DEATH OF ENTRYMAN—SECTION 2448 R. S.

HENRY E. STICH.

Section 2448, Revised Statutes is applicable only where the right to patent exists in the entryman at the time of his death.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 16, 1896. (C. J. W.)

Henry E. Stich made homestead entry, No. 158, Guthrie land district, Oklahoma, on April 26, 1889. The entry embraces lots 3 and 4 and the E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 30, T. 19 N., R. 3 E. Pending said entry Henry E. Stich died and Louvenia L. Stich, his widow, continued the occupancy and cultivation of the land. She submitted final proof, and on December 11, 1895, final certificate, No. 1537, was issued thereon to her. Your office, on June 22, 1896, by letter "C" of that date, returned said final certificate to the local officers, directing them to correct the same without erasure by substituting the name of Henry E. Stich, the deceased entryman, for that of Louvenia L. Stich, in whose name the certificate was issued.

Before said correction was made the New England Loan and Trust Company, through its attorney, apprised your office that it held a mortgage against said land, dated after the issuing of the final certificate, and insisting that the rule in the case of Joseph Ellis (21 L. D., 377), which it was supposed your office followed, did not apply in a case like this. In reply, your office adhered to the position taken in the letter of instruction to the local officers, directing that the name of Henry E. Stich should be substituted for that of Louvenia L. Stich in the final certificate.

The New England Loan and Trust Company having filed proof of its mortgage, intervenes and files appeal from your office decision, and alleges error upon the part of your office—

1. In holding that the final certificate and receipt should be changed to read Henry E. Stich, and that patent should issue in his name for the land described, and citing the case of Joseph Ellis (21 L. D., 377,) as authority for so doing.

2. That it was error not to hold that section 2291 of the Revised Statutes gives the widow the exclusive right to continue the occupancy and cultivation of the land, and to make proof and receive patent for the land in her own name.

In the case of Joseph Ellis, quoted by your office, as authority for the ruling in this case, Ellis had made cash entry for the land involved in that case in his lifetime, and the final certificate had issued in the name of John Ellis, instead of Joseph, through mistake. Ellis filed application to have the mistake corrected, but he died without having the correction made. The equitable title to the land was in Ellis upon the payment of the purchase money, and there was no obstacle in the way of patent issuing to him, upon the correction of the certificate. He had earned the title in his lifetime, and hence Sec. 2448, Revised

Statutes, applied. In the case under consideration the facts are altogether different. Stich died without having acquired title, either legal or equitable, to the land entered by him, and no right to patent existed in him at the time of his death, and Sec. 2448, Revised Statutes, is inapplicable to the case. Sec. 2448 is applicable only where the right to patent existed in the entryman at the time of his death. Sec. 2291, Revised Statutes, is intended to cover cases where the entryman died without having perfected his claim or earned title, and in such cases the surviving widow is permitted to continue residence and cultivation and earn title for herself.

Section 2448 is as follows:

Where patents for public lands have been or may be issued, in pursuance of any law of the United States, to a person who had died, or who hereafter dies, before the date of such patent, the title to the land designated therein shall inure to and become invested in the heirs, devisees, or assignees of such deceased patentee as if the patent had issued to the deceased person during life.

Section 2291 is a part of the homestead law, and is taken from the act of June 21, 1866 (14 Stat., 67). It is as follows:

No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law.

There seems to be no conflict between these two sections.

Louvenia L. Stich having submitted final proof on the entry of her deceased husband and obtained final certificate in her own name, it was error to direct the changing of said certificate, so as to substitute the deceased husband's name for hers.

Your office decision is reversed, and said final certificate is held to be proper and valid as originally issued.

RIGHT OF WAY—RAILROAD—CANAL—RESERVATION.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 27, 1896.

Registers and Receivers, U. S. Land Offices.

SIRS: The Honorable Secretary having held, in the case of Dunlap v. Shingle Springs and Placerville R. R. (23 L. D., 67) that "A railroad right of way under the act of March 3, 1875 is fully protected by the

terms of the act as against subsequent adverse rights, and a reservation of such right of way, in final certificates and patents issued for lands traversed thereby, is therefore not necessary, and should not be inserted" (syllabus), and having on October 16, 1896 denied a motion for review of said decision, you will be governed thereby.

The language of the canal and reservoir right of way act of March 3, 1891 (26 Stat., 1095), in reference to this matter, being the same as of the act of 1875, the ruling applies to it as well.

The effect of this decision is to revoke that part of the instructions at the bottom of page 6, circular of March 21, 1892,* for railroads, and in paragraph 26, circular of February 20, 1894,* for canals and reservoirs, relating to the notation to be made in red ink across the face of the certificate issued upon any entry apparently subject thereto, that the same is allowed, subject to the right of way of the road, or the canal or reservoir. The notations on township plats and tract books should be made as heretofore.

It will be observed that the decisions above noted do not refer to cases where right of way has been granted under special acts. In the current annual report of this office will be found a list of approved rights of way in which are designated the cases where the grant has been made under special acts. See pages 266 and 267 report of 1895.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved,
DAVID R. FRANCIS,
Secretary.

STATE SELECTIONS—MINERAL LANDS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 27, 1896.

Registers and Receivers, United States Land Offices.

SIRS: Hereafter where the lands selected by the States, under their grants, are within a mineral belt or proximate to any mining claim, the State will be required to file with the local land officers, with each selection list, a satisfactory non-mineral affidavit, covering each legal subdivision, of land selected. If any of the lands selected are found, upon examination, to be within a township containing any mineral entry, claim or location, you will at once notify the proper State officer as to the specific tracts, and require him to at once publish notice in some newspaper of general circulation (to be designated by you) within the

* See 14 L. D., 338, and 18 L. D., 168, for these circulars.

vicinity of said lands, setting forth that the State has applied for the lands designated, and has filed lists for the same in your office, that said lists are open to the public for inspection, and that a copy of the same by descriptive subdivisions has been conspicuously posted in your office for inspection by persons interested, and the public generally; and that you will receive protests, or contests, within the next sixty days for any of said tracts or subdivisions of land claimed to be more valuable for mineral than for agricultural purposes.

At the expiration of the sixty days, you will make full report to this office as to any protests or contests, or suggestions as to the mineral character of any of such lands, together with any information you may have received in regard thereto.

You will also notify the proper State officer that a failure to make the required publication within thirty days will result in the cancellation of the selections referred to, upon the same being reported to this office.

The notice will be published once a week for ten consecutive weeks.

The original lists, with proper notations as to the lands within mineral townships, will be duly forwarded to this office, without awaiting the publication of notice, that proper action may be taken in respect to the remaining lands.

Circular instructions of July 9, 1894 (19 L. D., 21), so far as the same are made applicable to State selections, are accordingly modified.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved,

DAVID R. FRANCIS,
Secretary.

SUMNER v. ROBERTS.

Motion for review of departmental decision of August 24, 1896, 23 L. D., 201, denied by Secretary Francis, December 3, 1896.

STATE SELECTIONS—CERTIFICATION—ACT OF AUGUST 3, 1854.

THE STATE OF OREGON.

Under the provisions of the act of August 3, 1854, the certification of lands under the agricultural college grant, that in fact passed under the swamp grant, is of no operative effect.

Secretary Francis to the Commissioner of the General Land Office, December 3, 1896. (J. I. P.)

I am in receipt of your office letter "K" of the 26th ultimo recommending the revocation by this Department of its approval of so much of Oregon swamp land list No. 4, approved April 24, 1882, as embraces

or relates to the E $\frac{1}{2}$ lots 5, 6, 7, 8 and the SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 28 and lots 6, 7, 8, 9, 10; SE $\frac{1}{4}$ of NE $\frac{1}{4}$; SE $\frac{1}{4}$ and SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 32, all in Tp. 33 S., R. 19 E., Willamette meridian in said State.

It appears that under date of January 23, 1874, there was approved to the State of Oregon, under the agricultural college grant of July 2, 1862 (12 Stat., 503), a list including the tracts above described.

The governor of the State of Oregon, who was apprised of the conflict in the two grants, has informed the Department that the State has sold the lands as swamp lands for \$1.00 per acre, the statutory price; that the legal price of agricultural college land is \$2.50 per acre, and he requests that said approved list No. 4 be permitted to remain intact and that the approval of list No. 1 of said agricultural college grant, in so far as it relates to the tracts in question, be allowed to stand and that the State be allowed to select other lands in lieu thereof.

You state that inasmuch as the approval and certification of the lands under the agricultural college grant has the force and effect of a patent, that you are of the opinion that such approval was a determination that the tracts were not swamp land, and hence you make the recommendation above stated.

In the case of *English v. Leavenworth, Lawrence and Galveston Railroad Company*, decided by the Department October 3, 1896 (23 L. D., 343), it is held that the certification of land under a railroad grant in accordance with the provisions of the act of August 3, 1854 (10 Stat., 346; sec. 2449 R. S.), is of no operative effect if the land in fact was excepted by the grant, or did not pass under the grant. The question then presents itself whether the certification by this Department on January 23, 1874, of these lands to the State of Oregon under the agricultural college grant of July 2, 1862, had the effect stated in your letter. The act of March 12, 1860 (12 Stat., 3) extended the provisions of the swamp land act of September 28, 1850 (9 Stat., 519) to the States of Minnesota and Oregon. This Department has held so frequently that reference to authority is unnecessary that the act of September 28, 1850, was a present grant, vesting in the state from the day of its date the title to all the swamp and overflowed land then not sold and requiring nothing but the determination of boundaries to make it complete. That being true it is evident that the act of March 12, 1860, *supra*, is of the same character, and from the date of its passage vested in the State of Oregon the title to all the swamp lands within its limits. It follows, therefore, that the lands in question, being evidently of that character, passed to the State under that grant, and hence could not have been passed under the agricultural college grant of July 2, 1862, *supra*.

I am therefore of the opinion that the request of the governor of the State of Oregon should be complied with to the extent that swamp land list No. 4 including the tracts above described, should remain intact, and list No. 1 under the agricultural college grant of July 2, 1862, be canceled as to said tracts, and that the State be advised of this action.

BRAMWELL *v.* CENTRAL AND UNION PACIFIC RAILROAD COMPANIES.

Motion for review of departmental decision of October 3, 1896, 23 L. D., 326, denied by Secretary Francis, December 3, 1896.

SOLDIERS ADDITIONAL HOMESTEAD—LANDS SUBJECT TO ENTRY.

BARBOUR *v.* WILSON ET AL.

The validity of a soldier's additional homestead entry is not affected by the fact that it is made for the benefit of another.

The amendment of sections 2289 and 2290 R. S., by the act of March 3, 1891, does not authorize entry under the homestead law of lands included within the limits of an incorporated town.

Secretary Francis to the Commissioner of the General Land Office, December 3, 1896. (I. H. L.) (A. B. P.)

The land involved in this case is the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ (lots 5 and 6), section 24, T. 8 N., R. 8 E., Helena, Montana. The controversy disclosed by the record appears to be the sequel of the case of *McGregor et al. v. Quinn*, decided by this Department April 5, 1894 (18 L. D., 368), wherein Sioux half-breed strip location, made by one William L. Quinn, for the land in question was canceled. A motion for review of said decision of April 5, 1894, was denied October 10, 1894 (19 L. D., 295).

The record shows that prior to the date of said decision of April 5, 1894, the Castle Land Company became the transferee of the land in question by deed of conveyance executed by one Messena Bullard, its attorney, to whom the land had been conveyed by Quinn the day after his scrip location was made; and had sold and conveyed by deeds of general warranty, to appellant and various other parties, a large number of town lots from said land, the title to which necessarily failed upon the cancellation of said scrip location. That thereupon a number of suits were brought against the company in the local courts, by appellant and other lot grantees, for the purpose of recovering back the money paid by them on account of their lot purchases, on the ground of said failure of title.

It further appears that on October 30, 1894, just twenty days after the denial of said motion for review in *McGregor et al. v. Quinn*, the defendant William Wilson, a resident of Marshall county in the State of Illinois, appeared at the local office, accompanied by W. E. Moses, a professional land scrip broker of Denver, Colorado, and S. W. Langhorne, the attorney for the Castle Land Company, and filed his application to make soldier's additional homestead entry for the land. After some delay, caused by the transmission of the application papers to your office for examination, and their return, Wilson's entry was finally

allowed January 22, 1895. Eight days thereafter he and his wife executed, before a justice of the peace in Marshall county, Illinois, a deed conveying the land, for the stated consideration of one dollar, to said W. E. Moses, and five days later, said Moses and his wife executed a deed before a notary public of Arapahoe county, Colorado, conveying the land to the Castle Land Company for the stated consideration of \$800 cash. Immediately after obtaining said deed from Moses, the company proceeded to set up and did set up its newly acquired title as a defence in all the suits brought against it by its said lot grantees, of whom this appellant was one. It further appears that on August 2, 1895, Arthur P. Heywood instituted a contest against the said Wilson entry upon the alleged ground that the same was made in the interest of the Castle Land Company under a previous agreement by the entryman to convey the title acquired, to or for the use of the company, and was therefore fraudulent.

On August 30, 1895, Heywood filed an application to amend his affidavit of contest by adding thereto the charge that the land in question, when Wilson's

said application and entry were made, was, and now is within the limits of a town incorporated under the laws of the State of Montana, namely, the town of Castle, Montana.

The proposed amendment was disallowed by your office October 28, 1895, for the stated reason that the same presented

a charge, which, if true, would not of itself require the cancellation of the homestead entry here involved.

A hearing had been previously ordered upon the original charge, and the same was now proceeded with, and was finally concluded in November 1895. Notwithstanding the disallowance by your office of the said proposed amendment, evidence appears to have been introduced by the contestant upon that, as well as upon the original charge. The entry was defended by the Castle Land Company but its evidence was confined to the issue raised by the original affidavit of contest. Neither Wilson nor Moses appeared.

The local officers found for the defendants and recommended the dismissal of the contest. On February 13, 1896, the contestant filed a waiver of his right of appeal. Thereupon George H. Barbour filed his application to intervene as a party in interest, accompanied by an appeal from the decision of the local officers. The application was denied by your office, and the appeal disallowed on the ground that Barbour had no such interest as entitled him to the right of appeal. He again appealed but your office declined to entertain or recognize his appeal, and he thereupon filed in this Department his application for certiorari, which on July 1, 1896, was allowed (23 L. D., 12), whereupon the papers in the case were duly transmitted, and are now before me for consideration.

Both the alleged grounds of contest are insisted upon in Barbour's appeal, namely:

1. That the Wilson entry was made in the interest and for the benefit of the Castle Land Company, and
2. That at the date of the entry the land was within the limits of an incorporated town.

The first ground your office held was not sustained by the evidence. As to the second it appears that by your direction the municipal authorities of the town of Castle were notified to file any objections they might have to the allowance of the Wilson entry, and that on January 5, 1895, the certificate of the mayor was filed setting forth that the land in question was not then and never had been occupied for the purposes of trade and business, and that the authorities of the town would not interpose any objection to Wilson's entry. This, your office, on May 11, 1895, held to be sufficient evidence of the fact that the land was subject to homestead entry, and presumably for that reason, the said proposed amendment to the original affidavit of contest was afterwards disallowed as stated.

In my judgment the record clearly shows that Wilson's entry was made for the benefit of the Castle Land Company. As soon as the final action of the Department in the former case of *McGregor et al. v. Quinn* was made known, the said company, through its agents, went to work to procure title to the lands by some other means. To accomplish that purpose the services of said land scrip broker Moses, were procured, and through him Wilson was brought to the local office from his home in Illinois in order to present the disguise of a personal entry. Immediately after making his entry Wilson conveyed the land to Moses, and Moses thereupon conveyed to the Castle Land Company.

It is perfectly apparent from the evidence either that Wilson's right to make soldier's additional entry was purchased by the company through the land scrip broker Moses before the entry was made, or there was an understanding and agreement between Wilson and the company's agents whereby the land was to be conveyed after entry for the company's benefit. The so-called personal entry by Wilson was but an attempt to disguise the real purpose of the transaction.

It has been repeatedly and uniformly held by this Department that the right to make soldier's additional homestead entry is not assignable, but is a personal right to be lawfully exercised only by and for the benefit of the soldier. See *Cleveland et al. v. North et al.* (16 L. D., 484); *Paulson v. Owen* (15 L. D., 114); *John M. Walker* (10 L. D., 354); and also the circulars and decisions cited in the last named case. It seems clear that the entry in question was made in violation of these repeated and uniform rulings, and but for the decision of the supreme court in the recent case of *Webster v. Luther* (163 U. S., 331), the same would have to be canceled as fraudulent.

In that case, however, the court held that the right to make soldier's

additional entry, given by section 2306 of the Revised Statutes, was without restriction, and therefore assignable and transferable; thereby establishing as the law, a doctrine directly the reverse of that so long followed by this Department, as shown by the cases cited. If the right itself is assignable I can see no reason why an entry may not be made by the possessor of the right for the benefit of another; for that would be simply another means of accomplishing practically the same result. In view, therefore, of the doctrine thus announced by the supreme court, whose decision is to be taken as settling the law on this subject, it follows necessarily that said first or original ground of contest is without merit, and even though sustained by the evidence as shown, it cannot affect the validity of the entry in question, and the same, if without objection in other respects, must be allowed to stand.

The evidence introduced by the contestant upon the charge that the land is within the limits of an incorporated town, and therefore not subject to homestead entry, however, is to the effect that the town of Castle was duly incorporated under the laws of Montana in the year 1891, and that the land here in question is within the corporate limits of that town. On this question the defendants did not introduce any evidence, presumably for the sufficient reason that your office had declined to entertain the charge as a part of the contest.

There can be no question that prior to the repeal of the "laws allowing pre-emption of the public lands of the United States" (act of March 3, 1891, 26 Stat., 1095), "lands included within the limits of an incorporated town" were not subject to pre-emption or homestead entry (Revised Statutes, Secs. 2258, 2289; *Root v. Shields*, 1 Wool., 340; *U. S. v. Schurz*, 102 U. S., 278, 401; *Harper v. Grand Junction*, 15 L. D. 124). Lands so situated were reserved from pre-emption or homestead entry, not by the judicial or legislative act incorporating the town, but by the pre-emption and homestead laws themselves, and no action of or proceeding by the municipal authorities of the town could have affected them in any manner. The consent of the town as given in this case, therefore, could not have operated to relieve the tract in question from its state of reservation under the law as it formerly stood, and thereby making it subject to to Wilson's entry.

It is claimed by the defendant company, however, that under sections 4 and 5 of said act of March 3, 1891, which repeals the pre-emption laws, as stated, and amends sections 2289 and 2290 of the revised statutes relating to entry of lands under the homestead law, there is no longer any inhibition against the entry of lands within the limits of an incorporated town, as a homestead. This contention is based upon the facts that such inhibition was originally stated in terms in the pre-emption law only (section 2258 R. S.), and was afterwards carried into the homestead law (section 2289 R. S.), simply by designating the lands subject to entry under that law, to be "unappropriated public lands" upon which a pre-emption claim may have been filed, or which was at the

time subject to pre-emption, and that in the homestead law as amended by said act of March 3, 1891, there is no reference to the pre-emption law or to lands subject to pre-emption; the claim being that by reason of this omission from the homestead law, as thus amended and reenacted, lands within the corporate limits of a town are no longer excluded from homestead entry. I do not think the contention is sound. It will readily be seen that the repeal of the pre-emption law of itself necessarily required the amendment of the homestead law in the particular stated. It would have been absurd for Congress, after repealing the pre-emption law, to have left in the homestead law the reference to "land subject to pre-emption." I do not think it follows from said amendment, however, that lands within the limits of an incorporated town may now be entered under the homestead law. I cannot believe that such was the intention of Congress. It might just as well be contended that lands on which are situated known salines or mines—certainly the former—are subject to homestead entry under the amended law, for the reason that such lands embraced one of the exceptions in the repealed pre-emption law, and no reference thereto is contained in the amended homestead law. The purpose of Congress in making the amendment is apparent, and I do not think a broader scope should be given the amended law than that purpose warrants.

Moreover, as the law now stands it is only "unappropriated public lands" that are subject to homestead treaty, and I do not think that lands included within the limits of an incorporated town can be justly held to come within that category. It would not be in accord with a sound public policy to allow the acquisition by homestead entry, of lands so situated, and thereby likely largely enhanced in value. Moreover the settlement and occupancy of such lands for purposes of trade and business or their use for townsite purposes could, and most likely would, be seriously interfered with if such were the law.

My conclusion therefore is that the amendment of sections 2259 and 2290 of the revised statutes, by said act of March 3, 1891, does not authorize the entry under the homestead law of lands included within the limits of an incorporated town.

Inasmuch however as the defendants without fault of their own have never been heard upon this question, it is proper that time should be allowed them to be so heard if they desire it. You will therefore allow them thirty days within which to file an application for a further hearing upon this question, and if said application be filed, and the same presents a denial under oath of the showing made by defendants' evidence, you will order a hearing to determine that question. If no such application is filed within the time allowed, the entry of Wilson will be canceled.

HANCE ET AL. v. CITY OF GUTHRIE.

Motion for review of departmental decision of August 12, 1896, 23 L. D., 196, denied by Secretary Francis, December 3, 1896.

PAYMENT—EXTENSION OF TIME—COMMUTED HOMESTEAD.

ANNA E. WHITE.

An extension of time in which to make payment on a commuted homestead entry is not authorized by the joint resolution of September 30, 1890, nor by the act of July 26, 1894.

Secretary Francis to the Commissioner of the General Land Office, December 3, 1896. (I. H. L.) (J. L. McC.)

Anna E. White has appealed from the decision of your office, dated September 25, 1895, rejecting her application for extension of time in which to make payment in commutation of her homestead entry, made September 22, 1892, for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 21, and the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 32, T. 24 N., R. 1 E., Seattle land district, Washington.

The proof shows residence on the land since February, 1893; fourteen acres of the land slashed, and four acres under cultivation for two seasons; the improvements are valued at \$1,850.

Your office held that the act of September 30, 1890 (26 Stat. 684), was not applicable to the case, inasmuch as the applicant did not allege a failure of crops as a reason for her failure to make payment for the land.

She has appealed to the Department, contending that relief can properly be extended under the act of July 26, 1894 (28 Stat., 123), extending for one year "the time for making final proof and payment for all lands located under the homestead and desert-land laws of the United States."

The time within which this entrywoman is required by law to make final proof and payment of fees and commissions does not expire until September 21, 1900. If she chooses to pay for the land and obtain title thereto before that date, she does it at her own election. To hold that the act of September 30, 1890, was intended to apply to any case of homestead commutation would be to impute to Congress the doing of a vain thing (Stillman B. Moulton, 23 L. D., 304); and the same is true of the act of July 26, 1894. If she does not wish or is not able to pay for the land in question under the commutation clause of the homestead act, her remedy is in her own hands—she need not commute.

Her application will be denied upon the ground herein indicated, and her commutation proof canceled without prejudice to her rights under the homestead law.

RAILROAD LANDS—ACT OF JANUARY 13, 1881.

MOORE *v.* KELLOGG.

An indemnity selection, made for the protection of one whose claim under the public land laws has been rejected on account of the railroad grant, and who is consequently seeking title through the company, operates to reserve the land, while subsisting, from other disposition, and if finally canceled, the occupant of the land under the company's license is entitled to the right of purchase under the act of January 13, 1881, if otherwise within its terms.

Secretary Francis to the Commissioner of the General Land Office, December 3, 1896. (I. H. L.) (F. W. C.)

The case of Mattie Moore *v.* Norman A. M. Kellogg, involving the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and lot 1, Sec. 29, T. 4 N., R. 19 W., Los Angeles land district, California, is again before this Department upon appeal by Kellogg from your office decision of January 16, 1895, rejecting his application to purchase the above described tract under the provisions of the act of January 13, 1881 (21 Stat., 315).

This land is within the indemnity limits of the grant made by the act of March 3, 1871 (16 Stat., 579), to aid in the construction of the branch line of the Southern Pacific Railroad. It is also within the primary limits of the grant of July 27, 1866 (14 Stat., 292), to aid in the construction of the Atlantic and Pacific Railroad as shown by the map of definite location filed March 12, 1872.

Mattie Moore tendered homestead application August 10, 1888, covering this land; which application was rejected on the ground that the tract was covered by the indemnity selection made by the Southern Pacific Railroad Company, list No. 5, filed May 25, 1883.

The case arising upon this application was duly prosecuted before this Department, resulting in the decision of November 29, 1890 (11 L. D., 534), in which it was held, that lands within the grant to the Atlantic and Pacific Railroad Company are expressly excepted from the grant to the Southern Pacific company, and that the act of Congress forfeiting certain lands granted to the former company, confers no right upon the latter to select the lands. This decision ordered the cancellation of the selection by the Southern Pacific company, and that Mattie Moore be allowed to enter the land under her application on showing compliance with the provisions of the homestead law.

The month following said decision, to-wit, December 20, 1890, Kellogg tendered his application to purchase these lands under the provisions of the act of January 13, 1881 (*supra*), and applied for a hearing in order to determine the conflicting claims of himself and Moore, which was duly ordered; and on January 9, 1891, the local officers rendered a joint opinion holding for cancellation the homestead entry of Moore and allowing the application of Kellogg as applied for. Moore thereupon appealed to your office; said appeal resulting in your office deci-

sion of May 16, 1892, which affirmed the recommendation of the local officers. Moore further prosecuted her case to this Department, her appeal being considered in departmental decision of October 5, 1893 (17 L. D., 391), in which it was held, that the act of January 13, 1881, applies only to settlers upon lands of the railroad for whose benefit the land is withdrawn, and that the act of July 6, 1886, forfeiting the grant to the Atlantic and Pacific Railroad Company, did not give the Southern Pacific Company any rights to lands so forfeited and lying within its indemnity limits.

Your office decision was therefore reversed, Moore's entry permitted to remain intact, and the application to purchase tendered by Kellogg was denied.

A motion was filed for the review of said decision, which was considered in departmental decision of December 4, 1894 (19 L. D., 446). In this motion it was claimed that the land here in question was excepted from the grant to the Atlantic and Pacific Railroad Company by reason of the fact that at the date of filing the map of definite location of said Atlantic and Pacific Railroad opposite the land in question, the same was included within the original limits of the survey of the Sespe rancho Mexican grant, from which it was finally excluded upon the survey and patenting of said grant March 14, 1872, which was subsequent to the definite location of said Atlantic and Pacific Railroad opposite this land.

As this fact was not presented in the record before considered by this Department, and as the record then before the Department did not disclose sufficient facts relative to said Mexican claim on which to adjudicate the question as to the effect of said Mexican grant upon the grant for the Atlantic and Pacific Railroad, the matter was returned to your office and you were directed to investigate the matters set up in said motion relative to said Mexican grant, to the end that the case might be adjudicated. It is under this order that the case was again considered in your office decision of January 16, 1895; from which the present appeal is taken.

Said office decision states, that the tracts here involved

were included in the Sespe rancho tract, No. 2, according to the survey approved by the surveyor general June 17, 1868, but were excluded from said rancho according to the survey of said claims approved by the surveyor general December 5, 1871, and subsequently approved by this office, and upon which survey patent issued March 14, 1872. . . . Said Sespe rancho may be properly placed under what is described by the United States supreme court, in the case of the United States v. McLaughlin (127 U. S., 428), as a grant of quantity, as to one or more leagues, within a larger tract described by outside boundaries, where the donee is entitled to the quantity specified and no more. At the date of filing of the map of definite location of the Atlantic and Pacific Railroad, March 12, 1872, the tracts in question were excluded from the survey of said private claim and were not excepted from the operation of the grant to the company.

When it is remembered that this tract was included within the survey first made and approved by the surveyor general, on June 17, 1868,

there may be some question as to whether the reservation created by said survey would not continue until the final approval by your office of the second survey, which excluded this tract from the grant.

For the disposition of the several applications by Moore and Kellogg, however, I deem it unnecessary to decide the question as to the effect of the reservation under the first survey after the approval by the surveyor general of the second survey and before the final approval of said survey by your office.

It is shown in this case that on February 10, 1879, Kellogg made timber culture entry for lots 2, 3, 4 and 5, and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section 29, which entry was canceled by decision of your office dated April 20, 1880, in which it was held, that said tracts were excepted from the grant to the Atlantic and Pacific Company because within the claimed limits of the said Sespe rancho at the date of the definite location of that road; and being within the indemnity limits of the Southern Pacific Railroad, that they were subject to selection by that company.

On February 24, 1880, Kellogg had also made a homestead entry covering the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section 29, which entry was canceled, as to the portion of the land here in controversy, by your office decision of June 15, 1881, for conflict with the right of selection in the Southern Pacific Railroad Company.

These decisions, adverse to his several entries, appear to have been accepted by Kellogg, who thereupon applied to the Southern Pacific Railroad Company to purchase the land, and received due acknowledgment from said company of his application to purchase.

On May 25, 1883, the said company made selection of the land here in question. Kellogg remained in possession of these lands, making valuable improvements thereon, and was so in possession of the lands when Mattie Moore first applied to enter the same on August 10, 1888. As before stated, upon her application the company's selection was ordered canceled in departmental decision of November 29, 1890 (*supra*), and the following month Kellogg, having exhausted his rights under the general land laws, applied to purchase the tract under the provisions of the act of January 13, 1881 (*supra*). Said act provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons who shall have settled and made valuable and permanent improvements upon any odd numbered section of land within any railroad withdrawal in good faith and with the permission or license of the railroad company for whose benefit the same shall have been made, and with the expectation of purchasing of such company the land so settled upon, which land so settled upon and improved, may, for any cause, be restored to the public domain, and who, at the time of such restoration, may not be entitled to enter and acquire title to such land under the pre-emption, homestead, or timber culture acts of the United States, shall be permitted, at any time within three months after such restoration, and under such rules and regulations as the Commissioner of the General Land Office may prescribe, to purchase not to exceed one hundred and sixty acres in extent of the same by legal subdivisions, at the price of two dollars and fifty cents per acre, and to receive patents therefor.

Admitting that the reservation on account of the Sespe rancho did not serve to except the tract here in question from the Atlantic and Pacific grant, and that consequently the same was not included in the withdrawal order of your office for indemnity purposes on account of the Southern Pacific grant, which, however, was in violation of law, yet the decision of your office recognized the right in the Southern Pacific Railroad Company to make selection of this land. And acting thereon, Kellogg applied to the company to purchase the land; and for his protection selection was duly made, which selection remained of record from 1883 until ordered canceled by departmental decision of November 29, 1890.

It has been repeatedly ruled by this Department that a pending indemnity selection excludes the land covered thereby from entry and bars other disposition of the land. (*Rudolph Nemitz*, 7 L. D., 80; *Northern Pacific R. R. Co. v. Halvorson*, 10 L. D., 15; *Simser v. Southern Minnesota Ry. Co.*, 12 L. D., 386; *Darland v. Nor. Pac. R. R. Co.*, 12 L. D., 195.)

This being so, it must be held that this land was reserved during the years it was covered by the indemnity selection, and upon the cancellation thereof was restored to general disposition. This would seem to be sufficient to meet the requirements of the act of 1881, independently of the question as to whether the land was ever included in any formal withdrawal, and the land must therefore be held to be subject to Kellogg's application tendered in December, 1890. This is in nowise in conflict with the holding in *Roeschlaub v. Union Pacific Ry. Co.* (6 L. D., 750), for there the land applied for was within the primary limits, in which the right attaches without regard to the listing of the land by the company. Here the tract is within the indemnity limits, in which no right is respected prior to selection.

The act of 1881 is a remedial statute and should therefore be liberally construed to provide the remedy, viz: the protection of those in possession of lands, reserved as railroad lands, under license from the company, where the company's claim fails and the party is not qualified to enter the lands under the general land laws.

It is disclosed by the record and recited in the first part of this opinion, that Kellogg first sought to enter this land under the homestead and timber culture laws.

His entries were canceled because the lands were held to be reserved for the Southern Pacific Railroad Company. He continued in the possession and improvement of the lands, amended his homestead to cover other lands, and sought title, through the company, to the lands here in question.

For his protection the company made due selection of the land, which selection, after being of record more than seven years, was canceled, and Kellogg is again forced to look to the government to protect him in his possession and improvements. Surely the act of 1881 was designed to protect such persons.

Departmental decision of October 5, 1893, is therefore recalled and vacated, and Kellogg will be permitted to complete his purchase as applied for, and thereupon Moore's entry will be canceled.

CONTEST—QUALIFICATIONS OF CONTESTANT.

McEVERS v. JOHNSON.

In a contest wherein the contestant alleges a superior right in himself to the land, it is incumbent upon him to establish his qualifications as an entryman.

Secretary Francis to the Commissioner of the General Land Office, December 3, 1896. (I. H. L.) (E. M. R.)

This case involves the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 5, T. 6 N., R. 1 W., Guthrie land district, Oklahoma Territory.

On the 25th day of April, 1889, George P. Johnson made homestead entry for the above described tract, together with the N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of the same section, township and range.

On the 20th day of July, 1889, Theo. L. McEvers made application to enter the NW. $\frac{1}{4}$ thereof, and filed his affidavit of contest against the entry of Johnson as follows:

Before United States Land Office,
Guthrie, Indian Territory,
Purcell, Indian Territory. }

Before me, L. C. Gossett, United States Commissioner for Eastern District of Texas, personally appeared before me Theodore L. McEvers of Purcell, Indian Territory, who being duly sworn upon his oath deposes and says he is well acquainted with the land embraced in H. A. No. 123 made by George P. Johnston, April 25, 1889, for the S. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 5, T. 6 N., R. 1 West, Indian Meridian.

That your affiant settled upon said land legally and in good faith April 22, 1889, after 12 o'clock, noon.

That at the time of his settlement and establishing a residence on said land no other person than himself had made residence or any settlement thereon or claimed any interest therein.

That your affiant has had a continuous residence on said land since he made settlement April 22, 1889, and has made valuable improvements thereon.

That defendant George P. Johnston well knew your affiant was a prior occupant of said lands, and had a prior right thereto at time he filed H. A. No. 123 as aforesaid.

That for a long time after your affiant made residence on land above described defendant George P. Johnston was claiming other than the land in controversy.

That defendant is not a qualified homesteader under homestead laws and act of Congress approved March 2, 1889, and these facts your contestant is ready to prove at such time as may be named by the Register and Receiver of the United States Land Office at Guthrie, Indian Territory.

Wherefore your affiant asks that a time may be set for a hearing in said case, and that your affiant be permitted to prove the above with other facts why the said H. A. No. 123 made by George P. Johnston, April 23, 1889, be canceled and forfeited to the United States on your contestant paying the expenses of the hearing of said cause.

(Signed)

THEODORE L. McEVERS.

Subscribed and sworn to before me this 17th day of May, 1889.

(Signed)

(SEAL)

L. C. GOSSETT,
United States Commissioner.

Also appeared at the same time and place Elbert P. Scott and William S. McEvers who being duly sworn say that they are acquainted with the above described land and have heard read the above affidavit and have personal knowledge that the facts stated in said affidavit are substantially true and correct.

X. ELBERT P. SCOTT,

X. WILLIAM S. MCEVERS.

Subscribed and sworn to before me this 17th day of May, 1889.

(Signed)

L. C. GOSSETT,

United States Commissioner.

Filed July 20, 1889.

It will thus be seen that the two material charges contained in this affidavit were the prior settlement on the part of McEvers and the disqualification on the part of George P. Johnson, the defendant.

Upon the issues thus joined the case went to trial.

The local officers decided that McEvers was the prior settler and recommended the cancellation of Johnson's entry as to the tract in controversy.

On February 19, 1895, your office affirmed the action of the local officers.

On March 26, 1896, this Department, following the concurring decisions of your office and the local office, affirmed your action.

On June 9, 1896, the case being before the Department upon review, it being alleged that in the affidavit of contest filed by McEvers and in the evidence contained in the record there was nothing to show that McEvers was a qualified settler upon the land, it was held—

It is not asserted in the papers filed to obtain a motion for review that in fact McEvers was disqualified as a settler, and in the absence of such affirmative assertion by the petitioner, the Department would not be justified in granting the review. If the petitioner is prepared to make any showing of the disqualification of McEvers the Department will then entertain the question of review of the decision complained of.

On September 1, 1896, a decision was rendered entertaining the motion, it appearing that

the affidavits of Wm. W. Ansley and C. P. Smith, are furnished to the effect that McEvers had violated the act and the President's proclamation opening these lands to settlement.

Counsel for the petitioner urge that

said affidavit of contest was wholly insufficient in law to raise any issue upon which the homestead entry of said Johnson could be lawfully canceled, nor was there any sufficient testimony introduced on the hearing of said cause that would justify the cancellation of said homestead entry.

The province of an affidavit of contest is to state a cause of action. The contest on its face alleged two causes of action as has been already set out. Ordinarily speaking, the qualifications of a contestant do not enter into a case for the entry must stand or fall upon the rights in the entryman. Was the entry made in good faith? Was the entryman qualified at the time of making such entry? Has he done anything since making his entry that must result in a forfeiture of the entry? It

follows, therefore, that even though the contestant be himself not qualified the contest would not fail on account of such disqualification. The contestant stands in the position of furnishing information to the government and as the silent third party in all causes before this Department in relation to the public lands, the government may proceed to act upon the information so furnished and can cancel the entry.

But it appears that there is nothing to show that George P. Johnson is a disqualified entryman. He is over twenty-one years of age; the head of a family; is not the owner of more land than is permitted by the statute allowing entries, and did not violate the act opening these special lands to settlement, and his entry is canceled in so far as it conflicts with that of McEvers, for the sole reason that McEvers was the prior settler upon the tract in controversy, together with the rest of the NW. $\frac{1}{4}$. Such being the case we are brought to a discussion of a different phase of what is the effect of the qualification of the contestant.

It may be said in general that where a contest is brought against an existing entry by anyone, the only question to be considered is whether the entry can stand. This is true of all cases where the contestant alleges no rights in himself, but it is not true where he does so allege superior rights in his own person by reason of any acts of his, and in such cases the contest so initiated is really a suit to try title to land, and the questions of disqualification of the entryman are of no more importance than those of the qualifications of the contestant. They both stand upon the same plane. They both must make a showing of their qualifications and it devolves upon the contestant to establish his qualifications as an entryman under the law.

It does not appear that in this case McEvers has made any such showing. An examination of page 12 of the record discloses that he testifies as to his other qualifications but not that he did not violate the acts of Congress and the President's proclamation in opening the Territory of Oklahoma to settlement.

In the alleged affidavit which accompanied his papers at the time of making application to enter this land, prior to the hearing in this cause, it appears that such affidavit was not sworn to.

It does not seem to be just that the entry of Johnson should be canceled because of the prior settlement of McEvers, if it be true that McEvers was in fact a violator of the law pertaining to Oklahoma Territory.

While there is no specific finding upon the question of the disqualification of Johnson, yet it must be assumed that it was found that he was not disqualified, otherwise it would have become incumbent to cancel his entire entry, which was not done.

A number of witnesses depose that they saw McEvers within the Territory during the prohibited period, on or near the tract in controversy. In answer to this, the contestant submits the affidavits of various witnesses who testified that during this period the said McEvers

was sick from malarial fever and was confined to his room. The petitioner further presents the affidavits of others that McEvers was not sick during such period, but was daily in attendance of his duties as restaurant proprietor in the town in which he lived. The credibility of the two witnesses (Ansley and Smith) upon whose testimony the motion for a rehearing was entertained, is attacked; many deponents appearing upon either side. The contestant further shows by recent affidavits that some of the affiants for the petitioner who deposed that they saw the contestant within the Territory during the prohibited period, were unworthy of belief, and that other witnesses who testified to the veracity of Ansley and Smith did so under a misapprehension of what they were signing.

All of this raises questions of fact which the Department is not at present in position to pass upon. This can best be done and the truth more accurately arrived at, by submitting all of the evidence to its course, under the regular machinery of the Department.

The case is therefore remanded to your office, and you will order a further hearing to pass upon questions involved.

APPLICATION TO ENTER—RESIDENCE.

BAKER ET AL. v. RAMBO.

A homestead applicant is not required to establish residence on the land involved prior to the allowance of his application.

Secretary Francis to the Commissioner of the General Land Office, December 3, 1896.
(I. H. L.) (J. L. McC.)

George E. Baker and Henry C. Allison have appealed from the decision of your office, dated November 28, 1894, sustaining the action of the local officers in dismissing their respective contests against the homestead entry of James R. Rambo for the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 3, and the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 10, T. 21, R. 4 E., Perry land district, Oklahoma.

Rambo applied to make said entry on October 31, 1893; but his application was suspended, and not allowed until April 24, 1894.

On May 2, 1894, Baker filed affidavit of contest against so much of said entry as embraced the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said Sec. 3, and Allison filed affidavit against so much of said claim as embraced the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 10, alleging in substance abandonment and failure to reside upon the tract. Baker alleged settlement and residence since November 12, 1893; and Allison since November 8, 1893.

The local officers, and on appeal, your office, dismissed said contests, for the reason that they do not state sufficient grounds, if proven, to warrant the cancellation of the entry, the same not having been subject to contest for abandonment at the time said affidavits were filed.

The appellant's several allegations of error are in substance included in the one which contends that your office erred

in holding that the defendant was not required to establish his residence on the land involved, pending action on his application to make homestead entry, when the record fails to show any reason why his application was suspended.

In the case of *Goodale v. Olney* (12 L. D., 324), the Department held that

Olney was not bound to reside upon the land after the local officers had rejected his application, pending final action thereon in your office. If an applicant were required to reside on the land embraced in his application pending final decision thereon, he would, in case of an adverse decision, lose his labor and improvements placed thereon.

This doctrine has since been reaffirmed in the cases of *Rice v. Lenzshek* (13 L. D., 154), *Hall et al. v. Stone* (16 L. D., 199), and many others.

The decision of your office was correct, and is hereby affirmed.

MINING CLAIM—LODE WITHIN PLACER—LOCATION.

WILSON CREEK CONSOLIDATED MINING AND MILLING CO. v. MONTGOMERY ET AL.

A lode or vein is not "known to exist" within a mining claim from the recorded notice of the location thereof, in the absence of a prior discovery of a valuable vein or lode therein.

Secretary Francis to the Commissioner of the General Land Office, December 3, 1896. (I. H. L.) (E. B., Jr.)

In the case of the Wilson Creek Consolidated Mining and Milling Company v. W. S. Montgomery *et al.*, the Department decided September 11, 1896 (unreported), that the Hall City Placer claim, for which said Montgomery and others made Pueblo, Colorado, mineral entry No. 24, April 4, 1894, was valuable for placer mining purposes, and did not contain within its limits any valuable mineral bearing lode or vein at the date of the placer application, May 20, 1893.

Said company has filed a motion for review of this decision, assigning four grounds of error, none of which contain anything not heretofore carefully considered here in the case. The third ground of alleged error should, however, receive some consideration, both to correct misstatement of fact and an erroneous application of the case cited therein.

It reads—

3. In ignoring the third specification of error set up in the appeal from the Commissioner's decision, which specification is as follows:

In each of the lode claims now in controversy, a discovery and location were made, and the certificate of location duly recorded before the date of the placer location and application. Therefore it was error not to hold that the placer applicants must be presumed to know that lodes were known to exist therein at the date of the placer application. See *Noyes v. Mantle* (127 U. S., 348-354), wherein it is held that—

Where a location of a vein or lode of mineral or other deposits has been made under

the law, and its boundaries have been specifically marked on the surface, so as to be readily traced, and notice of the location has been recorded in the usual books of record within the district, that vein or lode is "known to exist" within the meaning of that phrase as used in Rev. Stat. Sec. 2333, although personal knowledge of the fact may not be possessed by the applicant for a placer claim. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the applicant with the existence of the vein or lode.

Said third specification was not overlooked nor ignored by the Department in its decision. It is embraced in the following paragraph taken from the statement, in said decision, of error assigned in the appeal—

1. Not to have found from the evidence that valuable known lodes were shown to exist within the placer limits at date of application.

An examination of the language used by the supreme court in the case of *Noyes v. Mantle*, *supra*, in connection with "the law" therein referred to, which is found in sections 2318, 2319, 2320 and 2333, Revised Statutes, will show that the vein or lode held by the court as "known to exist" was one "valuable" for its mineral deposits, and "known" to be such at the date of the placer application. It was only "a vein or lode such as is described in section twenty-three hundred and twenty," when "known to exist" within ground claimed as placer, and not included in the placer application, that the statute (2333 R. S.) excepted from the placer patent. See in this connection, generally, as to the importance attaching to the use of the words "known" and "valuable" in the mining laws, *Deffebach v. Hawke*, 115 U. S., pp. 404 and 5, and *Davis's Administrator v. Weibbold*, 139 Id., 524 and 5).

The location which when duly recorded, the court held to be constructive notice of the existence of a vein or lode, was one "made under the law" and meeting, at the time, all the requirements of the law, that is, among other things, one made after the discovery within its limits of a *valuable* vein or lode (Sec. 2320 R. S.). A mere notice standing of record of a so-called location made regardless of the discovery of a valuable vein or lode, or of a location long since abandoned, was certainly not the notice which the court held "must be deemed sufficient to acquaint the (placer) applicant with the existence of the vein or lode."

The proposition that any recorded notice of a so-called lode location is conclusively presumptive of the existence of a valuable lode or vein within its limits, as would seem to be the contention of this motion, needs, it would seem, in view of the law and the history of mining claims and operations, only to be stated to be refuted. In *Noyes v. Mantle*, *supra*, page 351, the court expressly states:

There is no pretense in this case that the original locators did not comply with all the requirements of the law in making the location of the Pay Streak lode mining claim, or that the claim was ever abandoned or forfeited.

It was of such a location that the court very properly used the language quoted in the motion. No such location, for any ground within the placer limits, was shown to exist at the date of the placer application. The motion is denied.

PRACTICE—APPEAL—ORDER OF CANCELLATION.

MURRAY v. SKAGGS ET AL.

An appeal will not lie from the action of the Commissioner in canceling an entry under directions issued in a departmental decision that has become final.

Secretary Francis to the Commissioner of the General Land Office, December 3, 1896. (A. E.)

On June 13, 1896, your office transmitted an appeal filed by Skaggs, one of the parties to the above entitled cause, from the action of your office on December 19, 1895, canceling the entry of Robert M. McKenzie. The land involved is the SW. $\frac{1}{4}$ of Sec. 32, T. 17 N., R. 2 W., Guthrie land district, Oklahoma.

The record necessary to an understanding of this appeal is as follows:

On April 30, 1889, Robert M. McKenzie made homestead entry of the land above described. On May 30, 1889, William Skaggs filed a contest against the entry alleging prior settlement. On August 20, 1889, William Murray filed contest charging that both McKenzie and Skaggs were disqualified.

After a hearing, the local office, the receiver alone acting, found McKenzie and Skaggs disqualified. This was affirmed by the General Land Office. Skaggs and McKenzie appealed. While these appeals were pending, Skaggs filed a motion before the Secretary for rehearing of the case.

On September 7, 1895, the Department denied the motion of Skaggs for rehearing without prejudice, and considering the case upon the appeals of McKenzie and Skaggs, affirmed your office finding that they were both disqualified.

On November 22, 1895, the Department denied a motion for review filed by McKenzie.

On December 19, 1895, your office promulgated the last above mentioned decision and canceled McKenzie's entry.

On December 27, 1895, your office transmitted a motion for rehearing filed by Skaggs. While this was under consideration, and on January 31, 1896, Skaggs filed an appeal from the action of the Commissioner canceling the entry of McKenzie by letter of December 19, 1895, above mentioned.

On February 10, 1896, the Department denied the motion of Skaggs for rehearing and now has before it the appeal from your office action canceling McKenzie's entry.

The cancellation of the entry of McKenzie after his motion for review had been denied was in accordance with the practice of your office. It was not a matter from which he could appeal, as it was substantially but following the directions of the Department.

The appeal can not therefore be considered, and the same is dismissed.

SECOND CONTEST—RES JUDICATA.

GUERTEN *v.* CHISHOLM.

An entryman is entitled to be heard on an issue raised as to the qualifications of an adverse claimant, though such issue may have been tried and determined as between said claimant and a third party in a prior proceeding.

Secretary Francis to the Commissioner of the General Land Office, December 3, 1896. (I. H. L.) (C. J. G.)

Under date of June 13, 1896, the attorneys for Archibald M. Chisholm filed a motion for review of departmental decision of April 28, 1896, denying his application for a hearing in the above entitled case, involving the SE. $\frac{1}{4}$ of Sec. 35, T. 63 N., R. 12 W., Duluth land district, Minnesota.

On June 27, 1896, the said motion for review was entertained, and the case is again before the Department for consideration. It is unnecessary for the purposes of this decision to repeat here the details of the case. The ground for the denial of Chisholm's application was that a second contest will not be allowed upon the same charges. It was held, in view of the fact that the charge in Chisholm's affidavit has reference to the qualifications of Delina Guerten, a matter already passed upon and determined by the Department in the case of Guerten *v.* Anderson (295 L. and R., 169), that the question involved in Chisholm's application for a hearing is *res judicata*.

Chisholm's interest was recognized in the decision which passed upon Guerten's qualifications, and the local officers were instructed therein to fix a day for a hearing for the express purpose of determining Chisholm's rights. It is alleged by Chisholm that the application of Guerten for the land in controversy was not of record in the local office at the time he made homestead entry thereof. The fact that he was permitted to make entry without specifying that the same was subject to Guerten's entry, and subsequently to commute his said entry to cash, lends force to his allegation. However this may be I am of the opinion, upon further consideration that Chisholm does not come within the technical rules of the doctrine of *res judicata*. He cannot be held responsible for any error that may have been committed by the local office in allowing his entry. He now has an entry of record and cannot be deprived of any rights secured thereby without due process of law, regardless of any question as to Guerten's qualifications that may have been adjudicated at a former hearing between different parties. He was not a party to that suit, and his rights have never been adjudicated.

The motion for a hearing is therefore granted, and the same is hereby directed to be ordered in accordance with the rules of practice and the custom prevailing in such matters in your office.

Departmental decision of April 28, 1896, is modified accordingly.

RESIDENCE QUALIFICATION OF SETTLER—POSTMASTER.

GLOVER ET AL. v. SWARTS

The rule that a postmaster will not be heard to claim residence outside of the delivery of his office is not applicable where it appears that such officer's resignation has been received by the Post Office Department prior to the date of his settlement.

Secretary Francis to the Commissioner of the General Land Office, December 15, 1886. (I. H. L.) (A. E.)

On September 26, 1893, Benjamin F. Swarts made homestead entry of lots 3 and 4 and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 7, T. 26 N., R. 1 E., Perry, Oklahoma, and on October 4, 1893, William Carson filed contest against the entry alleging prior settlement. On October 6, 1893, John B. Glover also filed contest against the same entry alleging prior settlement. Carson failing to prosecute his contest, a hearing was had on March 26, 1894, on the affidavit of Glover.

On February 21, 1895, the local office recommended that the contests be dismissed. On appeal, your office, on August 6, 1895, awarded the entry to Glover on the ground that Swarts was disqualified. Your office reached this conclusion in words following:

It is shown that Swarts was appointed postmaster at Otoe May 3, 1893, and was still holding that office at the date of trial and engaged in attending to the duties of his office as postmaster at Otoe. . . . Even if Swarts was the first settler on the land, and established residence thereon prior to the time that Glover did and said Glover's residence was established after Swarts made entry, the controlling question is whether a person holding the office of postmaster, to which he was appointed before entry, can be allowed to claim residence on the public land beyond the limits of the delivery of his office. This is not an open question.

Your office then held that as section 3631 of the Revised Statutes required every postmaster to reside within the delivery of the office to which he is appointed, and the land in controversy was not within that delivery, that therefore Swarts was disqualified to make entry of the same. This holding was based on the principle laid down in the case of Henry C. Hansbrough (5 L. D., 155). Concluding, your office found that,

the land covered by Swarts' homestead entry is not within the delivery of the post-office at Otoe, where he held the office of postmaster when he made his entry and up to the date of the hearing. Therefore, in view of the decision referred to (5 L. D., 155), your decision is reversed, Swarts' entry is held for cancellation, and the right of entry is awarded to Glover.

From this Swarts appealed, claiming that he was not postmaster at the time he made entry, having resigned and his successor having been appointed. To support this Swarts cites the records of the Post Office Department.

These records, as certified to by the Postmaster General, show that Benjamin F. Swarts resigned as postmaster at Otoe on August 23, 1893,

that said resignation was received at the Department at Washington on September 1, 1893, and his successor appointed on September 13, 1893.

The land in controversy was opened to settlement and entry on September 16, 1893, which was twenty-three days after Swarts had resigned and three days after his successor had been appointed.

Judge McLean, of the United States supreme court, sitting in circuit and considering the case of the United States *v.* Wright (1 McL. C. C., 509) and the question as to when an office is terminated, said:

There can be no doubt that a civil officer has a right to resign his office at pleasure, and it is not in the power of the Executive to compel him to remain in office. It is only necessary that the resignation should be received, to take effect, and this does not depend upon the acceptance or rejection of the resignation by the President.

Applying this ruling to the case under consideration, it is quite clear that Swarts, upon the receipt of his resignation by the Post Office Department September 1, 1893, had the right to abandon his residence within the delivery of the post office at Otoe, and to establish a residence elsewhere, if he chose to do so, notwithstanding the requirement of said section 3631 R. S.; and in view thereof he was not disqualified to claim residence upon the land in question at and from the date of his settlement.

In view of what has been said, your office decision is reversed, and you will allow the entry of Swarts to remain intact.

CONFIRMATION - SECTION 7, ACT OF MARCH 3, 1891.

COSTELLO *v.* BONNIE (ON REVIEW).*

The confirmatory provisions of section 7, act of March 3, 1891, for the benefit of transferees are not limited to cases where the encumbrance has been made of record.

The fact that proceedings have been instituted by the government against an entry, at the date of its encumbrance, does not defeat confirmation thereof for the benefit of a transferee.

Secretary Francis to the Commissioner of the General Land Office, December 15, 1896. (J. L. McC.)

Counsel for the transferees of Patrick Costello has filed a motion for review of departmental decision of August 4, 1896, in the case of said Costello against William Bonnie and the Boston Safe and Trust Company, his transferee—reported (23 L. D., 162) as “Castello” *v.* Bonnie—involving Bonnie’s pre-emption cash entry for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 30, and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 29, T. 59 N., R. 17 W., Duluth land district, Minnesota.

The department has already rendered three decisions in this case, in the course of which the facts have been fully set forth; therefore they need not be repeated in detail. The question at issue is whether Bonnie’s entry was in existence on March 3, 1891, so that it was subject to

* Previous decisions herein reported under the title of “Castello *v.* Bonnie.”

the provisions of section 7 of the act of that date, confirming in the hands of *bona fide* purchasers all entries, where the sale was made after such entry and prior to March 1, 1888. The departmental decision of August 4, 1896, sought to be reviewed, held that, inasmuch as the entry had been canceled upon the report of a special agent, without giving the entryman his day in court, such cancellation was improper, and that Bonnie's entry ought therefore to be considered as being, to all intents and purposes, so far as the transferee is concerned, an existing entry, and subject to confirmation under said act. Counsel for Costello alleges that said departmental decision was in error—

(1). In attaching controlling weight to the decision in the case of *Drew v. Comisky* (22 L. D., 174); . . . the record shows that Drew's entry was not made until after March 1, 1888, the controlling date of the confirmatory act of March 3, 1891; while in the case at bar not only had Costello's entry been made, but transfer thereunder to *bona fide* purchasers had also been made, long prior to March 1, 1888.

If there be any validity in the contention that one or the other of the two decisions referred to must be wrong, such inference certainly can not weigh against the entry of Bonnie; for the law expressly confirms entries "which have been sold or encumbered prior to the first day of March, 1888."

(2). In ignoring the fact, nowhere adverted to in the decision for which review is hereby sought that on March 1, 1888 (conceding for the purpose hereof that Bonnie's entry was intact at that date), Costello's entry was also an existing entry, and that *bona fide* transfers had been made thereunder and duly placed of record in the office of the county register of deeds.

(3). In not therefore holding that, inasmuch as there were two entries of record, both encumbered, on March 1, 1888, the equities created by the act of March 3, 1891, were equal, and that the strict letter of the law should therefore prevail.

The Department held that Bonnie's entry, having been improperly and illegally canceled, was to all intents and purposes legally existing on March 3, 1891. But there cannot legally be two entries in existence for the same tract at the same time. Hence the second so-called entry (Costello's) was wrongfully allowed, and was to all intents and purposes no entry whatever; and the so-called transfers thereof made and placed of record were transfers of a nonentity.

(4). In holding the encumbrance of the Boston Safe Deposit and Trust Company to be an encumbrance in good faith, when, as it is shown by the record here . . . that no such encumbrance affecting the land involved herein was of record at any time to date or prior to said date of March 1, 1888.

(5). In giving any status as an encumbrancer to the Boston Trust and Safe Deposit Company, which the record shows was nothing but a secret encumbrancer, no instrument appearing anywhere in the record showing or describing this land and purporting to have been filed in the proper record office of the county where the land is situated.

The act of March 3, 1891, does not require that the encumbrance must be made of record. If in fact the land has been sold or encumbered as set forth in said act the entry is confirmed in the hands of the transferee.

(6). In not holding that the departmental decisions of August 11, 1894, and April 12, 1895, establishing Costello's rights, had become *res judicata*.

The Department has never made a final decision of the case at bar; and your office has never made a decision that has become final. Your office on October 23, 1891, held that the case came within the provision of the confirmatory act of 1891. When the case reached the Department on appeal, the departmental decision of August 11, 1894, directed that it be remanded to the local officers for a hearing. The departmental decision of April 12, 1895 (20 L. D., 311), denied a motion for review of the departmental decision ordering a hearing. When the hearing was had your office ruled against Bonnie—but Bonnie appealed. The departmental decision of August 4, 1896, was rendered in response to said appeal. It will be seen that in none of the decisions above mentioned has a judgment against Bonnie been rendered that has yet become final.

Finally, the motion contends, in substance, that—

(7). At the date of the alleged encumbrance of the Boston Safe Deposit and Trust Company, the Bonnie entry had been canceled of record, and whether or not said cancellation was valid, the entry was then under proceedings by the government calculated to result in its cancellation.

The fact that "the Bonnie entry had been canceled of record" has already been fully discussed, and it has been held that, inasmuch as such cancellation was improper and illegal, the entry should be considered as though legally in existence at the date of the confirmatory statute of March 3, 1891. The further fact that "the entry was then under proceedings by the government calculated to result in its cancellation" does not prevent its confirmation under said act in the interests of a transferee. If the act had applied only to entries against which proceedings had not been instituted, there would have been no need for this paragraph of the act, and its passage would have been a vain and superfluous proceeding on the part of the legislative powers.

The motion for review is denied.

RESERVOIR SITE—WITHDRAWAL—PRE-EMPTION FILING.

MARIA H. WILLIAMS.

A pre-emption filing made subject to a withdrawal under the arid land act of October 2, 1888, that is awaiting action by Congress, may be suspended until such action is taken.

Secretary Francis to the Commissioner of the General Land Office, December 15, 1896. (I. H. L.) (W. A. E.)

By your office letter of October 1, 1889, certain lands in the Salt Lake City, Utah, land district, were withdrawn for reservoir purposes under the act of October 2, 1888 (25 Stat., 526). This withdrawal

included all of section 10 in township 33 south, range 2 west. The letter of withdrawal was not received at the local office, however, until October 7.

In the meantime, on October 4, 1889, Maria H. Williams filed pre-emption declaratory statement for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said section 10, alleging settlement September 27, 1889.

January 7, 1893, she submitted final proof, which was rejected by the register and receiver for the reason that the land covered by her declaratory statement had been reserved for reservoir purposes.

On appeal, your office held that her claim was subject to the reservoir site selection, but pending the approval or rejection of said selection by the Secretary, her filing was suspended.

Appeal from this action brings the case before the Department.

The arid land act of October 2, 1888, provided that:

All the lands which may hereafter be designated or selected by such United States surveyors for sites for reservoirs, ditches, or canals for irrigation purposes and all lands made susceptible of irrigation by such reservoirs, ditches, or canals are from henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act to entry, settlement, or occupation until further provided by law: *Provided*, That the President at any time in his discretion, by proclamation, may open any portion or all of the lands reserved by this provision to settlement under the homestead laws.

This act was subsequently amended by the act of March 3, 1891 (26 Stat., 1095), which provided that reservoir sites located

shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs, excluding so far as practicable land occupied by actual settlers at the date of the location of said reservoirs.

It has been held by the Department in several cases that an entry after the passage of the act of October 2, 1888, of land subsequently designated as a reservoir site under said act is invalid, but may be suspended with a view to its ultimate allowance under section 17, act of March 3, 1891, in the event that the land is not required for reservoir purposes. Mary E. Bisbing, 13 L. D., 45; Newton F. Austin, 18 L. D., 4; Amanda Cormack, 18 L. D., 352.

On August 18, 1894, the Department directed that reservoir site No. 10 (among others), containing the land here involved, "continue withdrawn from disposition to await further action by Congress" (Miscel. Press Copybook 290, p. 494).

The papers transmitted by your office letter "G" of August 31, 1893, are accordingly herewith returned, and Mrs. Williams' filing will remain suspended until the matter of these reservoir sites has been acted upon by Congress.

SECOND CONTEST—RES JUDICATA.

PARCHER *v.* GILLEN.

A contest should not be allowed on an issue that has been considered and finally determined in a prior suit involving the rights of the entryman.

Secretary Francis to the Commissioner of the General Land Office, December 15, 1896.
(I. H. L.) (R. W. H.)

The motion of John Gillen to review and reverse the departmental decision of April 28, 1896, affirming the decision of your office of April 3, 1895, in which you sustained the contest of D. W. Parcher against Gillen's homestead entry, No. 7121, made March 10, 1894, for the N. $\frac{1}{2}$ NW. $\frac{1}{4}$ and lot 1, Sec. 12, T. 39 N., R. 6 E., Wausau land district, Wisconsin, having been filed, and it appearing that proper grounds for entertaining said motion have been shown, and the rules of practice as to service upon the parties and filing of briefs complied with, I have examined the same.

The errors assigned as the basis for the motion may be grouped for more convenient discussion under two heads:

1. Whether Gillen's qualification as an entryman of the tract in question was passed upon in the departmental decision of the case of Gillen *v.* Beebe (16 L. D., 306), and upon the motion for review of the same, as set forth in L. and R. letter book No. 279, p. 319, in such manner as to bring it within the rule of adjudged questions, as held by the Department.

2. Whether Gillen secured any advantage by reason of his alleged entry prior to December 20, 1890, which would bring him within the prohibitive provision of the act of June 20, 1890 (26 Stat., 169).

The tract in question was part of the land withdrawn from market by proclamation of the President, of April 5, 1881, and by the act of Congress of June 20, 1890, restored to the public domain, subject to entry under the homestead law.

Section 3 of this act is as follows:

That no rights of any kind shall attach by reason of settlement, or squatting, upon any of the lands hereinbefore described, before the day on which said lands shall be subject to homestead entry at the several land offices, and until said lands are opened for settlement, no person shall enter upon or occupy the same, and any person violating this provision, shall never be permitted to enter any of said lands, or acquire any title thereto.

The act by its terms was to take effect six months after its approval by the President, and the land thus became subject to entry and settlement on December 20, 1890.

The record in the case of Gillen *v.* Beebe *et al.*, *supra*, shows that Beebe made homestead entry of the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and lots 1, 2 and 3 of Sec. 12, T. 39 N., R. 6 E., Wausau land district, shortly after 9 o'clock A. M., December 20, 1890; that, upon application of John Gillen, a

hearing was ordered to determine his rights as a settler upon the land under his application made January 8, 1891, to enter the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and lot 1 of said section, in which he alleged settlement December 20, 1890, "between the hours of 12 and 1 o'clock A. M. of that day;" and it appearing from the records of the local office that Samuel H. Norton had applied to enter lots 1, 2, and 3, and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section, alleging settlement December 20, 1890, he was also ordered to appear.

As a result of the hearing the local officers decided in favor of the settlers, Gillen and Norton, as against the entryman Beebe, and recommended the cancellation of the latter's entry. As between the settlers it was recommended that an amicable settlement be made between them; and in default of this the privilege of entry be awarded to the highest bidder.

Beebe appealed, and your office by letter of April 9, 1892, affirmed the judgment of the local officers as to the cancellation of his entry, but modified their decision by allowing Gillen "the preference right to the N. $\frac{1}{2}$ NW. $\frac{1}{4}$," and Norton "the preference right of entry to lots 1, 2 and 3." Both Beebe and Gillen appealed; the former assigning error as follows:

In holding that Congress meant the usual day of twenty-four hours in the act of June 20, 1890, when it evidently meant the official land office day, commencing at 9 A. M.

In not finding and holding that John Gillen was disqualified to make entry of the land, because according to the testimony he entered upon the land prior to the day it was opened to entry, to wit, before 9 o'clock A. M., on December 20, 1890, and thereby forfeited all right to enter the same under the act of June 20, 1890.

In not finding and holding that Samuel H. Norton was disqualified to make entry of the land, for the reason that the testimony discloses that he entered on the land prior to the day it was opened for entry, to wit, prior to 9 o'clock A. M. on December 20, 1890, and thereby forfeited all right to enter the same under the act of June 20, 1890.

In holding Beebe's homestead entry for cancellation when he was the first legal applicant therefor and when there was no valid adverse claim to the tract.

In finding contrary to both the law and the evidence.

Gillen alleged as error the awarding to Norton, instead of to himself, of the right to enter lot 1. While Beebe's chief contention and reliance were upon the proposition that the word "day" as employed in section 3, act of June 20, 1890, meant the "business day" recognized in the practice of the local office, and not the calendar day of twenty-four hours, the Department, in its decision upon the appeals, considered the qualifications of all the parties to the controversy to make entry under the act, so far as they were disclosed by the record.

In Beebe's assignments of error the alleged disqualification of Gillen is set forth in substantially similar terms as those used in the case of Norton. Both are charged, upon the testimony at the hearing; with having entered on the land, prior to the day it was opened to entry, to

wit, prior to 9 o'clock A. M., on December 20, 1890, and having thereby forfeited all right to enter the same under the act of June 20, 1890.

After disposing of the specific question as to the proper construction of the word "day," as used in the act, the decision (16 L. D., *supra*,) goes on to say:

Therefore if it is shown that Gillen and Norton were both qualified settlers under said act, it follows that Beebe's entry should be canceled, and if it appears that either was disqualified, then his settlement should be declared ineffective.

No question was raised as to the sufficiency of either Gillen's or Norton's acts of settlement, and their qualifications, under said act, were considered apparently without restriction to the period between 12 and 1 o'clock A. M. of the 20th of December. This view is sustained by the fact that Norton was found disqualified *under the act* to enter said land upon the authorities cited and facts presented in the case, while Gillen was allowed to enter the land he had applied for. This judgment of the Department would seem to be sufficient to warrant the conclusion upon Gillen's part that his qualifications had been passed upon and that he could safely venture upon expenditures for the improvement of the land.

Norton asked for a review of the decision of the Department, and Beebe moved for a rehearing of the case. (L and R. 279, p. 319). Before these motions came up for consideration Norton executed a release of all his rights and interest in lots 2 and 3 to Beebe "for value received," and the contest narrowed down to Beebe and Gillen.

In his motion for rehearing Beebe made oath that he had recently discovered several witnesses who would testify, in case an opportunity is afforded, that John Gillen had entered upon and occupied water reserve land upon the 19th of December, 1890, in violation of law. The names of these witnesses are given and their affidavits filed.

Counter affidavits were filed upon the part of Gillen, in which every material allegation contained in the affidavits of Beebe and his witnesses are denied, and the exact whereabouts of Gillen, from the morning of the 19th of December, 1890, until midnight of that day are stated with great particularity. It is made to appear, by these affidavits, that Gillen and his party were very careful not to go upon the water reserve land prior to December 20, 1890, but that two minutes after midnight of the 19th of said month, he went upon the land in question, and made settlement thereon. That he has since properly resided on the land is not questioned.

In concluding the decision upon Beebe's motion for rehearing it is said:

In the case of Sutton *et al.* v. Abrams (7 L. D., 136), it was held that a new trial will not be granted on the ground of newly discovered evidence, unless such evidence is of that character to necessarily cause the trial court to arrive at a different conclusion. It is not shown to my satisfaction that the newly discovered evidence of Beebe would necessarily have that effect in the case at bar, especially in view of the fact that such evidence would all be contradicted by witnesses called by Gillen,

judging by the affidavits now before me. "So far as the rights of Gillen are concerned there have been concurring decisions in his favor by the local officers, the Commissioner and the Secretary. In such a case it was held in *Matthiessen and Ward v. Williams* (6 L. D., 95), that a reviewing tribunal would not disturb their decision if there was any evidence to support it, and unless it was unquestionably contrary to law.

I think the departmental decision complained of was justified by the evidence then in the case, and I do not think the new evidence which it is proposed to submit, in case a rehearing should be ordered, would make the rights of the parties appear materially different. The motion is therefore denied.

This decision was made February 12, 1894.

On April 3, 1895, in the contest of *D. W. Parcher v. John Gillen*, involving the same land and substantially the same matter as was involved in the case of *Gillen v. Beebe et al.*, *supra*, and upon Beebe's motion for rehearing of the same, as above given, your office held that the action of the Secretary in denying said motion for review on the ground stated, should not be taken as precluding further investigation.

From the evidence in the case you believed that the defendant was on "water reserve" land on December 19, 1890, and said Gillen's entry, No. 7121, was held for cancellation, and your said office decision was formally affirmed by the Department, April 28, 1896.

The length to which controversies between claimants for the public lands should be carried, with a view to the protection of the government on the one hand, and the security of established rights on the other, must necessarily depend upon the circumstances of each particular case.

The policy of the government, as reflected in the decisions of this Department has been to put an end to contention arising from this source, as soon as possible, consistently with the firm maintenance of its laws; and it has become a well-settled rule, that a matter once in issue and adjudicated may not be litigated again, though the parties be different, or, as it is sometimes expressed, an entryman can not be required to defend a second time on a charge already passed upon in one contest. Therefore it is that the Department, as a reviewing tribunal, will not disturb concurring decisions of the local office, the Commissioner and the Secretary, if there is evidence to support them, and they are not unquestionably contrary to law.

John Gillen complains that this rule has been violated by the reopening and readjudication of the question as to his qualifications to enter the land in dispute.

It is not strictly an issue of *res judicata*, because there is not an identity of parties; nor does it appear from the record that the charge, *in totidem verbis*, that Gillen entered the land on the 19th of December was made at the hearing of *Gillen v. Beebe et al.*, which was held upon Gillen's application to determine his rights as a settler thereon, upon his claim that he had made settlement between the hours of 12 and 1 A. M. of the 20th; but the government, which is a party to every controversy of this sort, does not seem to have thus limited the scope of

its inquiry, and having ordered Norton who was also alleging settlement on part of the tract to appear, proceeded to consider the qualifications of the parties "as settlers under the act" (26 Stat., 169), and rendered judgment accordingly.

It was clearly competent, under our rules of practice, in a case of this sort, to consider the general issue upon the specifications of error as set forth in Beebe's appeal; and that this was done is shown by the Secretary's language in denying Beebe's motion for rehearing, in which he says:

I think the departmental decision complained of was justified by the evidence then in the case, and I do not think the new evidence which it is proposed to submit, in case a rehearing should be ordered, could make the rights of the parties appear materially different.

The new evidence Beebe proposed to submit was upon the same question Parcher subsequently raised in his contest for the same land; and, as it was held insufficient to justify a rehearing, it ought not to have been entertained in a new contest. Although Parcher's contest affidavit alleged abandonment there was no evidence to support the charge, and the record of the contest discloses no cause of action that had not accrued prior to the Beebe contest.

I am therefore of the opinion that as the rights of Gillen under his homestead entry, No. 7121, were fully considered and sustained by the concurring decisions of the local officers, the Commissioner and the Secretary, in a former contest, they should not again have been called in question.

In this view of the case it is unnecessary to consider the question presented in the second specification of error.

The departmental decision of April 28, 1896, is accordingly revoked. Parcher's contest will be dismissed, and Gillen's entry remain intact.

RAILROAD GRANT—INDEMNITY SELECTIONS—SPECIFICATIONS OF LOSS.

GRINNELL *v.* SOUTHERN PACIFIC R. R. CO. (ON REVIEW).

A list of indemnity selections in which due specifications of loss are assigned, should not be rejected on account of the company's failure to designate losses for prior selections, as required by the circular of August 4, 1885, but should be suspended awaiting compliance with said requirement; and a list so filed operates to protect the right of the company from the date of its presentation.

The departmental decision herein of April 6, 1895, 22 L. D., 438, recalled and vacated.

Secretary Francis to the Commissioner of the General Land Office, December 15, 1896. (I. H. L.) (F. W. C.)

The case of Emory E. Grinnell *v.* Southern Pacific Railroad Company, involving the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 35, T. 25 S., R. 29 E., M. D. M., Visalia land district, California, is again before this Department for consideration; the motion filed on behalf of the company for review of

departmental decision of April 6, 1895 (22 L. D., 438), having been entered and returned for service, and the same having been returned bearing evidence of service upon Grinnell.

The tract involved is within the indemnity limits of the grant to said company under the act of July 27, 1866 (14 Stat., 292), and was first included in a list of selections filed by the company on December 9, 1885. This list, being designated as list No. 23, contained a proper designation of losses as a basis for the selections included therein, but was rejected by the local officers because the company had not, in compliance with the circular of August 4, 1885 (4 L. D., 90), designated losses for previous indemnity selections made on account of its grant. From this action the company appealed.

Upon consideration of said appeal, by letter of November 4, 1891, your office advised the register and receiver that their action in rejecting the list was not warranted, and they were directed to further consider the same and to require the selecting agent of the company to file a new list; whereupon the company prepared list No. 56, in which the same losses were assigned for the selections as were included in list No. 23. Said list No. 56 was approved by the register and receiver on May 10, 1892.

It appears that during the pendency of the company's appeal from the rejection of its list No. 23, the register and receiver, on January 16, 1888, permitted Grinnell to make homestead entry covering the tract above described, together with eighty acres in the adjoining even numbered section.

On August 15, 1893, Grinnell submitted final proof upon said entry, which was rejected by the local officers for conflict with the company's indemnity selection; from which action he duly appealed to your office.

By your office decision of January 12, 1895, the action of the local officers in rejecting Grinnell's proof for conflict with the company's indemnity selection was approved and Grinnell's entry was held for cancellation; your said office decision holding that the company's rights under its selection lists related back to the date of the first presentation. From said decision Grinnell prosecuted the case by appeal to this Department; said appeal being considered in departmental decision of April 6, 1896 (*supra*), in which it was held as follows:

The question thus presented by the record is: did the company gain any such right by the filing of its list on December 9, 1885, as would bar the allowance of any entry upon a tract included in the list?

By the circular of August 4, 1885 (4 L. D., 90), addressed to the local officers, it was directed—

"Where indemnity selections have heretofore been made without specification of losses, you will require the companies to designate the deficiencies for which such indemnity is to be applied before further selections are allowed."

In referring to said circular, it was held in departmental decision of May 1, 1891, in the case of *Sawyer v. Northern Pacific R. R. Co.* (12 L. D., 450)—

"The subsequent circular of Secretary Lamar, of August 4, 1885 (4 L. D., 90), requiring a basis of loss for such selection, was not designed to invalidate selections

theretofore made, but required the company to designate the losses in lieu of which such prior selections had been made, and directed the district officers not to receive any further selections until such order had been complied with."

It is clear therefore, that if the company had not complied with the circular and specified a basis for selections approved prior to the promulgation of said circular, the local officers were justified in refusing to receive further indemnity selections, and no rights were acquired by the attempt to make further indemnity selections, until the circular had been complied with, which you report was not until October 27, 1888.

It has been repeatedly ruled that there was no authority for an indemnity withdrawal on account of the grant for this company, and that no rights were acquired within the indemnity limits until selection had been made in the manner prescribed.

The allowance of Grinnell's entry on January 16, 1888, was therefore proper.

After a careful consideration of the matter I am of opinion that the former decision of this Department is in error in refusing to accord to the company rights under its selection list presented December 9, 1885, from the date thereof; it appearing that said list was regular and proper, being a selection of lands within the indemnity limits and based upon an actual loss to the grant.

While it is true the circular of August 4, 1885, requires the company to designate the deficiencies for indemnity selections made and approved prior to its date without the designation of losses before further selections are allowed, yet I do not believe its purpose was to estop the company from making further indemnity selections upon a valid basis, and thus protect itself against adverse claims within such limits, until it had complied with the circular, but rather to prevent the enlargement of the grant by continued certification of indemnity lands, until, by the specification of losses for previous selections made and approved, it had been shown that the right to make further indemnity selections existed.

The selection list of December 9, 1885, as before stated, was a regular and proper list, and upon its presentation, accompanied by a tender of the proper commission, it would seem that the company's rights as to such tracts were fully protected, if, upon its subsequent compliance with the circular of 1885, by the specification of losses for previous selections made and approved, the right to the indemnity, as claimed, upon the basis assigned, actually existed.

It is urged on behalf of the company that it had, prior to the allowance of Grinnell's entry, specified a loss for all previous indemnity selections made and approved within the Visalia land district, but this I not believe to be material, as the grant is adjusted as a whole.

While it appears from your report previously made in this case that the company did not until October 27, 1888, complete the assignment of losses as bases for the previous selections made and approved prior to the circular of 1885, yet it has been shown that after complying with said circular, the right to indemnity, as claimed in the list of December 9, 1885, exists. It would therefore seem that the proper action to have been taken by the local officers upon said list of 1885 would have been

to suspend the same awaiting the company's compliance with said circular.

If any irregularity existed in the matter of the selections made by this company, it was in those made prior to the circular of 1885, which it was not the purpose of said circular to hold to be invalid.

In so far as the decision under review holds that no rights were acquired by the attempt to make further indemnity selections, until the circular of August 4, 1885, had been complied with, the same is recalled and vacated, and your office decision holding that the company's rights relate back to the date of the presentation of its first list, is affirmed.

In the decision under review it is further stated that—

Your office decision holds that "there is nothing of record, or in the proof made by Grinnell, showing the initiation of a right or claim to the land prior to or at the date when the company first applied for it."

The proof, however, shows that the land "had been actually settled upon and occupied ever since the spring of 1870."

It is true that the qualifications of the settler are not set forth, and it would be necessary to order a hearing to determine the status of the land at the date of selection, but as I am of the opinion that no rights were acquired by the selection of December 9, 1885, and that Grinnell's entry was properly allowed on January 16, 1888, the question as to the status of the land on December 9, 1885, becomes immaterial.

In view of the action herein taken upon the company's selection, and of the showing made in Grinnell's proof, I have to direct that a hearing be ordered, after due notice, in order to determine the exact status of the land at the date of the presentation of the company's list of selections, on December 9, 1885.

Herewith are returned the papers for your further action in accordance with the direction herein given.

RELINQUISHMENT—PRACTICE—CERTIORARI.

WALTERS *v.* NORTHERN PACIFIC R. R. Co.

A relinquishment takes effect when it is filed in the local office and operates *eo instanti* to release the land from the effect of the filing or entry. The subsequent notation of the relinquishment on the records of the General Land Office is merely a clerical act.

An application for certiorari will not be granted, where it appears that the Commissioner's decision, if before the Secretary on appeal, would be affirmed.

Secretary Francis to the Commissioner of the General Land Office, December 15, 1896. (I. H. L.) (W. A. E.)

The SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 13, T. 13 N., R. 18 E., North Yakima, Washington, land district, is within the limits of the withdrawal upon the map of amended general route of the branch line of the Northern

Pacific Railroad, and on definite location of the road, as shown by map filed May 24, 1884, it fell within the primary or granted limits.

March 15, 1886, John W. Walters, who claims that he has lived on this land since 1880, was permitted to file desert land declaration therefor. He subsequently made proof and final certificate was issued on December 13, 1886. The railroad company, however, protested against the acceptance of said proof, upon the ground that it had acquired said land under its grant.

After various orders and actions by your office and the Department, this case was consolidated with that of the Northern Pacific Railroad Company *v.* Shedrick J. Lowe, involving the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of the same section (which Lowe claimed by purchase from Walters), and a hearing was ordered to determine the status of the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section 13 on May 24, 1884, the date the grant took effect.

As a result of this hearing, which was had on July 25, 1894, the local officers found that at the date of the definite location of the road John W. Walters was residing upon and claiming the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section; that he had, prior to that time, exhausted his rights under the settlement laws; and that consequently his settlement on this land did not except it from the operation of the grant.

Both Walters and Lowe appealed to your office, and the railroad company filed motion to dismiss these appeals, for the reason that they had been served on H. C. Humphrey, an agent of the company at North Yakima, and not on F. M. Dudley, the attorney designated by said company to receive notices and papers relating to the grant.

This motion was sustained by your office decision of May 18, 1895; the appeals were dismissed; and the action of the register and receiver was affirmed.

Subsequently, by your office letter of June 14, 1895, the case was reopened as to Lowe, it having been shown that his appeal had, as a matter of fact, been served upon Dudley, and the usual time was allowed him in which to file further appeal.

Lowe thereupon appealed, and the record in the consolidated case was forwarded to the Department.

On September 6, 1895, Walters also filed appeal, the delay being explained by affidavits tending to show that neither he nor his attorneys had ever been served with a copy of your office decision of May 18, 1895, adverse to him, and that a letter to his Washington attorneys directing them to file appeal miscarried in the mails and was never delivered to said attorneys. Your office, however, declined to forward said appeal, for the reason that as he had not taken proper appeal from the decision of the local officers, appeal did not lie from the action of your office in the matter.

April 16, 1896, Walters filed an application for writ of certiorari, and said application is now before the Department for consideration.

It appears that on October 3, 1896, the Department rendered a deci-

sion on Lowe's appeal, but Walters' rejected appeal and his application for writ of certiorari having become separated from the record in the consolidated case by the action of your office in forwarding Lowe's appeal and declining to forward that of Walters, said application was not considered by the Department at that time.

It was held by the Department in said decision (23 L. D., 331) that Walters' settlement on the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section at the date of the definite location of the road was not sufficient to except the land from the operation of the grant as he had previously exhausted his rights under the settlement laws. It was further held incidentally that notice of an appeal served upon a duly recognized agent of a railroad company is a proper and sufficient service.

As the failure of Walters to come properly before the Department by appeal was due to the erroneous action of your office in dismissing his appeal from the local office and refusing him the right of further appeal to the Department, said departmental decision of October 8, 1896, can not be held binding as to him. It was through no fault of his that he was not represented here at that time. So far, then, as his rights are concerned, this application for writ of certiorari must be treated as if said departmental decision had never been rendered.

The records of your office (of which the Department takes judicial notice) show that Walters had entered land under both the homestead and pre-emption laws prior to the date he claims he settled on the tract in dispute, and consequently had exhausted his rights under the settlement laws. This fact is not denied by him.

He claims, however, that said tract was excepted from the grant by reason of a pre-emption filing therefor, made in 1876, in the name of John W. Miller, and remaining uncanceled at the date of the definite location of the road.

It appears from your office records that Miller's relinquishment was filed in the local office in 1879, but for some reason, which does not appear, the attention of your office was not called to said relinquishment until 1895, when it was formally canceled on the records of your office.

A relinquishment takes effect when it is filed in the local office and operates *eo instanti* to release the land from the effect of the filing or entry. The subsequent notation of the relinquishment on the records of your office is merely a clerical act.

It thus appears that at the date of the definite location of the road, the land here involved was not covered by such a claim as would except it from the operation of the grant, and that if Walters were regularly before the Department on appeal, your office decision awarding the land to the railroad company would have to be affirmed.

An application for certiorari will not be granted where it appears that the Commissioner's decision, if before the Secretary on appeal, would be affirmed. (*Swanson v. Galbraith*, 21 L. D., 109.)

The application is accordingly denied.

LOWENSTEIN *v.* ORNE.

Motion for review of departmental decision of August 28, 1896, 23 L. D., 285, denied by Secretary Francis, December 15, 1896.

SOLDIERS ADDITIONAL HOMESTEAD—ACT OF MARCH 3, 1893.

WILLIAM HALL ET AL.

The act of March 3, 1893, providing for the perfection of title under soldiers' additional homestead entries, made on "certificates of right," was for the protection only of persons holding under the certificates issued by the Commissioner of the General Land Office in accordance with the circular regulations of May 17, 1877.

Secretary Francis to the Commissioner of the General Land Office, December 15, 1896.
(I. H. L.) (W. M. W.)

Thomas J. Groves appealed from your office decision of April 21, 1893, holding for cancellation soldier's additional homestead entry of the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and lot 7, Sec. 2, T. 22 N., R. 20 E., Waterville, Washington, land district, and from your office decision of December 5, 1893, refusing to reconsider said decision. On the 17th of February, 1896, my predecessor rendered a decision in said case, but before the promulgation thereof the same was recalled for re-examination.

Such examination has been made. The record shows that one William Hall made homestead entry on March 7, 1872, for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 2, T. 3 S., R. 5 W., at the Oregon City land office, Oregon, containing 77.62 acres. Final certificate issued thereon October 13, 1874, and patent December 30, 1874.

Hall made soldier's additional homestead entry at the same land office on July 8, 1880, for lots 1 and 3, Sec. 23, and lot 3 of Sec. 26, T. 9 S., R. 3 W., containing 97.85 acres. Final certificate was issued on the date of the entry. No notation showing said additional entry was posted in the tract book containing Hall's original entry.

On May 12, 1892, the local officers at Waterville, Washington, transmitted Hall's application to make a soldier's additional homestead entry for the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and lot 7, of Sec. 2, T. 22 N., R. 20 E., containing 89.50 acres. The tract books of your office failing to show the existence of Hall's first additional entry (said entry being under suspension pending the consideration of the rights of a railroad company to the tract embraced therein), and the applicant making oath that he had never made a prior additional entry, your office on the 5th day of August, 1892, directed the register and receiver of the local office to allow Hall's second soldier's additional application, and the same was allowed by them on the 26th day of August, 1892. Afterwards, the fact that Hall had made a prior soldier's additional entry was discovered, and your office, by letter of April 21, 1893, advised the local

officers that Hall had exhausted his right by his prior entry made at Oregon City, and thereupon the additional entry made by Hall at Waterville, August 26, 1892, was held for cancellation.

On May 22, 1893, counsel for Hall's transferee filed a motion for review of your office decision of April 21, 1893, in behalf of the transferee of said Hall. Said attorneys filed an argument in support of the motion for review, and also an abstract of title showing that on September 9, 1892, Hall deeded the land in question to one Thomas J. Groves. They also filed an application of said Groves to be allowed to perfect title to said land by paying the government price therefor in accordance with the act of March 3, 1893 (27 Stat., 593).

On December 5, 1893, your office overruled Groves's motion for review of your office decision of April 21, 1893, and denied his application to be allowed to acquire title to the land in question under the act of March 3, 1893.

Groves appeals.

Appellant alleges the following errors:

1. In holding said entry for cancellation in the first instance without considering the rights of the transferee Groves, under act of 1893.

2. In assuming, in the absence of any distinguishing words in the said act of 1893, that one form of certificate was intended to be embraced within its provisions and another form excluded.

3. In holding that because the errors and frauds under the special form of certificate employed since February 13, 1883, have been fewer in number than those under the general form of certificate used before that date, no reason exists for applying the statute to the later certificates, and that it was not enacted with reference to them.

4. Error in holding, in effect, that a letter of the Commissioner to the local officers, such as that quoted in Wm. Hall's case, advising them that Hall's application to enter certain land as a soldier's additional homestead had "been examined in connection with the records of this office and no objection thereto are found," is not a certificate, within the legal definition of the term.

"Certificate.—A statement in writing by a person having a public or official status, concerning some matter within his knowledge or authority." (Am. & Eng. Enc. of Law, Vol. 3, p. 59.)

5. Error in concluding from the circumstances, and the language of the act (March 3, 1893,) that it does not apply to all soldier's additional entries made prior to its passage, whether by the soldier in person or by his duly authorized agent.

6. Error in assuming from the circumstances, or anything contained in the act, that it was the intention of Congress to exclude from its operation or benefits a class of special certificates which had been employed for a period of more than ten years before its passage, and without which special certificate no soldier's additional entry had been allowed during that period.

7. Error in rejecting the application of Thos. J. Groves.

The sundry civil appropriation bill of March 3, 1893 (27 Statutes, 572, on page 593), contains the provisions under which Groves, as the transferee of Hall, claims the right to perfect his title to the land in question by paying the government price for it. Said act is as follows:

That when soldiers' additional homestead entries have been made or initiated upon certificate of the Commissioner of the General Land Office of the right to make such

entry, and there is no adverse claimant, and such certificate is found erroneous or invalid for any cause, the purchaser thereunder, on making proof of such purchase, may perfect his title by payment of the government price for the land; but no person shall be permitted to acquire more than one hundred and sixty acres of public land through the location of such certificate, etc.

As to the facts in the case, it is clear that Hall's second soldier's additional entry is in excess of his legal rights. The conveyance by Hall to Groves was actually made for a valuable consideration, and Groves has not transferred the land. From these facts it is clear that, if Hall's soldier's additional entry had been made or initiated upon a certificate of right issued by the Commissioner of the General Land Office, Groves would be entitled to perfect his title to the land in question by paying the government price therefor, notwithstanding the fact that Hall's entry was originally illegal, if such certificate should be found to have been erroneously issued or invalid for any cause. This is so where the entry is made or initiated upon such certificate, either by the soldier or by any good faith purchaser of such certificate. See *Charles Holt*, 16 L. D., 294; *Kisiah Goodnight, Id.*, 319; *Yellow Dog Improvement Co.*, 18 L. D., 77; *John W. Green*, 19 L. D., 465.

The act under consideration is not ambiguous. Its requirements are plain and easily understood. There must be an entry either made or initiated upon a certificate of right issued by the Commissioner of the General Land Office; there must be no adverse claimant; such certificate must be found to have been erroneously issued or invalid for some cause; the purchaser of the land covered by such entry, or the purchaser of such certificate, as the case may be, must make proof of his purchase. When all of these requirements are met, then such purchaser may be permitted to acquire title to the land embraced in the entry upon payment of the government price for it. But no person can be permitted to acquire title to more than one hundred and sixty acres of public land through the location of such certificate. It follows that, if any one or more of these pre-requisites are wanting in any given case, the purchaser is not entitled to perfect his title; they all must concur in order to bring a purchaser within the provisions of the act.

The underlying foundation for the acquisition of title from the government under the act is the certificate of right issued by the Commissioner of the General Land Office. In the absence of such certificate the statute has no application. See *Gregg et al. v. Lakey*, 17 L. D., 60.

The only remaining question to be determined is, whether the entry of Hall was made upon such a "certificate" as the act of March 3, 1893, *supra*, contemplates. In order to determine this question a brief reference to the practice of the land department with respect to issuing certificates of soldiers' rights to make additional entries, and the facts connected with Hall's entry, seems to be proper and necessary.

By circular letter of your office of May 17, 1877, soldiers' additional homestead entries were provided for; and in cases where such rights

at that time remained in the hands of the parties in interest it was provided:

To secure these rights it is required that a full recital of military service be presented to this office, with due proof of the identity of the party making the claim, and with proper reference to his original homestead entry, giving the name of the district office, date and number of entry, and description of the land. In addition, a detailed statement, under oath, must be filed by the party in interest, setting forth the facts respecting his right to make the entry, and containing his declaration that he has not in any manner exercised his right, either by previous entry or application, or by sale, transfer, or power of attorney, but that the same remains in him unimpaired. He must also declare, under oath, that he has made full compliance with the homestead law in the matter of residence upon, cultivation and improvement of his original homestead entry; and should further recite whether or not he has proved up his claim and received a patent of the land.

When these papers are filed and examined, they will, if found satisfactory, be returned, with a certificate attached recognizing the right of the party to make additional entry under the law; and when presented with a proper application at any district land office, either by the party entitled or his agent or attorney, they will be accepted by the register and receiver, and forwarded with the entry papers to this office in the usual manner.

Under this circular the Commissioner of the General Land Office issued certificates reciting that:

In accordance with Official Circular, issued from this office, dated May 17, 1877, I,, Commissioner of the General Land Office, do hereby certify that who made original homestead entry No., at, dated, containing acres, is entitled to an additional homestead entry not exceeding acres, as provided in Section 2306, Revised Statutes of the United States.

Commissioner of the General Land Office.

By circular of February 13, 1883 (1 L. D., 654), the circular of May 17, 1877, was modified, and the practice of issuing soldiers' additional certificates of right was discontinued.

On February 18, 1890, your office issued a circular letter requiring local officers, in cases where parties applied to make entry under section 2306 of the Revised Statutes and the right claimed was not certified under the circular of May 17, 1877, and the certificate presented in support of the claim, the local officers were directed to forward the papers to this office for examination in connection with the official records, after making the notations on your records necessary to show the pendency of the application . . . and await instructions, before taking any further action in the case.

On May 12, 1892, the register at Waterville, Washington, pursuant to the circular of February 10, 1890, forwarded to your office Hall's application to make additional entry of the land in question, and on August 5, 1892, your office informed the local office that Hall's application "has been examined in connection with the records of this office, and no objections thereto are found. The papers are herewith returned for allowance of the entry. . . ." Hall's additional entry was accordingly allowed by the register and receiver on August 26, 1892.

Counsel for appellant insist that the letter of your office of August

5, 1892, should be treated the same, and given the same force and effect, under the act of March 3, 1893, *supra*, as a certificate of right issued under the circular of May 17, 1877.

The certificates under the circular of May 17, 1877, were technically known as "certificates of right," and in character were scrip that could be located by agent or the holder upon unappropriated public land wherever found. Under said circular there were over 5,500 of these certificates issued, covering an area of about 400,000 acres of land.

At the date of the passage of the act of March 3, 1893, *supra*, there were enough of these certificates outstanding to cover something like 10,000 acres of land; many entries had been made or initiated under such certificates by purchasers, by agents and attorneys in fact; the issuance of the certificates was discontinued on account of the many frauds connected with their procurement, location, sales and attempted transfers. The act was evidently passed for the benefit of the purchasers of the certificates of right where entries had been made or initiated upon such certificate, as well as purchasers of the land covered by such entries. It is remedial in character, and in all matters within its purview should receive a liberal construction; at the same time it can not be extended so as to embrace entries not within its letter or spirit. The language of the act is plain and unambiguous. It clearly limits its benefits to entries made or initiated upon certificates of right issued by the Commissioner of the General Land Office. The "certificates" of right referred to in the act are evidently the "certificates" of right issued under the circular of May 17, 1877. The language of the act clearly confines and limits its benefits to entries made or initiated under this particular kind of certificates. It does not in spirit or letter cover statements made by your office, such as made in the case at bar in regard to Hall's soldier's additional application.

It is clear that said act has no application to a soldier's additional entry when made in person, unless it should appear that such entry has been made or initiated upon a certificate of right issued by the Commissioner of the General Land Office under the circular of May 17, 1877.

The Department has heretofore held this to be the proper construction of said act. *Harmick v. Butts et al.* and *Harmick v. Sheppard et al.*, 20 L. D., 516.

For the foregoing reasons, your office decisions appealed from are hereby affirmed.

The departmental decision rendered in this case on February 17, 1896, is hereby recalled and set aside, and the foregoing decision is substituted for that of February 17, 1896.

RAILROAD GRANT—INDEMNITY WITHDRAWAL.

SOUTHERN PACIFIC R. R. Co. v. KANAWYER.

An executive withdrawal for indemnity purposes is in violation of the terms imposed in the grant of July 27, 1866, and is without effect except as notice of the limits within which the company would be entitled to select indemnity.

Secretary Francis to the Commissioner of the General Land Office, December 15, 1896. (F. W. C.)

With your office letter of October 14, 1896, was forwarded a motion, filed on behalf of the Southern Pacific Railroad Company, for review of departmental decision of August 31, 1896 (not reported), in the case of said company v. Peter A. Kanawyer and others, involving certain lands within the Visalia land district, California.

These lands are within the indemnity limits of the grant to said company and were first applied for on account of the grant as indemnity on October 4, 1887. The lists of that date were first rejected by the local officers because the lost lands assigned as bases for the selections were not in their district, and afterwards because the lost lands were not opposite to those sought to be selected.

Upon appeal your office held the reasons assigned not to be good and directed that the lists be accepted if upon further examination no other reason appeared for their rejection. The local officers thereupon accepted the lists as to certain of the lands covered thereby but rejected the same as to others; from which action the company appealed.

Upon said appeal your office held that the company should present a clear list made up from those tracts not in conflict and include the conflicts in a separate list; in accordance with which a new list was presented as to the conflicts, which is the list now under consideration.

The indemnity withdrawal formerly recognized on account of this grant was revoked, at the same time other indemnity withdrawals were revoked, by order of August 15, 1887. Although the lands were by the terms of the order of revocation held to be subject to settlement, the local officers were directed not to allow any entries of such lands until after due notice by publication. Prior to such revocation, and indeed before the revocation of the indemnity withdrawal, in some instances entries had been allowed for the lands in question. The claimed rights under said entries antedated the first presentation of the indemnity list covering these tracts, by the company, to-wit, on October 4, 1887.

The grant in question was made by the act of July 27, 1866 (14 Stat., 292), which contains a provision for the withdrawal of lands upon the filing of the map of general route similar to that contained in the grant to the Northern Pacific Railroad Company, made by the act of July 2, 1864 (13 Stat., 365).

In the case of the Northern Pacific Railroad Company *v.* Miller (7 L. D., 100) it was held that the language in section six of the granting act, which expressly directed that the homestead and pre-emption laws should be "extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company," was a mandate effectually prohibiting the exercise of the executive authority to withdraw any "lands on the line of said road;" and an order, made on definite location, continuing in effect, for indemnity purposes, such a withdrawal is in violation of law and without effect, except as notice of the limits within which the company would be entitled to select indemnity. A similar provision is found in the grant of July 27, 1866 (*supra*).

The decision in the Miller case has been uniformly followed by this Department; and under said decision it must be held that the indemnity withdrawal formerly recognized on account of this grant was in violation of law and of no effect, except as notice of the limits within which the company would be entitled to select indemnity.

Your office decision of December 14, 1893, sustaining the action of the local officers in rejecting the indemnity selection of the Southern Pacific Railroad Company, covering the tracts embraced in the entries of Peter A. Kanawyer and others, was therefore, by the decision under review, affirmed.

The motion urges the following grounds of error:

1. Because the entries of Kanawyer *et al.*, were allowed in 1886 and 1887 while the withdrawal was in full force, and that a *de facto* withdrawal is the equivalent to a *de jure* withdrawal, so that no rights could be initiated which could avail Kanawyer *et al.*, as against the railroad grant.

2. Because this decision we ask reconsidered was rendered subsequent to that of the supreme court of the United States of June 3, 1895, in the case of Spencer *v.* McDougal (159 U. S., 62) which decided that a withdrawal of lands by order of your Department for the benefit of a railroad grant, was effective and barred settlement and entry of such withdrawn lands, notwithstanding the railroad grant did not authorize such withdrawal.

This precise question also was considered by the supreme court of the United States in Wood *v.* Beach (156 U. S., 548).

3. Because the decision in this case is in the face of and directly contrary to that of the Department in Willamette Valley and C. M. Wagon Road Co. *v.* Hagan (20 L. D., 259).

In this case there was no grant of specific lands, nor any provision for a withdrawal. The company was to get three sections out of six to be selected, and no possible right could be acquired prior to selection, and yet it was held that the withdrawal must be respected, and was effective to protect the lands from settlement "as though provided in the act," reversing the decisions in Chapman (13 L. D., 61) and S. P. R. R. Co. *v.* Brady (5 L. D., 407 and 658); See also 12 L. D., 214; 13 L. D., 432.

4. Because the decision is contrary to decisions of the U. S. circuit court for the southern district of California. (Southern Pac. R. R. Co. *v.* Orton, 6 Sawyer, 157; Southern Pac. R. R. Co. *v.* Araiza, 57 Fed. Rep., 98), and supreme court of North Dakota. (Northern Pac. R. R. Co. *v.* Barnes, 51 N. W. Rep., 386), supreme court of the U. S. (Buttz *v.* Northern Pac. R. R. Co., 119 U. S., 72).

In conclusion the motion states that—

The question at issue in this case is an important one, and as we believe the decision we ask may be reconsidered is directly contrary to the adjudications of the courts of the United States to which we have referred, we respectfully ask that argument be allowed upon our motion.

From what has been said it must be apparent that if the withdrawal formerly made on account of this grant for indemnity purposes was in violation of law and of no effect, that no real question is presented as to the authority of this Department to revoke or disregard such unauthorized withdrawal. As early as August 1888 this Department, after a full and thorough investigation of the matter and full opportunity to present the question both orally and by brief, held the indemnity withdrawal in the case of the Northern Pacific Railroad Company, for the reasons before given, to have been made in violation of law and therefore without effect except to mark indemnity limits. Although many times attacked in different ways, the Department has adhered to the position taken in said case. I can therefore see no good purpose in further offering an opportunity for the submission of argument upon this proposition.

The motion under consideration is therefore accordingly denied and herewith returned for the files of your office.

SOLDIERS ADDITIONAL HOMESTEAD—ACT OF AUGUST 18, 1894.

ASPINALL ET AL. v. STOCKS ET AL.

The act of August 18, 1894, providing for the approval of a certain class of soldiers additional homestead entries does not contemplate the confirmation of entries made on land not subject thereto, and hence cannot be invoked for the protection of such an entry made on lands occupied for trade and business.

Secretary Francis to the Commissioner of the General Land Office, December
(I. H. L.) 15, 1896. (P. J. C.)

It appears that on February 28, 1885, John L. Noonan as attorney-in-fact for William Stocks made soldier's additional homestead entry for what was then described as lot 9—by more recent surveys designated as lots 6, 7 and 8, Sec. 7, T. 10 S., R. 84 W., 6 P. M., Glenwood Springs, Colorado, land district. This feature of this controversy has been considered by the Department heretofore, and it was decided on November 7, 1895 (L. & R., 319, p. 342), that the entry of Stocks thus made was not illegal in its inception by reason of having been made under an absolute power of attorney from the entryman. On a motion for review it was decided, April 24, 1896 (L. & R., 330, p. 415), that the record had not been fully considered by your office, and the same was returned for examination on the feature that is now presented. Inasmuch as the details have no direct bearing on the questions now presented it is not deemed necessary to recite them.

On August 20, 1887, Aspinall and six others filed a protest against the entry of Stocks, alleging that the land was claimed and occupied by themselves with others as a town site prior to Stocks' entry; that there were residences, trading-houses, shops, and mills erected thereon, occupied and used, and that Stocks and his transferees were attempting to secure title for the purpose of extorting money from the residents thereon. Your office by letter of October 21, 1887, ordered a hearing on the charges, and as result thereof, the local officers decided, on this point, that "there seems to be no doubt but what there was some occupancy and use of the land before the Stocks' entry was made, but it does not appear to have been of a permanent character at that time," and recommended that the protest be dismissed.

Your office, by letter of June 9, 1896, reversed the action of the local office, holding that the land was occupied and used at that time for residence and business purposes, and was therefore exempt from entry; whereupon Stocks *et al.* prosecute this appeal.

From an examination of the record it is found that in your said office opinion the facts are fairly and sufficiently stated. It is conceded by the local officers that "there was some occupation and use of the land before the Stocks' entry was made," and the only difference between your office judgment and theirs is that they concluded that it was not of a permanent character at the date of the entry. So that as to the fact of the land being occupied for trade and residence purposes there is substantially no difference of opinion.

To go into detail as to what the evidence shows would be simply to reiterate what is recited in your office decision. But to state it briefly it is undisputed that at the date of the entry there was an ore sampling works; about twenty houses owned and occupied by persons and families; stable and out-houses on the land; that feed and potatoes were sold on the premises; that there was a laundry and carpenter shop; and that the land was surveyed into lots and blocks shortly after the entry of Stocks and platted in accord with the town of Aspen with the view of receiving government title thereto.

The contention of counsel that the Stocks entry is confirmed by the act of August 18, 1894 (28 Stat., 397) is not tenable. The statute reads as follows:

That all soldiers' additional homestead certificates heretofore issued under the rules and regulations of the General Land Office under section twenty-three hundred and six of the Revised Statutes of the United States, or in pursuance of the decisions or instructions of the Secretary of the Interior, of date March tenth, eighteen hundred and seventy-seven, or any subsequent decisions or instructions of the Secretary of the Interior or the Commissioner of the General Land Office, shall be, and are hereby, declared to be valid, notwithstanding any attempted sale or transfer thereof; and where such certificates have been or may hereafter be sold or transferred, such sale or transfer shall not be regarded as invalidating the right, but the same shall be good and valid in the hands of *bona fide* purchasers for value; and all entries heretofore or hereafter made with such certificates by such purchasers shall be approved, and patent shall issue in the name of the assignees.

It is not in my judgment contemplated by this statute that any entries made with soldiers' additional homestead certificates should be confirmed, except where under departmental decisions or instructions their transfer had been prohibited. It was only intended thereby to validate the transfers of the certificates and confirm entries made by attorneys-in-fact. The statute does not contemplate the confirmation of such entries upon land not subject to entry. The land in question was not subject to such entry because it was used and occupied for trade, business and residence purposes by the inhabitants thereof.

Your office judgment is therefore affirmed, and the papers transmitted by your office letter "N" August 20, 1896, returned for such further action as may be appropriate in view of the protest of the Aspen Consolidated Mining Company.

It is so ordered.

MINING CLAIM—NOTICE—POSTING.

PARSONS ET AL. *v.* ELLIS (ON REVIEW).

In the notice posted on a mining claim the book and page of the record should be given of the location on which the official survey is made, and failure to comply with this requirement will necessitate new notice.

Secretary Francis to the Commissioner of the General Land Office, December 15, 1896.
(I. H. L.) (P. J. C.)

Motion for review of departmental decision of July 7, 1896 (23 L. D., 69), was filed by E. D. Parsons *et al.*, and on consideration thereof the same was entertained. Notice has been served under the rule, and the matter now comes up for consideration.

It appears that Charles W. Ellis, by W. S. Morse, his attorney-in-fact, filed application for patent for the Pine Mountain lode claim, survey 1146, Prescott, Arizona, land district. The period of publication expired December 3, 1894. On December 5th following, E. D. Parsons *et al.* filed their protest and adverse against the entry, and the local officers rejected the same as an adverse, because it was not filed within the period of publication, but accepted it as a protest, and ordered a hearing. As a result thereof they recommended that the application to purchase filed by Ellis be rejected. On appeal, your office reversed their action; whereupon the protestants appealed. A motion to dismiss this appeal was filed, on the ground "that the protestants as such have no right of appeal, occupying the position of *amicus curiæ* merely, and not being parties in interest." This motion was sustained, and it was held (syllabus):

A protest against a mineral application, filed after the period of publication, will not be considered by the Department on appeal, unless it is shown that the protestant has an interest in the ground involved, and that the law has not been complied with by the applicant.

The errors assigned in the motion for review that are deemed of sufficient importance for consideration are:

1st. The record shows that the law was not complied with by the applicant for patent in that he failed, in the notice of his application given, to give the name or names of adjoining claimants on the same or other lodes, as required by paragraph 29, Mining Regulations, December 10, 1891, and specifically held to be necessary in the case of *W. H. Gowdy et al. v. The Kismet Mining Co.*, rendered May 23, 1896 (22 L. D., 624), in which case new notice was required because of such failure.

2nd. The record shows, in the finding of the register and receiver, as well as the paper on file, that the application for patent fails to set forth a copy of notice posted on the mine, and the proof of posting notice and diagram shows that the notice was signed by E. C. Babbitt and W. S. Morse and not by the applicant Ellis.

3d. The record clearly shows that the notice was intentionally and fraudulently misleading, in that it referred to the book and page of the original location record as a part of the description of the land, and the basis of the claim, while the description by metes and bounds contained in the notice was totally and wholly different from that in the original location, and embraced more than six acres of the claim of the protestants, together with all of their improvements.

It will be observed that the errors complained of are not directed to the correctness of the original decision upon the sole point therein discussed and decided. The position taken in that decision is not questioned and the conclusion arrived at is, in my judgment, unassailable.

The attention of the Department is now specially directed, however, to what is considered a fatal defect in the application for patent, a defect clearly apparent in the record made by the applicant himself, and it is suggested that there is such a plain violation of the regulations that, even as between the government and the entryman, entry should not be permitted.

The abstract of title of the Pine Mountain lode, as furnished by the applicant, shows that it was located by one S. A. Davidson, February 25, 1878, and was "duly recorded in book F, 6, of mines, records of Yavapai county, Arizona, at page 420," on March 28, 1878. Through mesne conveyances, C. W. Ellis became the owner of the claim, February 1, 1894, and on June 25, 1894, he filed an "amended notice of location," in which it is stated that,

this amended or additional notice is made for the purpose of more definitely locating the claim by metes and bounds, and is without waiver of any rights claimed under the original location as recorded in book F, 6, page 420, of the records of Yavapai county.

This amended notice is recorded "in book 41 of mines, pages 48-49, records of Yavapai county, Arizona."

The official survey of the claim was made from the amended notice of location. In the application for patent the claim is described: "Said lode claim was duly located on the 25th day of February, 1878." In the notices published in the newspaper and posted in the local office, it is stated that:

The location of this mine is recorded in the recorder's office of Yavapai county, Arizona, in book F, 6, of mines, page 420. The adjoining claimants are, Fortune Mine on south.

In the notice posted on the claim the place of record is given as "the office of the recorder of Yavapai county, at Prescott, in the county and territory aforesaid."

It will be noticed that no paper filed in the local office, except the field notes, nor either of the notices published or posted, contains any statement as to where the record of the amended location, upon which the official survey was made, can be found, but all refer to the record of the original location.

Paragraph 29, Mining Circular, provides that:

The claimant is then required to post a copy of the plat of such survey in a conspicuous place upon the claim, together with notice of his intention to apply for a patent therefor; which notice will give the date of posting, the name of the claimant, the name of the claim, mine, or lode; the mining district and county; whether the location is of record, and, if so, *where the record may be found*; the number of feet claimed along the vein and the presumed direction thereof; the number of feet claimed on the lode in each direction from the point of discovery, or other well-defined place on the claim; the name or names of adjoining claimants on the same or other lodes; or, if none adjoin, the names of the nearest claims, etc.

Then follow paragraphs in regard to posting, etc., and in relation to the publication of notice. Then this:

35. The notices so published and posted must be as full and complete as possible, and embrace all the *data* given in the notice posted upon the claim.

36. Too much care can not be exercised in the preparation of these notices, inasmuch as upon their accuracy and completeness will depend, in a great measure, the regularity and validity of the whole proceeding.

The necessity for a strict compliance with these regulations is discussed in *Gowdy et al. v. Kismet Gold Mining Company* (22 L. D., 624), and it is not deemed necessary to reiterate the same here.

It is certainly contemplated by paragraph 29 that the notice posted on the claim must contain information where the record of the claim may be found. Simply referring to the record in the office of the recorder of the county, as in the case at bar, is not, in my judgment, sufficient. The book and page of the record should be given of the location upon which the official survey is made. It is not contemplated that those owning land in the vicinity of the claim for which patent is sought should be put to the trouble and expense of searching records to ascertain the location. The applicant is the moving party, and upon him is cast the burden of showing all the data by which parties interested may readily make such examinations as will enable them to determine whether there is a conflict between the claim applied for and others in the neighborhood. The necessity for doing this with accuracy is emphasized by paragraph 36.

A better illustration of the evil results of a failure to comply with the regulations could not be presented than that suggested by the case at bar. It may be well to say in this connection that the Department does not consider the affidavits and statements of the protestants as evidence in this matter, but simply uses them as an illustration in the

same manner it would a hypothetical case. The Morning Star lode claim, located in 1882, and throughout part of its length, laid next to and parallel with the Pine Mountain, as originally located and recorded in book F, 6, at page 420. There was apparently no surface conflict between these two claims as thus located. By the amended survey, however, it is charged that the Pine Mountain was so swung around as to include about six acres of the Morning Star. Now, in the application for patent, and the notice posted and published, there is no mention of this amended location or reference to the record thereof, but by everything that by law and the regulations was intended to convey notice to the world, the old record was given. By this deception any one was likely to be deceived and lulled into quietude in the protection of his rights.

But whether that was the result in this case or not is wholly immaterial at this stage of this proceeding. It is clear that there was not a compliance with the regulations in the matter of giving notice "where the record may be found," and in this there was fraud upon and misrepresentation to the government sufficient to require a republication and reposting of the notices.

The further objection that W. S. Morse, who acted as attorney-in-fact for Ellis, the entryman, was also the chainman who assisted in making the survey of the Pine Mountain lode, in violation of the rules, is without merit. There is no evidence in the record that Morse was the attorney-in-fact of Ellis at the time the survey was made, July 19, 1894. The power of attorney from Ellis to Morse is dated August 23, 1894, more than a month after the survey.

It is urged by counsel for the applicant that review of the former decision should not be granted, for the reason that all the matters suggested by the motion were presented and discussed in the first instance, and there being no new points of fact or law presented, the motion should fail.

It is true that the defect in the notices was presented and discussed in the appeal to the Department, and in the briefs of counsel. It will be observed, however, that this feature of the case was not discussed or referred to in the original decision. This was probably due to inadvertence when the case was originally under consideration, the attention of the Department being absorbed in the question that was decided. It was not charged specifically in the protest that there was a violation of law in the matter of the application for patent, but protestants seemed rather to rely on the fact that the applicant had fraudulently swung his claim around so as to include protestants' ground. From this fact, which was not of itself sufficient to warrant an appeal under the circumstances, the Department may have overlooked the importance of the other questions suggested.

But be that as it may, under the supervisory powers invested in the Secretary of the Interior in disposing of the public domain, he may,

even on his own motion, correct errors that appear in the record and require a compliance with the law on the part of those seeking government lands.

In so far as this motion seeks a revocation of the former decision, the same is overruled, and the order will be that the applicant be required to make new publication and posting of notices, in conformity with the rules.

It is so ordered, and the papers are herewith returned.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

DURRELL ET AL. *v.* WINDOM.

The right of purchase accorded by section 5, act of March 3, 1887, extends to indemnity lands as well as those within the primary limits, and this is true of lands which at the date of purchase from the company had not been selected, as well as of those which had.

Lands sold to purchasers in good faith as part of a railroad grant, but in fact excepted from the operation thereof, are within the purview of said section.

An application for the right of purchase under said section may be entertained at any time after it is ascertained that the land involved is excepted from the grant, and without waiting for the final adjustment of the entire grant.

The fact that a purchaser from a railroad company does not, prior to his purchase, examine the records of the Land Department in order to ascertain the character of the company's title, is not sufficient to defeat his right of purchase under said section as a "bona fide purchaser."

The good faith of a purchaser from a railroad company is not affected by the fact that he is a stockholder therein; nor by the further fact that he gave preferred stock of the company in exchange for the land.

The successful contestant of an entry acquires no preference right that can prevail as against the right of a bona fide purchaser under said section.

Secretary Francis to the Commissioner of the General Land Office, December 15, 1896. (I. H. L.) (J. L. McC.)

I have considered the case of Joseph M. Durrell and John E. Greene *v.* Ellen T. Windom, involving the SE. $\frac{1}{4}$ of Sec. 19, and the SE. $\frac{1}{4}$ of Sec. 21, T. 148 N., R. 52 W., Fargo land district, North Dakota.

John Bowers made timber culture entry of the SE. $\frac{1}{4}$ of Sec. 21 on October 1, 1879. Harrison L. Wiard made timber culture entry of the SE. $\frac{1}{4}$ of Sec. 19 on October 2, 1879. On January 17, 1895, John E. Greene filed contest against the entry of Bowers, and on the same date Joseph M. Durrell filed contest against the entry of Wiard. Hearings were ordered; Bowers and Wiard made default; and in each case decision was rendered by the local officers in favor of contestant. Your office affirmed said decisions on September 9, 1895; and said entries were shortly afterward canceled.

The lands are within the indemnity limits of the grant for the Northern Pacific railroad company, and were selected by said company per list No. 6, on March 19, 1883; and are also included in amended list No. 6, filed October 12, 1887 and February 23, 1892.

On May 21, 1895, the company's selections of said tracts were held for cancellation because of conflict with the prior and then subsisting entries of said Bowers and Wiard. An appeal was taken by the company to the Department, which, on December 6, 1894, affirmed the decisions of your office (See L. & R. copybook No. 298, pp. 18 and 54). The company's selections were canceled on March 7, 1895.

On May 11, 1895, Ellen T. Windom, executrix of William Windom, deceased, filed application to purchase said tracts under the fifth section of the act of March 3, 1887 (24 Stat., 556), and gave notice of her intention to submit proof in support of her claim on June 28, 1895. On the date appointed testimony was submitted in her behalf. Greene and Durrell, contestants of Bowers' and Wiard's timber culture entries, were represented by counsel.

Afterward Durrell (on September 28, 1895), and Greene (on October 5, 1895) applied to purchase under the homestead laws the tracts claimed by them respectively; but the local officers rejected their applications because of Mrs. Windom's pending application to purchase under the act of March 3, 1887.

On January 4, 1896, the local officers rendered a decision holding that William Windom was not a *bona fide* purchaser; also that the application to purchase was premature, inasmuch as the grant to the company had not been finally adjusted; hence they rejected the application to purchase.

Mrs. Windom appealed to your office, which, on June 22, 1896, held that the local officers were in error as regards both grounds upon which they based their decision, and decided that Mrs. Windom should be permitted to purchase.

From said decision of your office both Durrell and Greene have filed appeals, basing the same upon numerous allegations of error. Counsel for said appellants contend that,

the tracts being in the indemnity limits, and forming no part of the grant, it was error to hold that they are of the class of lands subject to purchase under the act of March 3, 1887.

Mr. Attorney General Garland, on November 17, 1887 (6 L. D., 272), rendered an opinion holding that the right of purchase accorded in the fifth section of the act of March 3, 1887, extends to indemnity lands as well as to those within the primary or granted limits, and the Department has since uniformly so held. This is true of lands which at the date of the purchase had not been selected, as well as of those which had. (See *Pierce et al. v. Musser-Saunrey Co.*, 19 L. D., 136.)

Appellants contend that it was error to hold that the tracts in controversy ever belonged to the Northern Pacific Railroad Company.

Certainly they did not; if the lands had belonged to the company the act would not apply. Section five, under which Mrs. Windom desires to purchase, expressly provides:

That where any said company shall have sold to citizens of the United States, or persons who have declared their intention to become such citizens, as a part of its grant, lands *not* conveyed to and for the use of such company, . . . or where the lands so sold are for any reason excepted from the operation of the grant,

the purchaser from such company can acquire title by purchase from the United States. This covers literally the case at bar, where the railroad company sold to Mr. Windom lands that were "excepted from the operation of the grant" by the timber-culture entries of Bowers and Wiard.

Appellants contend that the application to purchase was premature—or at least the grant in so far as it relates to the tracts in controversy—has not been "finally adjusted."

The section under which Mrs. Windom applies to purchase is part of an act relating specifically to grants that have not been "finally adjusted." It provides:

That the Secretary of the Interior be, and is hereby, authorized and directed to immediately adjust, in accordance with the decisions of the supreme court, each of the railroad grants made by Congress to aid in the construction of railroads, and heretofore unadjusted.

Sec. 2. That if it shall appear, upon the completion of such adjustments respectively, or sooner, etc.

The direction to take certain action upon the adjustment of the grant, "or sooner" controls the entire act. Indeed, it would seem somewhat inconsistent that this act, entitled, "An act to provide for the adjustment of land-grants" should be construed to apply only in cases where the adjustment had already been completed. The correct rule in this respect is enunciated in the case of *Nicholas Cochems* (11 L. D., 627, syllabus):

An application to purchase under section 5, act of March 3, 1887, made by one claiming under a grantee of a railroad company cannot be entertained until it has been finally determined that the land in question is in fact excepted from the grant.

In the case at bar "it has been finally determined that the land in question is in fact excepted from the grant," by the timber-culture entries of Bowers and Wiard. That having been "finally determined" there was no occasion for further delay in applying to purchase or in acting upon such application. It can hardly be seriously contended that an applicant to purchase, having under the act in question a right superior to more recent applicants to enter, must sit idly by and witness without protest the patenting of the lands to others not legally entitled thereto. Indeed, it is better for these appellants that the application to purchase be made and decided now, than to postpone it until sometime far in the future, when the entire grant shall have been finally adjusted, and then put them to the trouble and expense of defending in a suit for the cancellation of such patent.

The Department has heretofore in numerous cases allowed applications to purchase under section 5 of the act of March 3, 1887, before the final adjustment of the grant. See *Union Pacific Ry. Co. et al. v. McKinley* (14 L. D., 237); *Criswell v. Waddingham* (16 L. D., 66); *Union Colony v. Fulmele et al.* (ib. 273); *Jenkins et al. v. Dreyfus* (19 L. D., 272); *Skinvik v. Longstreet et al.* (22 L. D., 32); *Northern Pacific R. R. Co. v. North* (ib. 93); *Hunt v. Maxwell* (23 L. D., 180); *Grandin et al. v. La Bar* (23 L. D., 301).

The appellants assert that the decision of your office was in error in holding that William Windom was a *bona fide* purchaser. This allegation of error, however, is unsustained by any statement or argument on the part of said appellants. The local officers held that he was not a *bona fide* purchaser, and dwelt at length upon the reasons which led them to such a conclusion; but I am not convinced of its correctness. They say:

No investigation was made by Mr. Windom, or by any one for him, as to the Northern Pacific Railroad Company's source of title, nor did he cause to be examined the records of the United States land office at Fargo, or at Washington; he did not know or ascertain whether the railroad company had ever selected the lands; and as a matter of fact, at the date of purchase these lands had not been selected by the Northern Pacific Railroad Company.

The fact that Mr. Windom did not make an exhaustive examination of all records that might possibly contain some information relative to the land in controversy is not sufficient to show that his purchase was made in bad faith. A purchase is made "in good faith", when it is made "in ignorance of any right or claim of a third party". (Amer. and Eng. Cyclo. of Law, Vol. 2, p. 444); again a

bona fide purchaser . . . is one who purchases for a valuable consideration paid or parted with, and in the belief that the vendor had a right to sell, and without any suspicious circumstances to put him upon inquiry. (Ib.)

If the act were to be given the strict and narrow construction contended for by the local officers, and nobody were to be considered a *bona fide* purchaser who could not, and did not, show that prior to purchasing he had examined the records of your office, and the local office, and perhaps the recorder's offices of the several counties through which the railroad runs, and found therefrom that the land he contemplated purchasing in fact belonged to the railroad company, then there could have been no such thing as a *bona fide* purchaser from a railroad company of lands that did not belong to it, and the remedial act of March 3, 1887, would have been a vain and superfluous piece of legislation. In fact, at the date of purchase in the case at bar (in 1878), there was no claim of record or otherwise; the timber culture entries which excepted the land from selection were made in 1879.

The appellants contend that William Windom

being a stock or bond holder of the Northern Pacific Railroad Company, and having traded with himself, one portion of the company's property for another class of property claimed by it, at about one-half the government price for such lands, it was therefore error to hold that he was a *bona fide* purchaser.

A sufficient answer to this allegation may be found in departmental decision of August 29, 1896, in the case of *Grandin et al. v. La Bar* (23 L. D., 301), which is correctly summed up in the syllabus:

There is nothing in the fact that a purchaser of land from a railroad company is a stockholder therein to affect the good faith of such purchaser; nor does the further fact that the preferred stock of the company, that was convertible into lands, was given in exchange for the land, open the transaction to objection on the ground that there was no consideration for the sale.

See also, with reference to the qualifications of a purchaser from a railroad company, departmental decision in the case of *Drake et al. v. Button* (14 L. D., 18).

The appellants further contend that Durrell and Greene being successful contestants of the timber culture entries that at one time covered the land, and having made applications for the respective tracts at the time when they initiated their contests, have earned a preference right to enter the land, which is sufficient to defeat Mrs. Windom's application to purchase.

Section five of the act under consideration is very explicit in stating the character of the claims that will be allowed to defeat an application to purchase; these are:

(1) Lands which, "at the date of such sales, were in the *bona fide occupation* of adverse claimants under the *pre-emption or homestead laws*."

At the date of the sale to Mr. Windom (December 10, 1878), neither of the appellants was in "occupation" of the land "under the pre-emption or homestead laws"; neither of them had applied to enter the land, or had in any other manner initiated even an inchoate right to the same.

(2). Lands are excepted from purchase which had been settled upon subsequently to the first day of December, 1882, and prior to the passage of the act of March 3, 1887 (*Union Colony v. Fulmele et al.*, 16 L. D., 272, 277; *Swineford et al. v. Piper*, 19 L. D., 9; *Northern Pacific R. R. Co. v. North*, 22 L. D., 93). Neither of the appellants alleges actual settlement upon said land between the two dates above named, nor indeed at any time.

The successful contestant of an entry acquires no "preference right" that can prevail as against the right of a *bona fide* purchaser, under section 5 of the act of March 3, 1887 (*Hunt v. Maxwell*, 23 L. D., 180).

The decision of your office allowing Mrs. Windom's application to purchase, and rejecting the applications of Greene and Durrell to make homestead entry, is affirmed.

PRACTICE—APPEAL—REJECTED APPLICATION—RAILROAD SELECTION.

ASHELMAN *v.* NORTHERN PACIFIC R. R. Co.

In a case between an applicant for the right of entry, and a railroad company, claiming under an indemnity selection, where the application to enter is rejected by the local office, on account of conflict with the selection, and the appeal from such action is dismissed for want of regularity by the Commissioner, who in the same decision holds the company's selection invalid, the right of the applicant should be considered when final action is taken on the company's selection.

Secretary Francis to the Commissioner of the General Land Office, December 15, 1896.
(I. H. L.) (F. W. C.)

With your office letter of November 13, 1896, was transmitted an application for writ of certiorari, filed on behalf of Benjamin F. Ashelman, in the matter of the contest arising upon his application to enter the SE. $\frac{1}{4}$ of Sec. 7, T. 132 N., R. 47 W., Fargo land district, North Dakota.

The facts in this case, gathered from your office decision of October 12, 1896, a copy of which has been filed with the application for certiorari, appear to be as follows:

The tract involved is within the indemnity limits of the grant to said company, and was included in the company's list of selections filed March 19, 1883. Several lists have since been filed amendatory of said list of March 19, 1883.

March 27, 1895, Ashelman applied to enter the tract in question under the homestead law, his application being rejected for conflict with the company's selection, from which action he appealed to your office, but did not serve notice upon the company of such appeal, unless service upon W. K. Mendenhall, of this city, be held to be sufficient service upon the company.

In considering this matter your office decision of October 12, 1896, held that the service was insufficient, and therefore dismissed the appeal from the action of the local officers, although in the same decision you proceeded to the consideration of the company's rights under its selection of July 13, 1891, and held said selection to be invalid. The selection is therefore held for cancellation, subject to the right of appeal in the company.

Ashelman has attempted to appeal from said office decision, but in your office letter of October 23, 1896, you refuse to receive the same, holding that as your aforesaid decision dismissed Ashelman's appeal from the action of the local officers for want of proper service upon the company, no appeal therefrom lies.

Following your refusal to accept his appeal, Ashelman made the application for certiorari now under consideration. As to whether the company has appealed from that part of your decision which held its selection for cancellation, the record is silent.

From a consideration of the matter I am of opinion that it is unnecessary to consider the question as to the sufficiency of the service upon the company of Ashelman's appeal from the action of the local officers in rejecting his application to enter this land, in view of that part of your decision which held the company's selection to be invalid.

Should the company fail to appeal therefrom, or should the action taken in your office decision upon appeal be affirmed, it is clear that the company was in nowise injured, even should it be held that no service of the appeal had been made upon it. If the company's selection was invalid, Ashelman was denied a right by the action of the local officers in rejecting his application for conflict therewith, and he should be recognized in his right, if any he gained under his application, from the date of its presentation. Should the company fail to appeal from your office decision Ashelman will be accorded rights under his application as of the date of its presentation; and in the event that the company appeals, its rights in the matter will depend upon the legality of its selection. In that event Ashelman will be made a party to the case and permitted to make any showing desired as against the claimed rights in the company under its selection. This results in restoring to Ashelman his position upon the record, to secure which was the evident purpose of the filing of the writ under consideration.

RES JUDICATA—ILLEGAL ENTRY—PREFERENCE RIGHT.

MOORES *v.* SOMMER (ON REVIEW).

The doctrine of *res judicata*, as between the parties to a controversy, will not prevent the government from cancelling an entry where it is apparent that it cannot be perfected without perjury on the part of the entryman.

Under the supervisory authority of the Department a preference right of entry may be accorded a party through whose efforts an entry is canceled, though he may not be entitled to be heard as a contestant against such entry.

Secretary Francis to the Commissioner of the General Land Office, December 23, 1896. (I. H. L.) (C. W. P.)

On March 19, 1896, you transmitted a motion, on the part of Thomas J. Moores, for a review of the decision of the Department of February 21, 1896, in the case of the said Moores against Christian F. Sommer (22 L. D., 217). Upon examination of said motion the same was by the Department entertained, under date March 23, 1896, for argument as provided by amended rule 114 of Rules of Practice.

The land involved is the NW. $\frac{1}{4}$ of Sec. 27, T. 12 N., R. 3 W., Oklahoma City land district, Oklahoma Territory.

The specifications in this motion are numerous, but it is only necessary to refer to the following:

I.

It was error on the part of said Secretary, when the testimony clearly shows that said Sommer is disqualified, and that said Moores has been living upon, cultivating,

improving and maintaining the tract in controversy—his home—ever since he initiated his claim thereto, to hold, upon the cancellation of Sommer's entry, that said Moores can not be permitted on account of the doctrine of *res judicata*, to make entry for the land and therefore hold it subject to entry by the first legal applicant, and thereby to deprive said Moores of the benefit of his settlement, residence and improvement of the tract involved.

II.

The Honorable Secretary erred in said opinion, upon the cancellation of the entry of said Sommer, in awarding the land to the first legal applicant and thereby depriving said Moores of the benefit of the improvements which he has put upon the tract by giving them to an entire stranger, when upon equitable principles at least, said Moores is justly and fairly entitled to the tract.

III.

The Honorable Secretary of the Interior erred in said opinion in not holding that upon the cancellation of said Sommer's entry—notwithstanding the fact that under technical rules Moores may be precluded from making the entry, still, as a matter of equity and right, the land should be awarded to him on account of rights which he has acquired by the prosecution of the contest involved in this controversy and his settlement and residence upon the tract.

IV.

The Honorable Secretary erred in said opinion in not applying the equitable and liberal rules recognized by the Department in this case in favor of said Moores, on account of the great equities which he has involved in this controversy, and awarding him the tract in dispute rather than giving it to a stranger and thereby depriving said Moores of the fruits of his toil, labor, means and expenditure of money upon the tract and in prosecuting this contest.

V.

The Honorable Secretary erred in said opinion in holding that Moores having failed to appeal from the decision of the Honorable Commissioner adverse to him, is concluded thereby under the circumstances of this case, though Moores may have mistaken his remedy and filed a motion for review in the case to which he was not a party, thereby believing and intending to protect his interests—manifesting and showing his good faith by his efforts, he should not have the doctrine of *res judicata* applied to him in all its rigor in this new and independent contest proceeding instituted by him for the purpose of protecting his rights in the premises.

On April 9, 1896, you transmitted a motion for review on the part of Christian F. Sommer, as follows:

The grounds upon which this application is based are error of fact and law upon which said decision is based, said Sommer having been a duly qualified entryman for the land in question at the time application therefor was filed, and so held by this office and by the Honorable Secretary, upon a full examination of the facts and the law, and there being a broad distinction between the principles laid down by the supreme court in case of *Smith v. Townsend* (in which the undersigned had the honor to represent the appellee), and the facts applicable to this case.

It was admitted by Sommer, in his testimony in his contest against James H. Carter's entry, recited in departmental decision of August 19, 1892, that he was appointed transportation agent of the quartermaster's department, September 22, 1881; that on April 7, 1887, he was ordered to Oklahoma station, and remained there in the discharge of his official duties until after the opening of the territory, and was there on March

2, 1889, the date of the passage of the act opening said territory, and on April 22, when the same was opened by the President's proclamation; that he was on the land in controversy after noon on April 22, and that on the 23d he hauled some building material on it with the intention of building. But he did not build, neither did he make an entry. His first offer to enter the land was on October 28, 1889.

In the decision complained of it was held that these facts disqualified him under the rulings of the supreme court of the United States in the case of *Smith v. Townsend* (148 U. S., 490), and it was further held, that as he could not perfect title to the land, without committing perjury, his entry should be canceled, the doctrine of *res judicata* having no application as between him and the government. And I see no reason for changing the conclusions then reached.

Upon Moores' motion for review, although it was held in the decision complained of that a contest by him did not lie against Sommer's entry, yet, in view of the fact that it was owing to his persistent attempt to contest Sommer's entry that the attention of the Department was directed to its illegality, according to the rulings of the supreme court in the *Smith v. Townsend* case, it would be in accordance with those equitable principles which should govern the Department in the exercise of the supervisory powers of the Secretary to accord to Moores the preference right of entry, and you are directed to permit him to make homestead entry of the land.

The departmental decision of February 21, 1896, is modified accordingly.

BUILDING STONE-PLACER ENTRY-ABANDONED MILITARY
RESERVATION.

SIMON RANDOLPH.

Section 5, act of July 5, 1884, providing for the disposition of abandoned military reservations, may be properly construed in connection with the act of August 4, 1892, to warrant the allowance of a placer application for land containing building stone, in accordance with the latter act.

Secretary Francis to the Commissioner of the General Land Office, December 23, 1896. (I. H. L.) (C. J. W.)

Simon P. Randolph, claiming as one of seven locators, and as assignee of the other six, made mineral application No. 97 for the consolidated claim therein described, on June 29, 1893, at the local land office, Seattle, Washington. The local officers rejected his application, for the reason that the tract applied for was reserved for light-house purposes, under executive order of July 13, 1892. On appeal, your office affirmed the decision of the local officers, and he appealed to the Department.

Pending said appeal, a map of the light-house reservation was filed, from which it appears that it did not embrace the land applied for.

When the case came up for consideration in the Department, it was held, inasmuch as it now appeared that the application did not conflict with the light-house reservation, that the rights of the applicant should be reconsidered under the act of August 4, 1892 (27 Stat., 318), and the case was returned to your office for re-adjudication under existing conditions, but was subsequently recalled, and a further hearing was granted the applicant. Under this state of the record, the case was considered here on October 3, 1896. It was then held that the act of August 4, 1892, did not take building stone without the provisions of the act of 1878 (20 Stat., 89), or add it to the class of substances known as mineral, but provided that lands chiefly valuable for building stone might be entered under the placer mining laws. That is, after discovery of building stone, it may be entered under the placer mining laws, the rights of the entryman attaching from the date of his application to enter. It was, in substance, held that, if on June 29, 1893, when Randolph made application to purchase, and made tender of the purchase money, the land had been subject to entry, or was then subject to entry, he should be permitted to purchase under the placer mining laws. It was further held that his application, accompanied by the tender of the purchase price, might be taken as equivalent to entry. It appeared, however, that the executive order of March 4, 1896, rescinding or modifying the original order of reservation, itself reserved for military purposes the residue of the land not included in the survey for lighthouse purposes, and, as the land applied for was by reason of the first order in reservation at the date of the application, and by reason of the second order was still in reservation, it was held that Randolph acquired no right by his application and tender of the purchase price.

Said decision, although published (23 L. D., 329), was not promulgated, it having been withdrawn for further consideration.

The reservation made by executive order of March 4, 1896, was a continuance of the original reservation made for lighthouse purposes and was on the recommendation of the Secretary of War. This reservation was the only bar to the allowance of Randolph's application to enter and purchase. On November 23, 1896, the Secretary of War addressed a letter to the President, recommending that so much of the military reservation on Sucia Islands, in the Gulf of Georgia, State of Washington, which was declared by executive order of March 4, 1896, as is embraced in the mineral application No. 97, made at the land office at Seattle, Washington, by Simon P. Randolph, for patent on the Sucia Island Stone Mine, as shown by the survey of the mining claim of the said Simon P. Randolph, made under the direction of and reported by the United States surveyor-general for the State of Washington, mineral survey No. 314, be placed under the control of the Secretary of the Interior for disposition under the act of Congress approved July 5, 1884 (23 Stat., 104).

On December 12, 1896, the following order, signed by the President, was endorsed upon the recommendation of the Secretary of War:

The within recommendation is approved. The Secretary of the Interior will cause this action to be noted on the records of the General Land Office.

Randolph's counsel has called attention to this changed state of facts, and invoked supplemental action on the case.

This case is proceeding as between Randolph and the government alone, and there seems to be no valid reason why he may not be permitted to perfect his title under the act referred to, since the obstacle to the allowance of his application has been removed, if the fifth section of said act is applicable.

Said section is as follows:

Whenever any lands, containing valuable mineral deposits, shall be vacated by the reduction or the abandonment of any military reservation under the provisions of this act, the same shall be disposed of exclusively under the mineral laws of the United States.

It seems that Randolph proceeded in the inception of his claim by development and location upon the idea and belief that building stone lands could be acquired under the placer mining laws, at a time when the land was not in reservation, and that he has in all the steps he has taken acted in perfect good faith; that he has discovered, located, and surveyed, and developed a valuable quarry of building stone, at an expense so great as to have exhausted his resources. His equitable claim, to be allowed to perfect his title, is so patent and strong as to forbid the denial of such right, unless it should appear that there is a want of legal authority to allow it. It has been held by the Department that building stone is not a mineral, but that under the act of August 4, 1892, it may be entered under mining laws as though it were a mineral. These apparently conflicting propositions are not to be so construed as to destroy each other, but rather in such a way as that each may stand, in its proper order. It is clear that for the purposes of entry building stone may be treated and considered as though the land wherein it is located contained mineral deposits.

Section 5 of the act of July 5, 1884, provides for disposing of vacated military reservations which contain valuable mineral deposits under mineral laws exclusively. It can not be said that building stone comes within the letter of this statute, but construing this section with the act of August 4, 1892,—the purpose of which was to allow building stone land to be entered under placer mining laws—it would seem to come within its spirit.

The premises considered, and especially in view of the fact that this is a proceeding between the government and Randolph alone, the published, unpromulgated decision of October 3, 1896 (23 L. D., 329), is hereby vacated and set aside, and the present decision substituted therefor; and Randolph will be allowed thirty days from notice of this decision within which to pay the purchase money for the land claimed by him, and your office will direct the local officers upon such payment to issue to him final certificate and duplicate receipt.

HOSMER v. DENNY ET AL.

Motion for review of departmental decision of September 11, 1896, 23 L. D., 319, denied by Secretary Francis, December 23, 1896.

REGULATIONS CONCERNING PERMISSION TO USE RIGHT OF WAY OVER
THE PUBLIC LANDS FOR TRAMROADS, CANALS, RESERVOIRS, ETC.

The following regulations are promulgated under the act of Congress of January 21, 1895, (28 Stat., 635), entitled "An Act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes," which is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of the right of way through the public lands of the United States, not within the limits of any park, forest, military or Indian reservation, for tramroads, canals or reservoirs to the extent of the ground occupied by the water of the canals and reservoirs and fifty feet on each side of the marginal limits thereof; or fifty feet on each side of the center line of the tramroad, by any citizen or any association of citizens of the United States engaged in the business of mining or quarrying or cutting timber and manufacturing lumber.

and the act of May 14, 1896, (29 Stat., 120), entitled "An Act to amend the Act approved March third, eighteen hundred and ninety-one, granting the right of way upon the public lands for reservoir and canal purposes," which is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes," approved January twenty-first, eighteen hundred and ninety-five, be, and the same is hereby, amended by adding thereto the following:

SEC. 2. That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and forest reservations of the United States, by any citizen or association of citizens of the United States, for the purposes of generating, manufacturing, or distributing electric power.

1. It is to be specially noted that these acts differ from the other right-of-way acts of March 3, 1875, and March 3, 1891, in that they authorize merely a permission instead of making a grant, and that they give no right whatever to take from the public lands adjacent to the right-of-way any material, earth, or stone for construction or for any other purpose.

2. The application for permission to use the right of way through the public lands must be filed, and permission granted, as herein provided, before any rights can be claimed under the acts, and should be made in the form of a map and field notes in duplicate of the center line of the right of way or of the tramroad, canal, or reservoir, and filed in the local land office for the district in which the right of way

is located; if situated in more than one district, duplicate maps and field notes need be filed in but one district and single sets in the others.

3. The maps, field notes, evidence of water rights, etc., and, when the applicant is a corporation, the articles of incorporation and proofs of organization must be prepared and filed in accordance with the regulations for railroad, and for irrigation canals and reservoirs under the general right-of-way acts, as in the circulars of March 21, 1892,* and February 20, 1894,* respectively; forms 4 and 6 being modified in the last sentence to relate to the act under which the application is made.

4. An affidavit that the applicant is a citizen must accompany the application; if the applicant is an association of citizens, each must make affidavit of citizenship; a corporation organized under the laws of the United States or of any State or Territory will be presumed to be an association of citizens within the meaning of the act. If not a natural-born citizen, the applicant will be required to file proofs of naturalization. The applicant must also state in the affidavit the purposes for which the right of way is to be used, whether for mining or quarrying, or cutting timber and manufacturing lumber, or for electrical purposes.

5. When application is made for "the use of necessary ground, not exceeding forty acres," the tract should be clearly designated on the map by colored shading or otherwise, its location and extent accurately described by field notes if necessary, and it should be described in forms 3 and 4, by legal subdivision or by course and distance from a corner of the public surveys. The applicant must also make a statement in duplicate of the purposes for which the tract is to be used, which must also contain a showing that the tract is actually and to its entire extent necessary for the purposes indicated. In such cases, forms 7 and 8, pages 12 and 13 of circular of March 21, 1892, should be incorporated in the engineer's affidavit and applicant's certificate (forms 3 and 4), with the changes necessary to make it applicable to the law in question.

6. If the application is satisfactory to the Department, the Secretary of the Interior will give the required permission in such form as may be deemed proper, according to the features of each case. And it is to be expressly understood in every case under the act of 1895, that the permission extends only to the public lands of the United States, not within the limits of any park, forest, military or Indian reservation; that it is at any time subject to modification or revocation; that the disposal by the United States of any tract crossed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission, so far as it affects that tract; and that the permission is subject to any future regulations of the Department. Applications under the act of 1896 may be for rights of way upon forest reservations.

* Reported 14 L. D., 338; 18 L. D., 168.

7. The applicant should mark each of the subdivisions affected by the proposed right of way "V" or vacant, if it belongs to the public domain at the time of filing the map in the local land office, and the same must be verified by the certificate of the register which should be written on the map and duplicate. If it does not affirmatively appear that some portion of the public land is affected, the local officers will refuse to receive the application.

8. When the maps are filed, the local officers will note in pencil on the tract books opposite each tract traversed, that *permission* to use the right of way for a tramroad, canal, reservoir, or for electric purposes, is pending, giving date of filing and name of applicant, noting on each map the date of filing.

9. When the permission is given by the Secretary of the Interior, a copy of the original map will be sent to the local officers, who will mark upon the township plats the line of the right of way, and will note in pencil opposite each tract of public land affected that *permission* has been given, noting the date of permission and the act.

10. Permission may be given under the acts for rights of way on unsurveyed land, maps to be prepared as in the circulars noted.

11. The act approved May 21, 1896 (29 Stat., 127), entitled "An Act to grant right of way over the public domain for pipe lines in the States of Colorado and Wyoming" is similar in its requirements to the right of way act of March 3, 1891, and the regulations of February 20, 1894, furnish full information as to the preparation of the maps and papers. Applicants will be governed thereby so far as they are applicable.

The text of the act is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way through the public lands of the United States situate in the State of Colorado and in the State of Wyoming outside of the boundary lines of the Yellowstone National Park is hereby granted to any pipe line company or corporation formed for the purpose of transporting oils, crude or refined, which shall have filed or may hereafter file with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by said pipe line and twenty-five feet on each side of the center line of the same; also the right to take from the public lands adjacent to the line of said pipe line material, earth, and stone necessary for the construction of said pipe line.

SEC. 2. That any company or corporation desiring to secure the benefits of this Act shall, within twelve months after the location of ten miles of the pipe line, if the same be upon surveyed lands and if the same be upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its line, and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way.

SEC. 3. That if any section of said pipe line shall not be completed within five years after the location of said section the right herein granted shall be forfeited, as to any incomplete section of said pipe line, to the extent that the same is not completed at the date of the forfeiture.

SEC. 4. That nothing in this Act shall authorize the use of such right of way except for the pipe line, and then only so far as may be necessary for its construction, maintenance, and care.

S. W. LAMOREUX,
Commissioner.

Approved, December 23, 1896.

DAVID R. FRANCIS,
Secretary.

SECOND CONTEST—HEARING—OKLAHOMA LANDS.

HERSHEY v. BICKFORD ET AL.

Where a second contest is filed on grounds set forth in the first, with an additional allegation as to the disqualification of the first contestant as an entryman, and the entry under attack is canceled as the result of the first suit, and the contestant therein makes entry under his preferred right, it is not competent for the local office to order a hearing on the second contest as against the entry then of record.

The failure of an intervening entryman to specify any reason, on due opportunity given, why his entry should not be canceled and the preferred right of a successful contestant recognized, warrants the cancellation of his entry, and precludes such entryman from thereafter attacking the entry of the successful contestant on a charge that should have been set up under the rule to show cause.

A person who at the hour of opening Oklahoma lands to settlement is rightfully on reserved land within said Territory (the "government acre") is by reason of such presence disqualified from making the run on the day of opening, but is not necessarily disqualified from thereafter making entry of lands in said Territory, if by his presence therein he secured no advantage over others.

Secretary Francis to the Commissioner of the General Land Office, December 23, 1896. (I. H. L.) (G. B. G.)

The land involved in this contest is the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and lots 12, 13, 18, and 19, Sec. 33, T. 13 N., R. 7 W., Oklahoma land district, Oklahoma Territory, containing 154.54 acres.

On April 23, 1889, one James A. Baum made homestead entry of the land described, excepting lot 13, containing 7.40 acres.

On October 30, 1889, Harvey L. Bickford filed affidavit of contest against said entry, alleging abandonment.

On February 14, 1890, Calvin L. Severy filed affidavit of contest, charging Baum with abandonment, and Bickford with premature and unlawful entry into the Territory.

On May 24, 1890, hearing was had on Bickford's contest against Baum's entry. Baum defaulted, and Bickford proved abandonment. The local officers recommended the cancellation of Baum's entry. Your office approved said recommendation, canceled Baum's entry (on December 11, 1890), and awarded to Bickford the preference right of entry.

On October 6, 1890 (after the decision of the local officers, but prior to that of your office, *supra*), John Hershey filed affidavit of contest

against Baum's entry, charging Baum with abandonment, Bickford with "soonerism," and Severy with fraudulent speculation.

On December 18, 1890, Severy was permitted to make homestead entry, subject to Bickford's preference right.

On December 31, 1890, Bickford presented his application to make homestead entry. The local officers rejected his application because of Severy's prior entry. He appealed to your office, which, by letter of March 9, 1891, directed the local officers to notify Severy that he would be allowed sixty days within which to show cause why his entry should not be canceled. They did so, and on May 7, 1891, his counsel filed in the local office the following:

Now comes Calvin L. Severy, by his attorney, L. P. Hudson, and asks that the Hon. Register and Receiver name a day upon which he may show cause why his homestead entry No. 269 for (describing the land) should not be canceled for conflict with the preference right of H. L. Bickford. As a basis for this application see Hon. Commissioner's letter "H" of March 12, 1891.

The above document contains the following endorsement, signed by the register:

Filed May 7, 1891: and ordered that cause be set for hearing whenever, within the time allowed, entryman shall have filed application for hearing, *stating specific causes* why the entry of Bickford should not be allowed.

Severy failed to file any application "stating specific causes"—or any cause—why Bickford's entry should not be allowed. The local officers (on September 16, 1891,) reported to your office that, although more than the prescribed time (sixty days) had elapsed, Severy had failed to comply with the order, and recommended the cancellation of his entry. Thereupon your office (on October 12, 1891,) directed the local officers to note the cancellation of Severy's entry, and to place the application of Bickford of record. From this order of your office Severy appealed to the Department, which, on October 11, 1892, affirmed the decision of your office. (15 L. D., 358; on review, 16 L. D., 135.)

In pursuance of the above named departmental decisions, Severy's entry was canceled; and on March 8, 1893, Bickford made homestead entry of the land.

The next day (March 9, 1893,) Severy filed contest against Bickford's entry, alleging that he had entered the Territory during the period prohibited by law and the President's proclamation of March 23, 1889.

On April 13, 1893, the local officers, at the request of John Hershey, issued notice of hearing upon his affidavit of contest (filed October 6, 1890, *supra*.) against Baum's entry—which had been canceled twenty-eight months before, as the result of Bickford's contest. Said notice summoned Severy (*et al.*) to appear at said hearing, inasmuch as he claimed "some right or equity in and to said tract, the exact nature of which does not appear."

On the day set for the hearing (May 29, 1893), counsel for Severy

filed a motion that the local officers vacate and set aside said notice, which motion was overruled. Counsel for both Hershy and Bickford moved that Severy's contest be dismissed; which motion, after argument, was granted. The hearing then proceeded as between Hershy and Bickford.

On June 3, 1893, the local officers found and held that Bickford was "disqualified from making legal entry of the tract in dispute by reason of his presence within the Oklahoma lands between March 2, 1889, and noon of April 22, 1889;" and they recommended that his homestead entry be canceled.

From the action and decision of the local officers, as above, both Bickford and Severy appealed to your office.

On January 11, 1894, your office, acting upon said appeals, held that Severy's contest affidavit of February 14, 1890, and Hershy's contest affidavit of October 6, 1890, against Baum's homestead entry, were nullities, so far as Bickford's entry was concerned; nevertheless, your office proceeded to consider Bickford's appeal, and affirmed the decision of the local officers in so far as concerned the cancellation of Bickford's entry.

From said decision of your office Severy, Hershy, and Bickford, all appealed: Bickford contending that his entry ought not to be canceled, and Severy and Hershy contending that, in case it should be canceled, each of them respectively has earned the preference right to enter the land.

II.—Hershy. From the preceding statement of the facts that led up to the hearing, it will be seen that said hearing (on May 29, 1893,) was based on Hershy's affidavit of contest (filed October 6, 1890,) against Baum's homestead entry—incidentally charging Bickford, the prior contestant of Baum's entry, with "soonerism." But long prior to the date of the hearing, Baum's entry, against which Hershy's contest was aimed, had been canceled. Relative to this branch of the case your office decision appealed from says:

The validity of a contest is not affected by the fact that the contestant is not qualified to enter the land (See *Lerne v. Martin*, 5 L. D., 259; *Mitchell v. Salen*, 16 L. D., 403). In *Spitz v. Rodey* (17 L. D., 503), it was held that "the government has no interest whatever in the personality of the individual who initiates a contest." At the time Bickford's contest against Baum's entry was pending, the government was not interested in the question of Bickford's qualifications to enter the land; and all charges brought against him at that time were premature, as it was not known whether or not, in the event of the cancellation of Baum's entry, he intended to exercise the preference right awarded to successful contestants by the second section of the act of May 14, 1880 (21 Stat., 140). No charge could properly be brought against Bickford in advance of his application to enter the land. Nor did the charges filed against him in anticipation of his application to enter the land become invested with life upon his application to enter, filed May 8, 1893. While Bickford's contest against Baum's entry was pending, any contest affidavits setting forth the same charges against Baum that were then in issue between Bickford and Baum, and alleging that Bickford was disqualified to make entry, were, so far as Bickford is concerned, mere nullities. It follows that the affidavit of Hershy, filed

October 5, 1890, while Bickford's contest was pending, was without force and effect, and that your action of April 13, 1892, ordering a hearing on Hershy's contest affidavit, filed October 6, 1890, was erroneous.

From this branch of your office decision Hershy appeals, contending that, however irregular the proceeding that led up to the hearing may have been, yet, inasmuch as the local officers deemed the contest affidavit of October 6, 1890, a sufficient basis for such hearing, and accordingly directed it to be held, and as Hershy at said hearing proved Bickford's disqualification, and paid the fees demanded, he is entitled, under the second section of the act of May 14, 1880, to the preference right of entry—in case Bickford's entry is canceled as the result of said hearing.

Upon the cancellation of Baum's entry, and the restoration of the land to the public domain, Hershy's contest against said entry ceased to exist. His premature and invalid affidavit against Bickford certainly did not survive thereafter. In my opinion, it was not competent for the local officers, in the face of persistent objection, to resurrect an irrelevant affidavit, improperly filed in connection with a disallowed application to contest an entry that had long before become extinct, and use such affidavit as the basis of a hearing against *another entry*.

III.—Severy. Counsel for Severy alleges more than a score of errors in your office decision appealed from, which need not be discussed *seriatim*. They may all be covered by a few general and simple propositions:

(1.) Severy's contest affidavit of February 14, 1880, against Baum's entry (also accusing Bickford with having entered the Territory prematurely), was, for the reasons hereinbefore given in connection with Hershy's similar contest affidavit against Baum's entry, a nullity as against Bickford, and every one else except Baum; it can not, therefore, be properly considered as pending or in existence at any stage of the proceedings subsequently to the cancellation of Baum's entry, against which it was directed.

(2.) Severy's entry of December 17, 1890, was properly canceled upon his refusal, after sixty days' notification by the local officers in pursuance of the order of your office, to specify any reason why his entry should not be canceled; hence it can not be considered as being in existence at any subsequent stage of the proceedings.

(3.) Severy's contest against Bickford's entry, alleging a cause which had previously existed, but which he had persistently refused to specify when ample opportunity was (by direction of your office) afforded him to do so, was properly dismissed, and is not to be considered as being in existence at any subsequent stage of the proceedings. He has "had his day in court."

(4.) It follows that Severy has never at any time had in existence a valid entry, nor a valid contest against any other entry, which gave him any rights whatever in the premises.

IV.—Bickford. The case being closed as regards Hershy and Severy, it remains to consider the case as between Bickford and the United States; for

the government is a party in interest, and entitled to judgment on the facts, however such facts may have been disclosed, and whatever the rights of the private parties to the contest may be as against each other (*Saunders v. Baldwin*, 9 L. D., 391).

The facts relative to Bickford's presence in the Territory during the prohibited period are simple and undisputed.

The proclamation of the President opening the lands in this part of the Territory to settlement, saved and excepted from such opening, "one acre of land in square form in the northwest corner of section 9, T. 16 N., R. 2 W.," for the site of the land office at Guthrie, and "one acre of land in the southeast corner of the northwest quarter of section 15, T. 16 N., R. 7 W.," for the site of the land office at Kingfisher.

For several years prior to the opening, Bickford, at that time a resident of Leavenworth, Kansas, was an employe in the service of the Indian Bureau. The finding of facts by the local officers is as follows:

From a careful examination of the evidence, we find that the defendant had been within the Oklahoma lands for a long time prior to March 2, 1889, engaged in the business of government contractor and flour inspector, and that he remained within said lands during the prohibited period, engaged in said occupation, his contracts not expiring until June or July, 1889. It appears also that at 12 o'clock, noon, of April 22, 1889, he was on the acre reserved for a land office at Kingfisher, O. T., whither he had been called by some of his contract work.

Bickford acknowledges that he was on the "government acre" at Kingfisher at noon of the day of opening. He testified: "I went there and stayed on purpose not to be in the country when it was opened." In his appeal to the Department he acknowledges the correctness of the local officers' finding as to facts. He says:

The Commissioner erred in holding and finding that the presence of the defendant upon the government acre near Kingfisher, O. T., at the hour of 12 o'clock, noon, on April 22, 1889, operated as a disqualification, and brought him within the prohibition of the act of March 2, 1889, said presence being in the line of his duty as government contractor, by virtue of legal permission, and uncoupled with any attempt to take land for more than three years subsequent to noon of April 22, 1889.

In their argument in support of the appeal, counsel for Bickford contend that he was legally outside the prohibited territory because of being inside the limits of the "government acres;" that if this contention is erroneous—if he is to be considered as within the prohibited territory—he was properly and legally there; that he manifestly gained no advantage over any one else, inasmuch as he did not "make the run" on the day of the opening; and that even if it were to be conceded that he was disqualified from "making the run" on the day of opening, he was not "forever disqualified," so that he could not be allowed, years after the opening, to contest Baum's entry for the land in question and make entry thereof himself, upon earning it by procuring the cancellation of the prior entry.

I cannot concur with counsel for Bickford in their contention that he

was outside the territory because he was inside the "government acre;" nor can I concur in the suggestion that inasmuch as Bickford was properly and legally within the territory he was not subject to the prohibition of the statute.

The supreme court of the United States in the case of *Smith v. Townsend* (148 U. S., 490) says:

The general language used in the sections indicates that it was the intention of Congress to make the disqualification universally absolute. It does not say 'any person who may wrongfully enter,' etc., but 'any person who may enter;'—'rightfully or wrongfully' is implied.

I think it, therefore, quite clear that Bickford was disqualified from making the run on the day of the opening, even though, at that time, he were within the "government acre."

It is contended, however, by counsel for Bickford, that conceding that he was disqualified to make the run, he was not necessarily disqualified from making entry years afterwards. I concur in this view. In the case referred to, the supreme court of the United States says that in construing a statute a court may with propriety recur to the history of the times when it was passed, in order to ascertain the meaning of particular provisions of it; that it was well known that as the time drew near to the opening of the territory for occupation, under and by virtue of treaties with the Indian tribes, and in accordance with the law of Congress under consideration, there was a large gathering of persons along the borders of the territory awaiting the coming of the exact moment at which it should be lawful for them to move into it and establish homestead and other settlements, and that the purpose of the act was evidently to secure equality between all who desired to establish settlements in that territory.

Due consideration of the mischief which the law was designed to correct, and of the reason of the remedy provided, will not justify such an interpretation of it as would exclude Bickford from making a settlement nearly two years after the territory was formally opened. His presence on the "government acre" at the time of the opening, secured to him no advantage whatsoever with respect to the settlement ultimately made by him. The equality of opportunity which it was the manifest purpose of the statute to secure to all settlers alike, is not in any degree impaired, imperiled, or involved by an entry made nearly two years after the formal opening. Assuming, therefore, that Bickford's case is within the letter of the statute, it falls without the spirit of it. The distinction between the letter and the spirit of the act was recognized by the supreme court in *Smith v. Townsend*, and it is intimated that the spirit, rather than the letter, of the law should be adhered to.

I very much doubt, however, whether Bickford's case falls within the letter of the statute. Its language is general and comprehensive:—

Any person who may enter upon any part of said lands prior to the time that the same are opened to settlement, shall not be permitted to occupy or to make entry of such lands, or to lay any claim thereto.

Until said lands are opened to settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto.

Assuming that under the first of the foregoing paragraphs Bickford—whether rightfully or wrongfully within the territory prior to the time of opening—was thereby disqualified to occupy or make entry of such lands, or lay any claim thereto, I think it clear that the disqualification is confined to the day of opening, it being manifest that the purpose of the act was to secure equality of opportunity to all persons alike.

The first paragraph does not say that one who enters prior to the formal opening shall *forever* be disqualified, as is provided by the subsequent paragraph.

The second paragraph is much more comprehensive in its terms. It declares that no person shall be permitted to enter upon and occupy the lands until they shall have been opened for settlement by proclamation, and imposes as a penalty upon the person who shall violate the prohibition a perpetual disqualification from acquiring any right to such lands.

Bickford did not enter upon and occupy any part of the territory opened. He was, at the day of opening, rightfully on the "government acre," and remained there until after the hour of opening had passed.

I am unwilling, however, to decide this case upon so narrow and special a ground. It is my opinion that wherever it can be clearly established that no advantage whatsoever was, or could have been, gained by a technical infraction of the law, a person should not be disqualified by reason of such technical infraction.

In the case of *Smith v. Townsend* it appeared that the run was made from a railroad right of way at the day of opening, and that an advantage was, or could have been, derived by reason of that fact. In concluding its judgment in that case the supreme court says:

It may be said that if this literal and comprehensive meaning is given to these words it would follow that anyone who, after March 2, and before April 22, should chance to step within the limits of the territory, would be forever disqualified from taking a homestead therein. Doubtless he would be within the letter of the statute; but if at the hour of noon on April 22, when the legal barrier was by the President destroyed, he was in fact outside of the limits of the territory, it may perhaps be said that if within the letter he was not within the spirit of the law, and, therefore, not disqualified from taking a homestead. Be that as it may,—and it will be time enough to consider that question when it is presented,—it is enough now to hold that one who was within the territorial limits at the hour of noon of April 22 was, within both the letter and spirit of the statute, disqualified to take a homestead therein.

In my opinion the facts now under consideration present a case which should be determined according to the spirit, rather than the letter, of the statute. For the reasons aforesaid, I cannot concur in the conclusion reached by your office that Bickford's entry should be canceled. Your office decision is therefore reversed.

KENDRICH ET AL. v. PERDIDO LAND COMPANY.

Motion for review of departmental decision of August 28, 1896, 23 L. D., 288, denied by Secretary Francis December 23, 1896.

PRACTICE—CERTIORARI—NOTICE OF APPEAL.

ADAMS ET AL. v. NORTHERN PACIFIC R. R. CO.

A writ of certiorari is not a writ of right but lies in the discretion of the Secretary of the Interior, and issues when an affirmative showing is made of substantial injustice in the decision rendered below.

An appeal should not be dismissed on account of insufficient proof of the service of notice thereof, without opportunity given to show that the service was in fact duly made, where the adverse party appears and does not object to the service.

Secretary Francis to the Commissioner of the General Land Office, December 23, 1896. (I. H. L.) (E. M. R.)

This is a petition filed by David W. Adams, asking that the record in the case of Adams *et al.* v. Northern Pacific Railroad Company, involving the SW. $\frac{1}{4}$ of Sec. 9, T. 14 N., R. 42 E., Walla Walla land district, Washington, be certified to this Department for consideration and action to the end that the relief prayed for in the petition may be granted.

The petition shows this land to be within the indemnity limits of the grant to the Northern Pacific Railroad Company by the act of July 2, 1864, as shown by the map of definite location filed October 4, 1880. The N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 9 was selected December 17, 1883, per list No. 2, and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, May 20, 1884, per list No. 3.

October 29, 1887, the petitioner applied to make timber culture entry for the land in controversy, alleging that "on or about the 30th day of November, 1877, he improved and exercised control" over the land he sought to enter, and ever since had it in his possession with the intention of acquiring title thereto under the timber culture laws.

June 4, 1884 Patrick Grady made homestead application, which was rejected, for the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$. Grady did not appeal, but renewed his application on November 5, 1887, claiming settlement in the spring of 1884.

February 23, 1895, a hearing having been had, the local officers rendered a decision, finding that one Cornelius Grady applied to make timber culture entry for the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ on November 3, 1887, and as such tracts were involved in the case of Grady v. Northern Pacific Railroad Company, then pending on appeal, they refused to consider said last named tract in the cause at bar, and further found that Patrick Grady, who had died since his settlement, had not acted in good faith in making settlement and therefore had no such rights as would inure to his heirs, and that the improvements of

Adams were sufficient to defeat the claim of the railroad company, and therefore recommended the allowance of the entry of the petitioner to the said N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$.

June 29, 1896, your office decision was rendered, in which it was said—

From your said decision of February 23, 1895, of which you state that all parties were notified the same day, the Northern Pacific R. R. Co. and the heirs of P. Grady appealed, the first March 27, 1895, and the latter on the 23rd of the same month. Adams filed an appeal from so much of your decision as dismissed the case to the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said Sec. 9, but there is no proper evidence that his appeal was served on the opposite parties. It is accordingly dismissed.

Your office decision affirmed the action of the local officers as to the claims of the Grady heirs, but held that the application of Adams to make timber culture entry must be denied *in toto*, as rights under the law could only be initiated by entry, and the occupation and cultivation of the petitioner could give him no rights, as it did not affirmatively appear that he was qualified to secure title under any of the settlement laws, and awarded the land to the Northern Pacific Railroad Company. The right of appeal was denied to Adams.

Subsequently appeal was filed by Adams, and on September 11, 1896, your office refused to accept the appeal, saying—

Rule 95 of Practice prescribes that "Proof of personal service shall be the written acknowledgment of the party served or the affidavit of the person making the service attached to the papers served and stating time, place, and manner of service." The affidavit of service attached to said appeal (from local office) merely states that on the 25 day of February, 1895, he made "due and legal service" of notice of appeal.

From the affidavit of F. M. Ellsworth, attorney for Adams, it appears that Adams claims the land included in his application by virtue of having tendered an application to enter under the timber culture law, with the regular fees, at the United States land office at Colfax, Whitman County, Washington, in November, 1876, which application was rejected on the ground that the land was within the limits of the grant to the Northern Pacific Railroad Company; that the record of such tender was burned in the Colfax land office; that he again applied to enter under the same law, making a tender of the legal fees at the land office at Walla Walla, which was rejected for the reason that the land was within the reserved indemnity limits of said railroad company; and that subsequently he again, to-wit, on October 27, 1887, applied to enter, under which application hearing was finally had. Further,

that within the time allowed for an appeal in said contest, which date will be shown by the original notice of appeal now in the office of the Commissioner of the General Land Office, this affiant served on C. E. Moulton, the attorney of record of the said Northern Pacific Railroad Company at Colfax, Washington, personally a true copy of the said notice of appeal within the time allowed for an appeal in said case; and that C. M. Kincaid, attorney for the heirs of Patrick and Cornelius Grady, accepted service of the said notice of appeal.

Is the petitioner entitled to the issuance of the writ? A writ of certiorari is not a writ of right, but lies in the discretion of the court

and is issued when an affirmative showing is made of substantial injustice on the part of the court below. Dobbs Placer Mine (1 L. D., 565); Reed v. Casner (9 L. D., 170); and Lyman C. Dayton (10 L. D., 159).

In reference to the question of the service of the notice of appeal, it appears from the argument of counsel for the petitioner that he seems to be under the impression that the objection to the service consisted in the fact that service had been had upon the attorney who appeared in the cause rather than the attorney designated by the Northern Pacific Railroad Company. This does not accord with the reason given in your office decision; the objection therein contained went to the sufficiency of the proof of service. Counsel for the petitioner in his assignment says—

Britton and Gray appeared generally in the said contest before the Honorable Commissioner, for the Northern Pacific Railroad Company; they made no objection to the service, and if any objections were made it was without any notice whatever to David W. Adams or his attorney.

There is nothing in the record to show whether counsel for the Northern Pacific Railroad Company moved to dismiss the appeal of Adams or not, but in the presence of the statement of counsel, *supra*, the Department considers itself justified in assuming that this was not done, and that counsel for the company made no objection and entered a general appearance.

If objection had been made, the petitioner was entitled to notice. Driscoll v. Morrison (7 L. D., 274).

In Hausen v. Ueland (10 L. D., 273) it was held *inter alia*, syllabus—

The defendant by appearing and procuring an order of continuance waives any defect in the service of notice or proof thereof.

Counsel for the petitioner deposes that he personally served upon C. E. Moulton, the attorney of record, a true copy of the notice of appeal within the time allowed by the rules of practice; assuming this to be true, the case last quoted becomes again applicable, as it was there held (syllabus)—

If the fact of service is admitted or not denied, and the service is legal and duly made, the manner in which proof of such service is made is not material.

So also in Allen v. Leet (6 L. D., 669).

The reason of the decision of your office went solely to the sufficiency of the proof of service and therefore, in consideration of the affidavit of the attorney in the cause, that proper service was had, and the further statement that counsel for the Northern Pacific Railroad Company made a general appearance and failed to object to the sufficiency of the proof of service of the notice of appeal, I am of opinion that your office was in error of its own motion to deny the appeal of the petitioner without calling upon or giving him an opportunity to show that the service was in fact made in full compliance with the rule of practice applicable in such cases.

Has the petitioner suffered a substantial injustice by reason of the refusal of your office to forward the appeal by him filed in this cause?

Your office decision states—

The land involved in this case fell entirely outside of the forty mile limits of the withdrawal on general route made August 13, 1870, and within the forty mile limits of the withdrawal on amended general route made February 21, 1872, but fell within the indemnity limits of the road Oct. 4, 1880.

These being the facts, it was held that neither the application to enter this land by Adams, in 1887, nor his prior occupancy of the tract served to operate to defeat the grant to the Northern Pacific Railroad Company. If these facts are all that the record shows, the Department would concur in the judgment rendered below and deny the petition for the issuance of the writ of certiorari; but the affidavit of counsel for Adams set forth that as far back as November, 1876, this petitioner tendered his application to enter this tract under the timber culture law, together with the proper fees, at the land office at Colfax, Washington, which application was rejected by the local officers on the ground that the land was embraced within the limits of the grant to the Northern Pacific Railroad Company, and that the record of such application was subsequently destroyed by fire in the said land office. Another application for the land appears to have been made by Adams prior to the one passed upon by your said office decision, but as to that nothing further need now be said. The alleged application of 1876, and its rejection for the reasons stated, however, in view of the fact that the land was not covered by the company's withdrawal on map of general route of 1870, which under the law was the only authorized withdrawal for its benefit, present a question affecting the rights of the petitioner which in my judgment calls for departmental consideration and action.

In *Ard. v. Brandon* (156 U. S., 537) the reporter's statement of the case in full, as contained in the syllabus, is as follows:

A., being qualified to make a homestead entry, entered in good faith upon public land within the indemnity limits of a railroad grant, but not within the place limits. He demanded at the local land office the right to enter 160 acres as a homestead. This was refused on the ground that the tract was within the limits of the grant, although at that time the land had not been withdrawn from entry and settlement. This was subsequently done, and the land conveyed to the railway company. A. remained upon the land, cultivating it. In an action to recover possession from him, brought here from a state court by writ of error, *Held*, that that application was wrongfully rejected, and that his rights under it were not affected by the fact that he took no appeal.

Mr. Justice Brewer in delivering the opinion of the court said—

He had therefore, on July 14, when he went to the land office, the right to enter the entire 160 acres as a homestead. This right he demanded. He made out a homestead application for the land as described, tendered the application and the land office fees to the register of the land office, but the register rejected the application, giving as a reason therefor that the land was within the granted limits of the Leavenworth, Lawrence and Galveston Railroad, and was double minimum lands, and that eighty acres was the limit of a homestead entry of such lands.

As a fact the register was mistaken and the application should have been accepted.

Mr. Justice Brewer said further:

The law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon. If he does all that the statute prescribes as the condition of acquiring rights, the law protects him in those rights, and does not make their continued existence depend alone upon the question whether or no he takes an appeal from an adverse decision of the officers charged with the duty of acting upon his application.

If it be true that Adams made application to enter this land in 1876, and if his application was rejected for the reasons stated, it may be a question as to whether he is not protected as against the claim of the railroad company under the doctrine announced by the supreme court in the case cited; and without now intimating any opinion upon such question but with a view to its consideration by the Department I deem it proper that the petitioner's prayer should be granted.

You will therefore certify the record in the case to this Department to the end that the same may be examined and such action taken as may appear proper and just.

OKLAHOMA LANDS—CHEROKEE OUTLET—SETTLEMENT RIGHTS.

BRADY ET AL. v. WILLIAMS.

By the proclamation of the President declaring the Cherokee Outlet open to settlement, and providing regulations for the acquisition of settlement rights therein, a strip of land one hundred feet in width immediately within the outer boundary of the entire tract then opened to settlement was set apart for the occupancy of intending settlers; and, if it be conceded that the Secretary of the Interior could thereafter modify said regulation, such action could only be taken after the notice required by the statute.

Persons making the run from said strip of land, so set apart for their occupancy, are not disqualified as settlers by the fact that in entering thereon they passed over an adjacent Indian reservation.

The case of *Cagle v. Mendenhall* (20 L. D., 447) overruled.

Secretary Francis to the Commissioner of the General Land Office, December 23, 1896.

(P. J. C.)

The land involved in this controversy is the NW. $\frac{1}{4}$ Sec. 30, Tp. 26 N., R. 1 E., Perry, Oklahoma, land district, of which Charles A. Williams made homestead entry September 21, 1893. On September 23, October 3, and October 23, 1893, John M. Dahl, John H. McDonald and Michael Brady, respectively, filed contests against the entry, each alleging prior settlement. Hearing was set for March 21, 1894, and on that day Williams's entry was canceled by relinquishment. The trial proceeded as between the three contestants, and as a result the local officers found that McDonald had the superior right to the land, recommended that he be permitted to make entry, and that the other contests be dismissed. They found that Brady was prior in time to McDonald, but that he was

disqualified by reason of having entered the Outlet between August 19, and September 16.

On appeal, your office sustained the action of the local officers. Referring to Brady your office decision says:

Brady's admission that he entered the Territory from the Osage reservation shows that he was disqualified.

In the case of *Cagle v. Mendenhall*, 20 L. D., 447, the Department held that: "the action of the Department in forbidding persons from making the run from any of the reservations on the eastern border of the 'Outlet' was not inconsistent with the act of Congress; and, it being generally known that such instructions had been issued, settlers who acted in obedience thereto should not be defeated in their rights by others who as a matter of fact obtained advantage over them by making the run from adjacent Indian reservations."

Both Brady and Dahl appealed, the former assigning as error his disqualification by reason of having entered the Outlet from the Osage Indian reservation, and the latter assigning errors of fact.

Your office did not pass upon the alleged disqualification of Brady on account of entering the Outlet during the prohibited period, upon which the local officers based their judgment as to him, but relied entirely on the *Cagle* case.

The testimony on this point is that of Brady himself. In response to the direct question as to whether he was in the Territory within the prohibited period, he replied that he was not. His booth certificate to the same effect was presented. On his cross-examination, however, he said he was in there about September 3, and in answer to a number of questions gave that as the date. After his testimony was closed and one or more witnesses had testified for McDonald, he applied to go on the stand to correct an error in his testimony. He did not go on until all the testimony was closed, then, in pursuance of the former request, he testified that he had inadvertently given September as the month, instead of August. I have no hesitancy in saying that the witness was testifying in perfect good faith when he made this latter statement. There is nothing in the case to intimate that he was in the Territory except his inadvertent statement. It is inconceivable that the claimant should go upon the stand and by his own evidence disqualify himself. I am unable to agree with the finding of the local officers that Brady was disqualified by reason of the testimony on this point.

The evidence clearly shows that Brady got on the land about 1:10 P. M.; that McDonald was next there and Dahl was last of the three; that Brady made the run from the east side of the Arkansas river, which divides the Osage reservation and the Outlet, starting at 12:01; that McDonald and Dahl each ran from the north line of the "strip."

It therefore follows that as between McDonald and Dahl, the former is the prior settler, and, if the doctrine of *Cagle v. Mendenhall* is sound and to be followed, that Brady acquired no right to the land by reason of his settlement prior to McDonald. I find myself, however, unable to yield assent to the doctrine announced in that case.

By act of Congress, March 3, 1893 (27 Stat., 640), that part of Oklahoma Territory, known as the Cherokee Outlet, was declared open for settlement on the President's proclamation any time within six months from the date of the act. Among other things contained in the act is this (Sec. 10, p. 643):

No person shall be permitted to occupy or enter upon any of the lands herein referred to, except in the manner prescribed by the proclamation of the President opening the same to settlement; and any person otherwise occupying or entering upon any of said lands shall forfeit all right to acquire any of said lands.

The Secretary of the Interior shall, under the direction of the President, prescribe rules and regulations, not inconsistent with this act, for the occupation and settlement of said lands, to be incorporated in the proclamation of the President, which shall be issued at least twenty days before the time fixed for the opening of said lands.

The proclamation of the President (17 L. D., 230), presumably prepared in accordance with the act, was promulgated August 19, 1893, declaring the land open for settlement at twelve o'clock, noon (central standard time), Saturday, September 16, 1893, and, among other regulations contained in this proclamation was this, on page 239:

A strip of land one hundred feet in width, around and immediately within the outer boundaries of the entire tract of country, to be opened to settlement under this proclamation, is hereby temporarily set apart for the following purposes and uses, viz:

Said strip, the inner boundary of which shall be one hundred feet from the exterior boundary of the country known as the Cherokee Outlet, shall be open to occupancy in advance of the day and hour named for the opening of said country, by persons expecting and intending to make settlement pursuant to this proclamation. Such occupancy shall not be regarded as a trespass, or in violation of this proclamation, or of the law under which it is made; nor shall any settlement rights be gained thereby.

This reservation was "around and immediately within the outer boundaries of the *entire* tract of country;" no limitation or exclusion of any portion thereof. The purpose of this reservation was well understood by all familiar with the vexed questions that so often arose in cases arising out of the former openings to settlement of the Oklahoma Territory, where the question was as to whether an individual was over the line or not at the instant of starting. Also to prevent individuals who owned the lands adjoining the Outlet from obstructing those seeking homes therein by refusing to allow them to congregate on their lands preparatory to making the run. To avoid these complications, the President made this reservation to enable all intending to enter lands to congregate on this strip and thereby get an even start.

By this proclamation, the reservation thus made was on the east side of the Outlet, as well as upon all the other sides. It must be assumed that it was known to the President and the Secretary of the Interior at the time the proclamation was promulgated that the Indian reservations of the Kansas, the Osages, the Poncas and Otoes and Missourias immediately joined the Outlet on the east, yet there is no inhibition in the proclamation from settlers entering from those reservations or the one hundred feet reservation created by the proclamation.

It was this proclamation, made in pursuance of the act of Congress, and containing rules and regulations made by the Secretary of the Interior for the opening and settlement of the land, that was the guide by which all those intending to enter the territory should be controlled. It was formally promulgated, it bore the signature of the President of the United States, and the great seal of State. By it all persons were invited to the one hundred feet reservation, regardless of which part of the land it might be, either in imagination or reality, located. No other public or official pronouncement was made, and the only authoritative, official or legal utterance is contained therein.

The statements made in the case of *Cagle v. Mendenhall* are somewhat misleading. In reference to the instructions issued and publicity given to them, as stated therein, it is only necessary to say that there is no official record in this Department of the same. There were several telegrams sent from the office of the Secretary of the Interior to private individuals, but none to any government officials, in relation to this matter. The instructions of September 5, 1893, referred to, is a telegram from your office to "Emmet Womack, special agent." This is signed by the Commissioner, but does not purport to be given under the authority of the Secretary of the Interior:

In every one of the communications sent from the Department, with the exception of that of September 13, to Ned P. C. Gould, which will be adverted to hereafter, the information is that intending settlers will be prohibited from making the run from "Indian reservations," but there is no mention of the one hundred foot strip, or inhibition from making the run from the same.

If, as before stated, the President's proclamation created the one hundred foot strip on the east side of the Outlet and persons made the run from there in good faith, can it be said that the route they traveled to get to the strip disqualified them from making an entry? I think not. I do not believe it is within the power of the executive branch of the government to fix the qualifications of one making a homestead entry. Congress, the law making power, has done this, and the right of the individual can not be enlarged or abridged by executive order. The only disqualification fixed by Congress was that no one should "acquire any of said lands" who entered upon or occupied any part thereof "except in the manner prescribed by the proclamation of the President opening the same to settlement." The purpose of this was well understood. It was to give all persons, from every part of the country, an even chance to secure a home, and prevent those in the immediate vicinity from securing the choice lands. Following this declaration by Congress, the Secretary of the Interior, under direction of the President, prescribed "rules and regulations not inconsistent with this act" which were incorporated in the proclamation. By this the one hundred foot strip was solemnly set apart for occupancy by the settlers, and there was no direction as to how parties should travel to get to it.

The only theory upon which the Secretary of the Interior could pos-

sibly prevent persons from making the run from these Indian reservations was that, under the laws and treaties with the tribes, white people were not allowed therein, and were trespassers, and could be forcibly and summarily removed as such. But, if, in ignorance of this fact, they actually did get into the reservations, can this in any just and legal sense be said to disqualify the individual from making a homestead entry in the Outlet? I do not so understand it. And if they passed through the Indian reservations and got on to the one hundred foot strip, and made the run from there in good faith, should they be deprived of their homestead rights? I find myself unable to yield assent to such a proposition. If the settler were guilty of a crime either against the United States or the Indians he would not be disqualified from availing himself of the right to make a homestead entry.

A question similar to this, at least bearing upon this proposition, was decided in the case of Madella O. Wilson (17 L. D., 153). By the President's proclamation, the Sisseton and Wahpeton Indian reservation was opened for settlement, and it contained this:

Warning, however, is hereby given that until said lands are opened to settlement, as herein provided, all persons, save said Indians, are forbidden to enter upon the same, or any part thereof.

It seems that the entrywoman entered the reservation prior to the hour of opening, and your office held her disqualified, citing certain Oklahoma cases in support thereof. In reversing your office judgment, Mr. First Assistant Secretary Sims, after comparing the two statutes, said:

Now, I submit that the President of the United States, under this section, has no authority to declare a forfeiture of the right of this woman who went upon the right of way of the Hastings and Dakota Railroad Company a few minutes before the land was subject to entry. There is neither an inherent nor an implied power vested in the executive to visit such a penalty upon the entryman. . . .

While the proclamation warned all people not to go upon the lands until they were opened for settlement, and they were forbidden so to do, yet, there is nothing in the statute which authorized the injunction, or justified the visiting of the penalty of the forfeiture of the right upon her for so doing. Indeed, the proclamation does not attempt to do so.

This doctrine was affirmed by Mr. Secretary Smith in Edward Parant (20 L. D., 53).

Notwithstanding the parties in these two cases were trespassers on the Indian reservations, to the same extent exactly as Brady was, yet it was held that they were not disqualified from exercising their homestead right.

As has been said, Congress fixed the qualifications of a homestead entryman. It empowered the Secretary of the Interior, under directions of the President, to formulate rules and regulations, not inconsistent with the act, under which that right might be exercised. This was solemnly done. Now, has the Secretary, in himself as such, acting alone, the power of abridging or changing those rules?

It will be conceded, if he has such power, that it must be done with the same degree of solemnity, and given the same publicity as the original rules contained in the President's proclamation, and in addition it must be in conformity with the law. The statute, as quoted above, requires that the rules and regulations "for the occupation and settlement of said lands, to be incorporated in the proclamation of the President," "shall be issued at least twenty days before the time fixed for the opening of said lands."

The only declaration of the Secretary that there was no one hundred foot strip on the east of the Cherokee Outlet was a telegram sent to Ned. C. P. Gould, dated September 13, 1893. The telegram is not addressed to any officer of the government, but is evidently to a private citizen. It can not, in my judgment, be maintained that this information, given to a private citizen, is sufficient in itself to abrogate the rules and regulations contained in the proclamation. But, conceding for sake of argument that it could, then it must be admitted that it was a change in the proclamation, and was in the nature of a new rule. Hence, it follows that at least twenty days' notice before the opening was not given of this new regulation, and it was therefore not in compliance with the statute.

The same may be said of all the telegrams sent.

The earliest one—that to Harding and Riddell—was dated August 28, but nineteen days before the opening.

It appears that A. P. Swineford was the "Inspector" who had charge of the opening of the Outlet.

There is nothing of record in this office to show that he was informed of this attempted change in the proclamation. He was telegraphed to about a number of other matters. For instance, on August 24, he was directed by the Secretary to "require those going upon Strip to do work to give obligation not to appear before those in charge of booths until September 14." (L. & R. Misc. 270, p. 257.) The Secretary of War was notified the same day that it would be necessary for those entering to do work to have permit "from A. P. Swineford, Inspector," to enter. (Id. 258.) Again, on September 11, the Secretary issued an order directing how trains should be run on the railroad, and wired Swineford: "You will see that the accompanying order is given due publicity and properly executed." (Id. 361.) On September 14, the First Assistant Secretary advised Mr. Swineford, in answer to a request for information as to the rights of persons to enter lands, "who have not had the benefit of the homestead laws." In reply he said: "that the matter of making entries in the Outlet is governed entirely by the President's proclamation of August 19, 1893, and the laws therein referred to."

These several instructions to the Inspector are quoted simply for the purpose of showing that in relation to all matters considered of public interest he was required to give publicity to the same, or follow the President proclamation.

It may be said that those entering from the east gained an advantage in securing land on that side over those entering from the north or south. There is, in my judgment, no force in this proposition. It is true, they did not have the same distance to travel, but the same is true of those who were fortunate enough to get desirable lands close to the other points of starting. In other words, all the seekers could not find homes on or near the lines, and some were forced to go further into the interior. If, however, those running from the east did gain an advantage in the distance they had to travel over those from other points, they were there by authority of the proclamation, and under the statute this was all that was required. The contestant Brady took his chances with the others that ran from that point. He had no greater advantage over those than did the others starting from the other lines that made selections close to the place whence they started.

There is nothing in the testimony in this case to show that Brady had any knowledge of or information upon the subject of the dispatches that were sent from this Department. It is certainly going to the extreme to say he should be disqualified when he acted in ignorance of any attempted change in the proclamation. The testimony shows that he had been on the Indian reservations frequently before the opening. The same is true of McDonald. In fact, McDonald at the time was farming some land in one of them on a lease.

I can not escape the conviction that Brady was not disqualified from making the homestead entry by reason of having made the run from the point where he started. He was the prior settler on the land, and is therefore entitled to make homestead entry of the same.

The case of *Cagle v. Mendenhall* is overruled, and your office decision reversed.

DOLLES *v.* HAMBERG CONSOLIDATED MINES CO.

Motion for review of departmental decision of August 8, 1896, 23 L. D., 267, denied by Secretary Francis, December 23, 1896.

RAILROAD GRANT—LANDS EXCEPTED—PRE-EMPTION CLAIM.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

A pre-emptor who makes homestead entry of a part of the land embraced within his filing thereby abandons all right under his pre-emption claim, and though the filing may not, at such time, be canceled on the record, it is thereafter not evidence of the existence of a pre-emption claim, and will therefore not defeat the operation of a railroad grant, as to the tract not included in the homestead entry.

Secretary Francis to the Commissioner of the General Land Office, December 23, 1896. (I. H. L.) (W. C. P.)

I have considered the appeal of the St. Paul, Minneapolis and Manitoba Railway Company from your office decision of March 28, 1895,

refusing its application to list the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 15, T. 127 N., R. 37 W., St. Cloud (formerly Fergus Falls) land district, Minnesota, as passing under the grant for the benefit of said company.

This land is within the primary limits of the grant for the benefit of the St. Vincent extension of said railroad, made by the act of March 3, 1871 (16 Stat., 588).

On March 16, 1868, one Sidney L. Fish, filed pre-emption declaratory statement, covering this and other tracts, alleging settlement December 20, 1867. On June 10, 1871, he made homestead entry for the other lands in his declaratory statement, but omitting from such entry the tract here in question.

On July 20, 1872, G. W. Lampman filed pre-emption declaratory statement for this tract with others, alleging settlement July 15, 1872, but made no effort to perfect such claim.

On December 26, 1891, the company applied to list this tract, which application was rejected by the local officers. Upon appeal to your office their action was affirmed upon the theory that Fish's pre-emption claim of record at the date of the act making the grant to said company served to except said tract from the operation of the grant, the case of *Bardon v. Northern Pacific R. R. Co.* (145 U. S., 535,) being cited in support of that conclusion.

It is urged upon appeal here that the *Bardon* case is not in point, because in this case the grant was not one taking effect at the date of the act making it, but was by the provision of the law to take effect at the future time and only upon the performance of certain acts by the beneficiary thereunder. In support of this contention the decision of the supreme court of the United States in *St. Paul and Pac. R. R. Co. v. Northern Pacific R. R. Co.* (139 U. S., 1), is cited.

By the act of March 3, 1857 (11 Stat., 99), a grant was made to the Territory of Minnesota to aid in the construction of certain railroads. On July 12, 1862 (12 Stat., 624), a joint resolution was passed by Congress authorizing a change of location of one of the lines of road provided for in the act of 1857. By the act of March 3, 1865 (13 Stat., 526), the grant made by the act of 1857 was enlarged and the time for the completion of the railroads extended. The act of March 3, 1871 (16 Stat., 588), authorized another change in the branch line of the St. Paul and Pacific R. R. company to St. Vincent, "with the same provisional grant of lands to be taken in the same manner along said altered lines as is provided for the present lines by existing laws." To this act there is, however, a provision in the following words:

Provided, however, That this change shall in no manner enlarge said grant, and that this act shall only take effect upon condition of being in accord with the legislation of the State of Minnesota, and upon the further condition that proper releases shall be made to the United States by said company, of all lands along said abandoned lines from Crow Wing to St. Vincent and from St. Cloud to Lake Superior, and that upon the execution of said releases such lands so released shall be considered as immediately restored to market, without further legislation.

In construing this act the supreme court said:

The line authorized, or supposed to be authorized, under the act of March 3, 1871, was distant many miles from the line projected in 1869, and the map of its definite location, approved by the Secretary of the Interior, was not filed with the commissioner of the general land office until December 20, 1871. The release required by the act of March 3, 1871 was not made by the St. Paul and Pacific Railroad Company until December 13, 1871, and a formal release to the United States by the company was not executed until the 19th of that month. It was only upon the execution of the release—whether that be deemed to have been the 13th or 19th of December—that the act took effect. The act did not make a grant upon condition subsequent. There was no condition, for a breach of which any forfeiture of a grant could be required, for no grant passed until the consideration for it, the relinquishment of the old lines with the lands along them, was given. The transaction was in the nature of an exchange, by which the right was given to the company to construct new lines with proportional grants, in consideration of its relinquishing certain old lines, with their accompanying lands. The new rights were to vest with the relinquishment of the old rights. The transfer was to be mutual and simultaneous. There was, therefore, no operative grant until there was an effective release, and whichever date be taken—whether December 13 or 19—it was subsequent to the definite location of the Northern Pacific Railroad Company in Minnesota. A map of that location approved by the Secretary of the Interior, was filed, as stated above, in the office of the commissioner of the general land office on the 21st of the previous November. No grant, therefore, was in existence of any lands to any other company, which are claimed by the plaintiff in this suit, at the time of the definite location of its route. (139 U. S., 1-16).

It has been decided that the release presented by the company did not become operative until it was filed in this Department and accepted by the Secretary on December 19, 1871, and that the grant in question became effective on that day. *St. Paul, Minneapolis and Manitoba Ry. Co. v. Bergerud* (23 L. D., 408).

The condition of a tract of land at that date determines whether it passed under said grant. Fish's pre-emption declaratory statement made March 16, 1868 had not been formally canceled upon the records of your office, and his homestead entry for the same land, except the tract here in question, was also of record. That is, the record shows two claims by the same person under the settlement laws. Fish afterwards submitted final proof under his homestead entry, which was approved and final certificate issued.

In the case of *Fish v. Northern Pacific Railroad Company* (23 L. D., 15), the effect of a pre-emption filing of record at the date a grant to a railroad company takes effect, is fully discussed, the conclusion being that an uncanceled pre-emption filing of record at that date serves to except the land from the grant. This conclusion is based, in part at least, upon the decision of the supreme court in the case of *Whitney v. Taylor* (158 U. S., 85). The underlying proposition in these cases is stated in the supreme court decision, where, after referring to other cases involving similar questions, the following language is used:

Although these cases are none of them exactly like the one before us, yet the principle to be deduced from them is that when on the records of the local land office

there is an existing claim on the part of an individual under the homestead or pre-emption law, which has been recognized by the officers of the government, and has not been canceled or set aside, the tract in respect to which that claim is existing is excepted from the operation of a railroad land grant containing the ordinary excepting clauses, and this notwithstanding such claim may not be enforceable by the claimant, and is subject to cancellation by the government at its own suggestion, or upon the application of other parties. It was not the intention of Congress to open a controversy between the claimant and the railroad company as to the validity of the former's claim. It was enough that the claim existed, and the question as to its validity was a matter to be settled between the government and the claimant, in respect to which the railroad company was not permitted to be heard.

It is necessary to apply this rule to the case here presented. It is contended in support of the appeal that by omitting the tract here involved from his homestead entry, "Fish, in law, abandoned all claim and surrendered all the rights he ever had thereto under the pre-emption law"—the case of *Nix v. Allen* (112 U. S., 129), being cited in support of the contention. In that case the court said specifically that one who, having filed pre-emption declaratory statement for a quarter-section of land, afterwards made pre-emption entry for one-fourth of said quarter-section

in law thereby abandoned her settlement on the other three quarters of the quarter section for the purposes of pre-emption and surrendered all the pre-emption rights she ever had in them.

This ruling has been followed by this Department in the case of *Holm v. St. Paul, Minneapolis and Manitoba Ry. Co.* (16 L. D., 251), and the land thus omitted from final proof was held to have passed under a grant taking effect subsequently to the date of such proof. These cases do not, however, cover the exact question involved here.

The act of May 20, 1862 (12 Stat., 392), known as the "homestead law," and afterwards incorporated into the Revised Statutes as section 2289, declares that one possessing certain prescribed qualifications "shall be entitled to enter one quarter-section or a less quantity of unappropriated public lands, upon which such person may have filed a pre-emption claim." The ruling of this Department has been from the first that a transmutation of a filing exhausts the pre-emption right. It has further been held that one who makes homestead entry for a part of the land covered by his pre-emption filing thereby abandons his pre-emption claim. In the case of *Neilson v. Northern Pacific Railroad Company* (9 L. D., 402), it was said:

It is clear, that the making homestead entry of another tract was an abandonment in law of his claim to that part of the tract covered by his pre-emption filing which was not embraced in his homestead entry.

In *Northern Pacific Railroad Company v. Harris* (12 L. D., 351), it was said:

It appears from the record that Harris—May 1, 1880—changed his pre-emption filing and made homestead entry of that part which embraced the land in the even section. In so doing he abandoned his filing for the land in the odd as well as that in the even section, and exhausted his rights and privileges under the pre-emption law.

If the rule laid down in these decisions is to prevail it must be held that the tract in question here was free from claims at the time the grant took effect and passed to the company.

The record in this case showed the filing of Fish, because it had not been formally canceled; that is to say, no formal statement appeared upon the record to the effect that said filing, and the claim evidenced thereby, had been abandoned. The same record showed, however, that Fish had taken such action as constituted, in law, an abandonment of his pre-emption claim. It cannot be said in view of this condition of affairs that the record showed an existing claim. If Fish had filed in the local office a formal relinquishment of his claim and this fact had been noted on the record, but no formal cancellation noted, it would not be held that his claim still existed, or that the record showed its existence. He did not file a formal relinquishment, but he did that which just as unmistakably and effectually evidences his abandonment of all claim under his filing. As a matter of law Fish had abandoned his claim under the pre-emption filing before the grant to the railroad company took effect, and the records of the land department disclosed this fact. Fish afterwards submitted final proof under his homestead entry in 1876, in which it is shown that he had lived on the land covered by it, from June 10, 1871, to the date of said proof. This shows that he had in fact, as well as in law, abandoned all claim to the tract here in question, prior to the date the grant took effect. The tract involved was free from claim when said grant took effect and passed to the company thereunder.

The decision appealed from is reversed.

RAILROAD GRANT—INDEMNITY SELECTION—SECTION 5, ACT OF MARCH 3, 1887.

HUMISTON *v.* NORTHERN PACIFIC R. R. CO. ET AL.

The occupancy of land for the sole purpose of speculating in the improvements thereon does not constitute a *bona fide* settlement that will except the land from indemnity selection.

An indemnity selection must fail in the absence of a valid basis therefor.

The odd-numbered sections within the limits of the Yakima Indian reservation did not pass under the grant to the Northern Pacific company, and afford legal bases for indemnity selections by the company.

The right of a purchaser from a railroad company to perfect title under section 5, act of March 3, 1887, where the title of the company fails, takes precedence over a subsequent adverse timber culture application.

Secretary Francis to the Commissioner of the General Land Office, December 23, 1896.

(I. H. L.)

ber 23, 1896.

(J. L.)

This case involves the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 3, T. 15 N., R. 45 E., Walla Walla land district, Washington.

On August 18, 1890, Henry Humiston filed his application to make

timber culture entry of said tracts, which was received, noted, and held by the local officers subject to the claims of the Northern Pacific Railroad Company, who were immediately notified of said application.

On September 2, 1890, the company filed a written protest against said application to enter, alleging:

That its map of definite location was filed on October 4, 1880: (2) That said tracts were embraced in its indemnity selection list No. 2, which was on December 17, 1883, filed in the district office, and approved and certified by the local officers: And (3) that said tracts are within the indemnity limits of the company's grant, and have never been and are not now, subject to any rights or claims adverse to the company's right to select them as indemnity.

A hearing was ordered and had; at which Thomas J. Adams as purchaser of said tracts from the railroad company, was permitted to intervene; and witnesses were examined in the presence of all parties.

On May 8, 1891, the local officers found that said tracts were not subject to selection by the company, and recommended that Humiston's application to make timber culture entry of them, be allowed.

An appeal was taken, and on April 30, 1895, your office found that the tracts in controversy, on December 17, 1883, were not occupied by a *bona fide* settler within the meaning of the settlement laws, and were subject to selection by the company on that date. Consequently, your office reversed the decision of the local officers, and rejected Humiston's timber culture application.

Humiston appealed to this Department and specified as errors:

(1) That the finding of your office that the tracts in controversy on December 17, 1883, were not occupied by a *bona fide* settler, and were subject to selection by the company was erroneous: (2) That the company's selection list No. 2 filed December 17, 1883, was illegal, and ineffective, because no lands lost in place were specified therein as a basis for the selection of the tracts in question as indemnity: (3) That notwithstanding subsequent orders, rules and regulations of the Land Department, the company did not specify any lands lost in place as basis for the selection of the tracts aforesaid, until August 30, 1892,—more than two years after the filing of Humiston's application to make entry: (4) That the lands finally specified as basis for the selection, to wit: odd-numbered sections within the Yakima Indian reservation, were not a lawful sufficient basis, inasmuch as no lands in place were ever lost by the company within said Indian reservation: And (5) that on August 18, 1890, the date of Humiston's application, said tracts were part of the public domain, and legally subject to entry by him.

It was proved that in the year 1887, Thomas J. Adams bought the tracts of land in controversy from the Northern Pacific Railroad company, paid for them, and received a warranty deed therefor. He also bought and paid for the improvements on said land of one S. G. King, who claimed to have been a *bona fide* and duly qualified settler on said tracts, on December 17, 1883, the date of the company's selection. The evidence by a clear preponderance justified your office in finding that said S. G. King was not a *bona fide* settler and that he occupied and held possession of the land solely for the purpose of speculating on the improvements thereon; and in holding that said tracts were subject to the selection made by the company, *Provided*, such selection

were made in accordance with law and the rules and regulations of the Land Department, and prior to the filing of Humiston's application to make entry.

It appears by the records of your office that the original selection list No. 2 of December 17, 1883, designated no bases in support of the selections contained therein: That on October 26, 1887, the company in support of said selections, filed a list of alleged losses in bulk, not arranged tract for tract with the selections, and consisting wholly of odd-numbered sections of land lying within the Yakima Indian reservation which was then unsurveyed: That on August 3, 1892, the company filed an amended list of its selections of December 17, 1883, rearranged so as to designate the losses tract for tract with the selected lands: According to said rearrangement, a "part of section 35, T. 8 N., R. 15 E.," was designated as the basis for the selection of the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 3, T. 15 N., R. 45 E. (part of the land involved herein); and part of section 1, T. 9 N., R. 15 E., was designated as basis for the selection of the other three forties of the land involved.

It further appears that on January 25, 1896, the company filed another amended list from which it omitted "part of section 35, T. 8 N., R. 15 E.," as a basis for the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 3 aforesaid, and substituted in lieu thereof the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 3, T. 6 N., R. 16 E., which was also within the Yakima Indian reservation, and which for other reasons stated in your office letter of October 27, 1896, filed in this case, was not a legal basis for an indemnity selection.

It follows that the company's selection of the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 3, T. 15 N., R. 45 E., is invalid, and must be rejected, because it is not supported by any sufficient basis.

Ever since the case of *Dellone v. Northern Pacific Railroad company*, decided March 2, 1893, and reported in 16 L. D., 229, this Department has held that odd-numbered sections of land within the limits of the Yakima Indian reservation did not pass under the grant to the Northern Pacific Railroad Company, and that they afford proper and legal bases for indemnity selections by the company. It follows, therefore, that the company's selections of the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 3, T. 15 N., R. 45 E., are valid and must be approved, and that Humiston's application to make timber culture entry must be rejected as to the three forty-acre tracts last above described.

It appears by the evidence that the intervenor, Thomas J. Adams, on July 15, 1887, in good faith purchased from the railroad company the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 3, T. 15 N., R. 45 E., (together with the other three forty-acre tracts, above described), for valuable consideration which has been duly paid, and has improved and cultivated the same at great expense. Therefore, your office is hereby directed, to permit said Adams, at any time within sixty days after service of notice that this decision has become final, to make application to

purchase said SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 3, T. 15 N., R. 45 E., from the government under the fifth section of the act of March 5, 1887 (24 Stat., 556); and in the meantime, and until the result of such application shall have been determined, action on Humiston's application to make timber-culture entry of said SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 3, shall be suspended.

Your office decision of April 30, 1895, is hereby modified as indicated by the foregoing directions.

MINING CLAIM—ADVERSE—TIME OF FILING.

GIROUX *v.* SCHEURMAN.

The local officers are not required to transact business out of office hours, and may therefore properly refuse to accept and file an adverse claim tendered out of office hours on the sixtieth day of publication; but if such claim, so tendered, is accepted and filed it must be regarded as filed in time.

Secretary Francis to the Commissioner of the General Land Office, December 23, 1896. (I. H. L.) (P. J. C.)

It appears that George Scheurman made application for patent for the Tough Nut lode claim in Prescott, Arizona, land district; that notice thereof was given by publication, commencing June 14, 1895. The sixty days period within which adverse claims should be filed, as provided by section 2325 (Revised Statutes), expired August 13.

Joseph L. Giroux presented an adverse, which was endorsed as follows: "Filed in U. S. Land Office, August 13, 1895, at 8:30 P. M." Then follows this endorsement:

Rejected as an adverse this 14th day of August, 1895, being filed out of time, but allowed as a quasi contest.

From this action of the register Giroux appealed, and your office, by letter of November 6, 1895, reversed his action, whereupon the applicant prosecutes this appeal.

The General Circular (February 6, 1892), on page 107, in reference to the duties of registers and receivers, says:

They will be in attendance regularly at their offices, keeping the same open for the transaction of business from 9 o'clock A. M., till 4 o'clock P. M., etc.; . . . applications to make entry can not be received by the register or receiver out of office hours, nor elsewhere than at their offices, etc.

The register rejected the adverse doubtless on the theory that the official day closed at 4 o'clock P. M. While this is true, and while he might under the rule have refused to accept and file the adverse after that hour, he did not so refuse, and having accepted and filed said adverse after office hours on the sixtieth day of publication, it will be treated as having been filed in time. In the case of the "Dolly Varden" mine (Copp's U. S. M. L., 262) the adverse claim was presented on

Sunday and accepted by the local officers. Your office reversed this action. On appeal, Mr. Secretary Schurz said:

While it is true that officers are not expected nor required to transact business out of office hours or on Sunday, still there is no law of the United States prohibiting them from doing such business. Nor am I able to find any law of the State of Nevada which prohibits the transaction of ordinary business on the Sabbath day.

Both of said officers might properly have refused to receive such application either out of office hours or on the Sabbath day, but the receiver did receive the adverse claim and filed the same, and by so doing, if suit was commenced within the time prescribed by law, I am of the opinion that the rights of the appellants were protected. Your decision is therefore reversed.

In *Sears v. Almy* (6 L. D., 1), it was held that the entry was "not invalid because allowed outside of office hours."

These cases are cited with approval in *John W. Nicholson* (9 L. D., 54; see also *McDonald et al. v. Hartman et al.*, 19 L. D., 547, and *Kelso v. Janeway et al.*, 22 Id., 242).

Your office judgment is therefore affirmed.

OKLAHOMA LANDS—QUALIFICATION OF HOMESTEADER.

BONNETT *v.* JONES.

The special provision in section 20, act of May 2, 1890, limiting the right of homestead entry to persons not "seized in fee simple of one hundred and sixty acres, etc.," is not repealed by the general provisions in section 5, act of March 3, 1891, amending section 2289, R. S.

A tax sale in the State of Kansas does not operate to divest the original owner of title until a deed is made thereunder, and, prior to such time, would therefore not relieve an entryman from the disqualification imposed by section 20, act of May 2, 1890, upon persons who are "seized in fee simple of one hundred and sixty acres of land."

Secretary Francis to the Commissioner of the General Land Office, December 23, 1896. (I. H. L.) (W. F. M.)

The land involved in this case is the SE. $\frac{1}{4}$ of section 5, township 16, range 7, in the land district of Kingfisher, Oklahoma, and is embraced in the homestead entry of James Jones, made May 14, 1892, and against which William J. Bonnett filed an affidavit of contest on May 20, 1892, alleging his prior settlement. Upon this issue a hearing was had, and upon the question of fact thus presented the register and receiver found for the contestant. On appeal to your office it was found that "all the evidence tends to show that their settlements should be considered simultaneous," and it was

ordered that each of the parties take one-half of the land according to the legal subdivisions embracing their improvements.

From this decision both parties have appealed here.

The record discloses that on October 15, 1886, Jones made homestead entry of the SE. $\frac{1}{4}$ of section 10, township 31, range 41, in the

land district of Garden City, Kansas, that he commuted the entry to cash on November 12, 1887, and that patent issued therefor on June 23, 1889. The land was sold for taxes on September 1, 1891, and after the expiration of the redemption period of three years provided by the laws of Kansas, a deed was made and delivered September 13, 1894, and filed for record September 24, 1894.

In section 20 of an act entitled "An act to provide a temporary government for the Territory of Oklahoma," etc., approved May 2, 1890, it is provided that

no person who shall at the time be seized in fee simple of a hundred and sixty acres of land in any State or Territory, shall hereafter be entitled to enter land in said Territory of Oklahoma. 26 Stat., 81.

This is a special provision enacted with sole reference to lands in the Territory of Oklahoma. Section 2289, of the Revised Statutes, as amended by section 5 of the act of March 3, 1891 (26 Stat., 1095), provides that

no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory, shall acquire any right under the homestead law;

but there is no theory of construction upon which this general provision can be said to have repealed or modified the special one affecting Oklahoma lands.

Construing the laws of Kansas providing for the sale of lands for the non-payment of taxes, the supreme court of that State has said that

at the time of sale, the purchaser acquires an interest which ripens into a title only on the execution of a deed. The title passes by the deed; till then, it remains with the original owner. This is manifest from the express language of the sections of the statute heretofore referred to. It is also the general voice of the authorities. *Douglass v. Dickson*, 31 Kansas, 310.

It is conclusive, therefore, that Jones was, at the time of his entry, the owner of one hundred and sixty acres of land in the State of Kansas, and was, on account thereof, disqualified to enter land in Oklahoma.

The decision appealed from is reversed, Jones' entry will be canceled, and Bonnett's application will be allowed.

PRACTICE—JURISDICTION—LOCAL OFFICERS—DISMISSAL.

LAMB *v.* ADAMS.

The receiver, acting alone, has no authority to dismiss a contest, and such action cannot be validated by a subsequent joint notice thereof from the register and receiver.

Secretary Francis to the Commissioner of the General Land Office, December 23, 1896. (I. H. L.) (J. L. MCC.)

At 9 A. M., November 2, 1891, there were received at the local office by mail the homestead applications of Marion A. Adams and Wilbert

W. Lamb. The application of the former was for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 3, T. 48 N., R. 11 W., Ashland land district, Wisconsin, and that of the latter was for the SE. $\frac{1}{4}$ of said Sec. 3. The applications were, therefore, in conflict as to the east half and the southwest quarter of the SE. $\frac{1}{4}$ of Sec. 3. There were received also a number of other applications conflicting with those of Lamb and Adams, but either through failure to prosecute their claims or by withdrawal thereof, the other applicants have been eliminated from the case.

The local officers allowed Adams to make entry for the land described in his application.

November 11, 1891, Lamb filed an amended application to enter the SE. $\frac{1}{4}$ of said section. This application was accompanied by affidavit claiming settlement in August, 1890, and continuous residence since that date. A hearing was ordered by the local officers for May 27, 1892, at 10 A. M.

The case was called on the day and hour set for hearing, and the defendant Adams appeared in person and by his attorney. The plaintiff Lamb did not appear, and the receiver on the motion of defendant dismissed the case for want of prosecution. At 10:16 A. M., Lamb appeared with his attorney, who, when he learned that the case had been dismissed, moved for a reinstatement thereof, stating that it was the practice of the Ashland office not to dismiss a case for default that had been set for an hour certain, until the expiration of the entire hour, and that as the case was set for 10 A. M., it should not have been dismissed until 11 A. M. The receiver admitted that the practice had been as stated by Lamb's attorney, and sent for Adams's attorney, who had left the office after the dismissal of the contest and before the appearance of Lamb. Adams's attorney returned to the office and Lamb was called and sworn as a witness.

The attorney for Adams entered a special appearance and objected to the introduction of any testimony, for the reason that the case had been dismissed, and asked for a ruling of the office.

The receiver said: "The receiver does not understand that he has jurisdiction to order the case to proceed at this time." Whereupon counsel for Lamb renewed his motion, reiterating his statement as to the practice of the office.

So far as the record discloses, there was no formal ruling by the receiver, but he allowed plaintiff to call and examine his witnesses.

At the conclusion of his examination of Mr. Lamb, the attorney for the plaintiff invited Adams's attorney to cross-examine the witness. Adams, by his attorney, refused to cross-examine the witness, stating that upon the dismissal of the contest he had sent away some of his own witnesses, and that until it was regularly reinstated according to the Rules of Practice he should refuse to participate in the trial. Upon being asked by the plaintiff to disclose the names of the

witnesses who had gone away, he refused to do so. The plaintiff proceeded with the introduction and examination of his witnesses, each of whom he invited the defendant to cross-examine, but the latter refused. When the plaintiff rested his case he stated that, as the defendant asserted that some of his witnesses had gone away, the plaintiff would agree to a continuance for any reasonable time to enable the defendant to procure his witnesses, if he desired to avail himself of the opportunity. To this proposition defendant's counsel made no response.

June 18, 1892, attorneys for Lamb accepted personal service of notice of dismissal, which notice was as follows:

You are hereby notified that you having failed to appear at the hearing set for March 27, 1892, at 10 A. M., after due service of notice on January 25, 1892, the above entitled case (i. e., Lamb v. Adams) was dismissed by us on motion of attorney for Adams, for want of prosecution. You are allowed thirty days from this date in which to appeal from this decision to Hon. Commissioner General Land Office.

(Signed)

H. L. BESSE, *Reg.*,

R. C. HEYDLAUFF, *Rec.*

Lamb appealed from the above decision, and on April 6, 1893, your office decided that no right was acquired by settlement prior to "mid-night Nov. 1-2, 1891," and that as neither Lamb nor Adams "alleged settlement between that time and 9 A. M., November 2, 1891," at which time said applications were presented, they should have been noted as simultaneously filed and the land put up to the highest bidder.

Appeal was taken to the Department, and on March 19, 1894, the decision of your office was modified, it being held that, as both the original application of Lamb and that of Adams were based on affidavits executed before the land was restored to entry, no rights were acquired thereby; that Lamb, having presented his amended application, based on affidavits executed subsequent to the restoration of the land, should be permitted to have his amended application placed of record.

Subsequently, on March 23, 1896, the Department revoked and recalled the decision of March 19, 1894, and held, under the decision of the supreme court in the case of the Wisconsin Central R. R. Co. v. Forsythe, 159 U. S., 46, that the previous construction of the Department that the land involved was a part of the "surplus Omaha land" was error, and that the land was a part of the forfeited Wisconsin Central land and was restored to the public domain under the act of September 29, 1890; that therefore both the original application of Lamb and that of Adams were based on affidavits properly executed, and that their rights must be determined by their settlement, and the case was remanded to your office for further consideration and decision in the light of the directions therein given.

On August 5, 1896, your office held that, as the action of the register and receiver on June 18, 1892, in dismissing the contest, does not appear to have been taken until subsequently to the time when Lamb's testimony was introduced, Lamb's testimony as to settlement should be

considered, and you found, from an examination of that testimony, that prior to September 29, 1890, Lamb had made settlement on said land, and was a settler thereon on September 29, 1890, and as Adams does not claim settlement prior to 1891, Lamb has shown a superior right, and you held Adams's entry for cancellation, in so far as it conflicts with Lamb's application.

Adams appealed to the Department.

In regard to the proceedings hereinbefore set forth, it is clear that the receiver (alone) was without jurisdiction either to dismiss or to reinstate the contest. When Lamb appeared, with his witnesses, the case was properly pending before the local office; Lamb's testimony and that of his witnesses was properly and regularly taken; and every opportunity was afforded Adams and his witnesses to submit their testimony. By failing to appear and defend Adams placed himself in default. If it be said that it is only a technical default, the answer is, Adams has chosen to stand upon a technicality; his counsel moved the dismissal of the case, objected to its reinstatement, refused to cross-examine Lamb and his witnesses, or to stipulate for a continuance at which the alleged absent witnesses might be heard. Having chosen to rest his case upon a technicality, by that technicality he must stand or fall.

This case is not "on all fours" with that of *Bradford v. Aleshire* (18 L. D., 78), in which the Department held (see syllabus):

Where the local office sustains a motion to dismiss, filed by a defendant who submits no testimony, and such action of the local office is reversed on appeal, the case should be remanded for the further action of said office.

In the case at bar the local office did not sustain the motion to dismiss; that action was taken, or attempted, by the receiver—who, acting *alone*, was incompetent to grant such a motion. The contest was *not* dismissed.

The notice dated June 18, 1892, in which the register and receiver informed Lamb that the contest had been "dismissed by us," for want of prosecution, was wholly ineffective to validate the invalid action of the receiver on the day of the hearing. It was given after the testimony had been regularly taken, and could not operate retrospectively.

For the reasons herein set forth, the judgment of your office in finding that Lamb was the prior settler on the land in controversy, and holding that he should be allowed to perfect his entry for the same, is affirmed.

CAWOOD v. DUMAS.

Motion for review of departmental decision of May 14, 1896, 22 L. D., 585, denied by Secretary Francis, December 23, 1896.

RAILROAD GRANT-INDEMNITY SELECTIONS-REARRANGED LISTS.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO. v. LAMBECK (ON REVIEW).

In the rearrangement of an indemnity list, under the directions issued in the La Bar case, it is not essential that the rearranged list should be signed by the selecting agent of the company.

A railroad company is entitled to six months from date of actual notice of the order issued under the La Bar case in which to file rearranged indemnity lists.

Secretary Francis to the Commissioner of the General Land Office, December 23, 1896. (I. H. L.) (G. B. G.)

By departmental decision of February 17, 1896 (22 L. D., 202), your office decision of September 24, 1894, holding for cancellation the indemnity selection filed by the St. Paul, Minneapolis and Manitoba Railway Company as to lots 16 and 17 of section 7, T. 122 N., R. 31 W., St. Cloud land district, Minnesota, with a view to allowing the homestead application of Joseph Lambeck, was reversed.

Motion for review of said decision was duly filed and entertained by this Department, the same being returned for service March 27, 1896. The motion has since been filed bearing evidence of service upon the company, and at the request of counsel an application for oral argument was granted and the case was duly argued, both parties being represented.

The land involved is within the indemnity limits common to both the main line and the St. Vincent Extension of said road and was included in the company's list of selections made on account of the St. Vincent Extension, filed November 13, 1885. Its list contained also a list of lands alleged to have been lost to the grant equal in amount to the selected lands.

Lambeck's claim depends upon a homestead application presented on September 3, 1891, which was rejected by the local officers for conflict with the company's selection before referred to, from which action he duly appealed to your office.

The motion alleges that,

The Hon. Secretary overlooked the fact, which appears by evidence accompanying the homestead application of appellant, that the land in question was actually settled upon and claimed by a qualified pre-emptor prior to the pretended selection by the appellant railway company November 13, 1885.

Accompanying Lambeck's application to enter this land were two sworn statements made by him respecting settlements on the land involved. One is, that he settled in the month of September, 1887; built a house thereon, into which he moved his family, and has ever since continued to reside therein. The other statement is, that during the years 1884, 1885 and a part of the year 1886, one Pick resided on said land, with his family, and claimed the same as his homestead, and that in 1886 said Pick abandoned the land.

These statements were duly considered when the case was considered upon its merits. They do not sustain the specifications of error for the reason that Lambeck's alleged settlement was made nearly two years after the original selection was filed, and there is nothing to show that Pick was qualified to make homestead entry of the land or that he ever applied therefor.

The case of *Railroad Company v. Griffey* (143 U. S., 32), cited by counsel, has no application to the state of facts set forth in these affidavits. In that case Griffey's right had attached under his filing which had been duly placed of record prior to the date of the attachment of rights under the railroad grant.

In the decision under review it was held that (syllabus):

Indemnity selections accompanied by designation of loss in bulk, made prior to the specific departmental requirement that lost lands should be arranged tract for tract with the lands selected, operate to protect the right of the company as against subsequent applications to enter, made prior to said requirement, and the rearrangement of losses in accordance therewith.

In departmental decision of October 14, 1893 (17 L. D., 406), in considering the case of *La Bar v. Northern Pacific R. R. Co.*, you were directed to—

call upon all railroad companies having pending indemnity selections to revise their lists within six months from the date of your order, so that a proper basis will be shown for each and all lands now claimed as indemnity, the same to be arranged tract for tract in accordance with departmental requirements, and that all tracts formerly claimed for which a particular basis has not been assigned in the manner prescribed, at the expiration of six months, be disposed of under the terms of the orders restoring indemnity lands without regard to such previous claim.

In the decision under review it is stated that:

Under the direction given by this Department in its decision in the case of *La Bar v. Northern Pacific R. R. Co.* (17 L. D., 406), this company was, during the month of December, 1893, called upon to re-arrange its indemnity selections so as to designate, tract for tract, the lands lost in place, in lieu of which selections had been made. Acting under this call the company on June 6, 1894, filed its re-arranged list in which the same losses were used, but re-arranged to show the losses tract for tract with the lands selected in its list filed November 13, 1885.

Your office decision holds that the company's selection as originally presented was invalid, and recognizes the intervening right of Lambeck.

Prior to the decision of this Department in this case of *La Bar v. Northern Pacific R. R. Co.*, *supra*, there was no specific requirement that the lost lands should be arranged tract for tract with the selected lands, the circular of 1879 merely requiring the designation of losses made the bases for the selections.

I am therefore of opinion that the company's rights were duly protected under the selection as made in 1885, and as they have since complied with the requirement in re-arranging their losses so as to show a specific loss for each tract selected, no rights were acquired as against the grant by the presentation of Lambeck's application in 1891.

In effect this decision held that where the company, within the time allowed under the direction given in the *La Bar* case, re-arranges a list filed prior to said order, the rights of the company are duly protected and date back to the filing of the original list. To this decision the Department, after due consideration of the matter, adheres.

It is alleged, however, in the motion under consideration, that the company's re-arranged lists were not filed within the time allowed under the decision in the La Bar case; and further, that the re-arranged lists are not in form sufficient, for the reason that they were not signed by an officer of the company.

Inquiry at your office discloses the following facts:

Acting under the directions given in the La Bar case, your office issued notice to a number of railroads, said notices all bearing date of December 4, 1893.

In the case of the St. Paul, Minneapolis and Manitoba Ry. Co. the notice was addressed to the Land Commissioner of the company at St. Paul, Minnesota.

Said notice was sent by registered mail, and presumably left your office on December 4, 1893, the date of the notice.

Re-arranged lists were filed in your office with letter from the company bearing date of June 6, 1894. Said letter bears the stamp of your office dated June 14, 1894. This letter fully describes the lists and I am of opinion that it was unnecessary that the re-arranged lists be appended with the usual certificates placed on selection lists or signed by the selecting agent, as the same were not new selections, but re-arrangement of the old lists. The original lists were in form sufficient, excepting the matching of the specific selections with the losses, which was not required at the date of the filing of said selection.

It will be noted that the lists were filed after the expiration of six months from the date of the notice issued on December 4, 1893. If the language of the La Bar case were to be strictly followed, the direction therein given might be so construed as to lead to the holding that these re-arranged lists were filed out of time. But it is evident that the language of said order did not fully express the intention of the Department. Under the terms of the order, if taken literally, there might not be any notice whatever actually received by the company, and yet the company would lose its rights unless it re-arranged its lists within six months from the *date* of said order.

In my opinion the railroad company is entitled to six months from date of actual notice of said order in which to re-arrange its lists. But there is not sufficient evidence in the case, relative to receipt of notice and the date of mailing the re-arranged list to your office, to enable me to determine whether or not said list was re-arranged within six months from receipt of notice.

The case is therefore remanded to your office in order that the fact as to whether the company re-arranged said lists within six months from receipt of notice, may be determined. To this end you will take appropriate action; and thereupon your office will dispose of the case in accordance with the views herein indicated.

REPAYMENT—ASSIGNEE—ACT OF JUNE 16, 1880.

LOUIS GIESMAR.

The purchaser of lands at a tax sale, at a time when the legal title thereto is in the United States, does not occupy the status of an assignee of the entryman under the statutory provisions with respect to repayment.

Secretary Francis to the Commissioner of the General Land Office, December 23, 1896. (I. H. L.) (P. J. C.)

In this case the petitioner, Louis Giesmar, is seeking to have repayment made to him of a part of the money paid by one John Minor on cash entries 393, 435, and 436, at New Orleans, Louisiana, in 1822 and 1824.

As the record is presented here, it appears that Minor made cash entry No. 393, of 728.52 acres, on the 10th of May, 1822, and cash entry No. 435, of 172.67 acres, and cash entry No. 436, of 204.60 acres, on the 28th of August, 1824. These entries were made under the acts of Congress of March 3, 1811, May 11, 1820, and February 28, 1823 (2 Stat., 662, and 3 Stat., 573-729), as back concessions to a tract of land which Minor owned on the Mississippi River front, in Acadia parish, Louisiana. The total area of these entries was 1,105.79 acres, and the aggregate amount paid was \$1,382.26, the price being \$1.25 per acre. Duplicate receipts and certificates were issued for each of these entries, but the petitioner alleges that they can not now be found.

At that time there was no official plat of the township in which these entries were situated, and they were surveyed separately, on irregular lines, and described by metes and bounds, by a deputy surveyor, as provided in section 5, of the said act of Congress of March 3, 1811 (2 Stat., 662). Subsequently complaint was made that each of these entries conflicted in part with the prior private claim of Etienne Coumo, and on the 14th of October, 1829, they were suspended by the Commissioner of the General Land Office pending the filing of a township plat.

Minor died in 1830. In the same year a plat of the township was made, upon which Minor's entries were designated as section 30, and their aggregate area, exclusive of the Coumo claim, shown to be 630 acres. On the 14th of May, 1878, patent was issued to Etienne Coumo for the Coumo claim, including the portions covered by Minor's entries, but there was no action on the Minor entries, and they remained suspended.

There were various conveyances, and on the 18th of February, 1891, the petitioner, Louis Giesmar, became the owner and final transferee of the Minor entries, and also of Minor's front lands.

A survey was made in 1891, and a plat thereof approved June 23, 1892, which described the Minor entries, exclusive of the portions that had been patented to Coumo as aforesaid, as follows: Cash entry No. 393, Lots 1 and 4, Sec. 63, 399.24 acres; cash entry No. 435, lot 1, Sec. 62,

50.40 acres, and cash entry No. 436, lots 1 and 4, Sec. 61, 135.02 acres, all in township 9 S., range 2 E., and containing in the aggregate 584.66 acres. And on the 14th of August, 1893, patents were issued to Geismar for these last mentioned areas, and on the 18th of March, 1895, he filed his petition in the General Land Office for repayment to him of the sum of \$651.41, which Minor had paid for those portions of his entries, aggregating 521.13 acres, which had been patented to Coumo, as above recited. On the 23d of March, 1895, the Commissioner of the General Land Office denied the petition. Geismar filed a motion for review, which was overruled on the 30th of April, 1895, and then he appealed to the Department.

The abstract of title from Minor to Geismar is as follows:

John Minor died unmarried and without direct heirs, leaving a will, under which he bequeathed one half of these entries and of his front lands, both together constituting what is now known as "Waterloo Plantation," to William J. Minor, and acknowledged that the other half belonged to his brother, Stephen Minor. Soon afterwards Stephen conveyed his half to William, which made William owner of the whole. On the 23d of November, 1867, William granted a special mortgage on the whole plantation to Classon and Company, of New Orleans, to secure a loan of \$30,000. This debt was not paid, and by agreement between the parties in interest the property was sold for taxes on the 2d of December, 1871, by C. F. Smith, tax collector of Ascension parish, and purchased by William A. Gordon as agent for William Lorenzen. On the 28th of March, 1877, the said Lorenzen executed and acknowledged before N. B. Trust, a notary public in New Orleans, a declaration that his purchase of the property through his agent Gordon on the 2d of December, 1871, was with the funds of, and for Marie Von Gableuz, then widow of John F. C. Vles, of Baden Baden, in Germany, which declaration the said Marie Von Gableuz accepted in due form in Germany on the 21st of April, 1877; and on the 19th of April, 1879, the Auditor of the State of Louisiana passed his act of sale, ratifying and confirming to the said Marie Von Gableuz the said tax sale of the property of December 2, 1871. And before John J. Ward, a notary public in New Orleans, on the 18th of February, 1891, the said Marie Von Gableuz, then wife of Baron Werner Von Schweinitz, of Germany, sold and conveyed the property for \$20,000 to the petitioner, Louis Geismar.

Section 2, act of June 16, 1880 (21 Stat., 287), reads as follows:

In all cases where homestead or timber culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and can not be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excess paid upon the same upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land

Office, and in all cases where parties have paid double minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to the heirs or assigns.

This statute contemplates that repayment shall be made to the party who made the entry, his heirs or assigns.

Geismar is not an heir, nor is he an assign of the entryman Minor, there being no privity of interest existing between him and the entryman.

It will be observed that Geismar, in 1891, obtained his alleged interest in or claim to the land, for which he is now seeking repayment of the money paid by Minor in 1822 and 1824. But prior to Geismar's purchase, and in 1878, the government issued its patent for part of this identical land to Coumo, which was equivalent to the cancellation of the Minor entries to that extent, or at least was sufficient to render them nugatory after that date.

In Adolph Emert (14 L. D., 101), it was held (syllabus):

The only person qualified to apply for repayment under section 2, act of June 16, 1880, is the one in whom the title to the land vested at the date of the cancellation of the entry, or the heirs of such party.

See also Joseph H. Harper, 23 L. D. 249; Alpha L. Sparks, 20 L. D., 75.

In the case of Albert G. Craven (14 L. D., 140), Craven purchased the land at administrator's sale. Prior to the purchase, the entry had been canceled. In deciding this question, it was said:

At the time of the alleged sale by the administrator, the land in question was a part of the public domain, and no State court can make a valid decree of title to parties of any part of the public lands, so long as the title remains in the United States. This doctrine is fundamental and needs no citation of authority in support thereof. Mr. Craven has acquired title to this land through purchase from a subsequent entryman who entered the lands shown on the records of your office to be a part of the public domain. His purchase at an administrator's sale long subsequent to the cancellation of said entry gives him no claim against the United States which would warrant this Department in directing a repayment of the purchase money paid by Mr. Montgomery, the original entryman. Ozra M. Woodward (2 L. D., 688).

This case is somewhat analogous to the one at bar in that Geismar's grantor derived her title as the result of a sale of the land for taxes. The legal title to the land at that time, (1871) was in the United States, and it is difficult to understand how any sale for taxes by the State authorities could create in Geismar the status of an assignee of Minor within contemplation of the statute.

Your office judgment is therefore affirmed.

DECISIONS
OF
THE DEPARTMENT OF THE INTERIOR
AND
GENERAL LAND OFFICE
IN
CASES RELATING TO THE PUBLIC LANDS

FROM JULY, 1896, TO DECEMBER, 1896.

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TABLE OF CASES REPORTED.

	Page.		Page.
Adams, Lamb <i>v.</i>	548	Bramwell <i>v.</i> Central and Union Pacific Railroad Companies...	326, 462
Adams <i>et al.</i> <i>v.</i> Northern Pacific R. R. Co.....	529	Briskey <i>v.</i> Northern Pacific R. R. Co.....	435
Adams, Tustin <i>v.</i> (on review)...	188	Brown <i>v.</i> Anderson <i>et al.</i> (on review).....	26
Adkinson, Francis.....	590	Bryant <i>v.</i> Begley.....	188
Alps Consolidated Mining Co., McGowan <i>et al.</i> <i>v.</i>	113	Bucknam <i>v.</i> Byram <i>et al.</i>	251, 455
Anderson <i>et al.</i> , Brown <i>v.</i> (on review).....	26	Buley, State of Montana <i>v.</i>	116
Anderson, Nilson <i>v.</i>	138	Bulger Hill and Nugget Gulch Placer, Aurora Lode <i>v.</i>	95, 348
Anderson <i>et al.</i> , Smith <i>v.</i>	580	Burns, G. A., <i>et al.</i>	430
Ashleman <i>v.</i> Northern Pacific R. R. Co.....	513	Butler, Welch <i>v.</i> (on review)....	8
Aspen Consolidated Mining Co. <i>v.</i> Williams.....	34, 256	Bynum, B. F., <i>et al.</i> (on review)...	389
Aspinall <i>et al.</i> <i>v.</i> Stocks <i>et al.</i>	502	Caldwell, Meagher <i>v.</i>	256
Aurora Lode <i>v.</i> Bulger Hill and Nugget Gulch Placer.....	95, 348	California, State of.....	423
Axford, Charles <i>et al.</i>	393	California, State of (on review)....	230
Bagley, Oregon and California R. R. Co. <i>v.</i>	392	California, State of, Owens <i>v.</i> (on review).....	12
Baker Fraction Placer.....	112	California, State of, <i>v.</i> Reeves (on review).....	377, 448
Baker <i>et al.</i> <i>v.</i> Rambo.....	475	Canady, Northern Pacific R. R. Co. <i>et al.</i> <i>v.</i>	436
Bakkene <i>et al.</i> , Heinrichs <i>v.</i>	234, 582	Castello <i>v.</i> Bonnie.....	162, 481
Barbour <i>v.</i> Wilson <i>et al.</i>	12, 462	Catron <i>et al.</i> <i>v.</i> Lewishon.....	20
Barnes, Newman <i>v.</i>	257, 585	Cawood <i>v.</i> Dumas (on review)....	551
Bartlett Bay Packing Co.....	337	Central Pacific R. R. Co., Halling <i>v.</i> (on review).....	9
Beach, Wood, <i>v.</i> (on review)....	200	Central and Union Pacific R. R. Companies, Bramwell <i>v.</i>	326, 462
Bell <i>et al.</i> , Florida Central and Peninsular R. R. Co. <i>v.</i> (on review).....	106	Childs <i>v.</i> Floyd (on review).....	350
Benesh <i>v.</i> Kalashek (on review)....	147	Chisholm, Guerten <i>v.</i>	479
Bergerud, St. Paul, Minneapolis and Manitoba Ry. Co. <i>et al.</i> <i>v.</i>	408	Christian, Penwell <i>v.</i>	10
Bickford, Hershey <i>et al.</i> <i>v.</i>	522	Church, John Houston M.....	130
Black Queen Lode <i>v.</i> Excelsior No. 1 Lode (on review).....	9	Cleaves <i>v.</i> Smith (on review)....	297
Blue Water Land and Irrigation Co.....	275	Clifford, Joseph.....	199
Bonnett <i>v.</i> Jones.....	547	Connell's Heirs, Stone <i>et al.</i> <i>v.</i>	166, 448
Bonnie, Castelló <i>v.</i>	162, 481	Cooper <i>et al.</i> , United States <i>v.</i> (on review).....	333
Bonner, John R. L.....	251	Copp, Henry N.....	123
Boomer, James.....	574	Corlis <i>v.</i> Northern Pacific R. R. Co.....	265
Boswell <i>et al.</i> <i>v.</i> Watkins (on review).....	12	Craig, State of Minnesota <i>v.</i>	305
Bowsman, Alexander.....	404	Crowley <i>v.</i> Ritchie <i>et al.</i> (on review).....	346
Brady <i>et al.</i> <i>v.</i> Williams.....	533	Cullom <i>v.</i> Helmer <i>et al.</i> (on review).....	148
		Curnutt <i>v.</i> Jones (on review)....	158

	Page.		Page.
Daily v. Marquette, Houghton and Ontonagen R. R. <i>et al.</i> (on review)	310	Gamble v. Northern Pacific R. R. Co	351
Davis, Spaulding v.	358	Gaunt v. Rutledge <i>et al.</i>	55
Dawson <i>et al.</i> v. Higgins (on review)	165	Giesmar, Louis	555
Dayton, United States v.	54	Gillen, Parcher v.	485
Denny <i>et al.</i> , Hosmer v.	319, 519	Giroux v. Scheurman	546
Dhalin, Peter	193	Glover <i>et al.</i> v. Swarts	480
Dodge, White v.	240	Grandin <i>et al.</i> v. La Bar	301, 381
Dolles v. Hamberg Consolidated Mines Co.	267, 539	Grayson, George W.	194
Douglas, Shook v. (on review) ...	331	Green River Coal Association, McWilliams <i>et al.</i> v.	127
Downman v. Moss (on review)	297	Green, Morgan v.	297
Drake <i>et al.</i> v. Wilt	2	Greenhoot <i>et al.</i> , Hamilton v. (on review)	180
Drew, Northern Pacific R. R. Co. v.	380	Grinnell v. Southern Pacific R. R. Co. (on review)	489
Drewicke v. State of Minnesota.	148, 384	Grothjan, Louise C.	414
Dumas, Cawood v. (on review) ..	551	Goldstein v. Juneau Townsite ...	417
Duncan <i>et al.</i> v. The Dalles Military Wagon Road Co. (on review)	339	Gonzales, Silva v.	189
Dunlap v. Shingle Springs and Placerville R. R. Co.	67, 391	Gowdy <i>et al.</i> v. Kismet Gold Mining Co. (on review)	319
Duran de Chavez v. Saabedra ...	193	Guerten v. Chisholm	479
Durrell <i>et al.</i> v. Windom	508	Gulf and Ship Island R. R. Co. ...	565
Dyer v. Oregon and California R. R. Co.	569	Gurnee, Clinton (on review)	151
Dysart, Francis J.	282	Guthrie City, Hance <i>et al.</i> v.	196, 467
Eastern Oregon Land Co., King v.	579	Guthrie City v. Nichols <i>et al.</i> (on review)	343
Ellis, Parsons <i>et al.</i> v.	69, 504	Hall, William <i>et al.</i>	495
English v. Leavenworth, Lawrence and Galveston R. R. Co.	343	Hall v. Lake (on review)	2
Epley, Hodgson v.	293	Halling v. Central Pacific R. R. Co. (on review)	9
Evans, Henry C.	412	Hamberg Consolidated Mines Co., Dolles v.	267, 539
Excelsior No. 1 Lode, Black Queen Lode v. (on review)	9	Hamilton v. Greenhoot <i>et al.</i> (on review)	180
Fairfield, Melloy v. (on review) ..	259	Hance <i>et al.</i> v. City of Guthrie ...	196, 467
Fay, Joel (on review)	358	Hardman v. The Dalles Military Wagon Road Co.	94
Ferguson, Powell v.	173	Harper, Joseph H.	249
Fields v. Kenedy	165	Harrington <i>et al.</i> v. Hegarty.	384
Fish v. Northern Pacific R. R. Co. (on review)	15	Hart, W. H. H.	280
Florida, State of.	237	Haskins, Perry <i>et al.</i> v. (on review)	50, 436
Florida Central and Peninsular R. R. Co. v. Bell <i>et al.</i> (on review)	106	Heiskell v. McDowell	63, 403
Florida, State of, Spencer v.	185	Helmer <i>et al.</i> , Cullom v. (on review)	148
Floyd, Childs v. (on review)	350	Heinrichs v. Bakkene <i>et al.</i>	234, 582
Fluent, Francis H.	175	Hershey v. Bickford <i>et al.</i>	522
Fort Alexander Fishing Station.	335	Higgins, Dawson <i>et al.</i> v. (on review)	165
Fort Cummings	14	Hillebrand v. Smith (on review).	456
Fyffe v. Mooers (on review)	15	Hilliard v. Lutz (on review)	400
		Hodgson v. Epley	293

TABLE OF CASES REPORTED.

IX

	Page.		Page.
Hopkins v. Wagner <i>et al.</i> (on review)	400	*Lancer, Weedon v.	248, 444
Hosmer v. Denny <i>et al.</i>	319, 519	Langsford, James H.	9
Howard v. Northern Pacific R. Co.	6	Larson, Frank	452
Huffman v. Milburn <i>et al.</i> (on review)	6	Lawrence, Frederick W.	450
Hughart <i>et al.</i> , Mee v.	455	Leavenworth, Lawrence and Galveston R. R. Co., English v.	343
Humiston v. Northern Pacific R. Co. <i>et al.</i>	543	Leshner v. St. Paul Catholic Mission (on review)	7
Hunt v. Maxwell	180	Lewishon, Catron <i>et al.</i> v.	20
Idaho, State of, Kent v.	147	Linnemann, White v.	378
Illinois, Jefferson County	184	Long v. Isaksen	353
Iowa Railroad Land Company ..	79	Louise Mining Company (on review)	317
Isaksen, Long v.	353	Lowenstein v. Orne	285, 495
J. C. Baker Fraction Placer	112	Lutz, Hilliard v. (on review)	400
Jefferson County, Illinois	184	Lynde and Hough Company	442
Jensen, Mads	586	Machomich, Keyes v.	106
Jones, Bonnett v.	547	Makemson v. Snider's Heirs (on review)	189
Jones, Curnutt v. (on review) ...	158	Malone, North Perry Townsite <i>et al.</i> v.	87, 204
Johnson, Charles A., <i>et al.</i>	283	Maloney, Tipton v.	186
Johnson, McEvers v.	472	Marker, Emory H., <i>et al.</i>	407
Johnson <i>et al.</i> v. Smith <i>et al.</i> (on review)	317	Markuson v. State of Minnesota ..	591
Juneau Townsite, Goldstein v. ...	417	Marquette, Houghton and Ontonagon R. R. Co. <i>et al.</i> , Daily v. (on review)	310
Kalashek, Benesh v. (on review) ..	147	Martin, Jared, <i>et al.</i>	582
Kanawyer, Southern Pacific R. Co. v.	500	Maxwell, Hnnt v.	180
Keagy v. Wilcox	444	McCollom Fishing and Trading Co.	7
Keithly v. Richardson	158, 569	McCord, W. E.	137
Kellogg, Moore v.	468	McDowell, Heiskell v.	63, 403
Kendall, F. P.	245	McEvers v. Johnson	472
Kendrich <i>et al.</i> v. Perdido Land Co.	288, 529	McGowan <i>et al.</i> v. Alps Consolidated Mining Co.	113
Kenedy, Fields v.	165	McGrade v. Murray	140
Kent v. State of Idaho	147	McPeck, Sullivan v. (on review) ..	411
Keyes v. Machomich	106	McWilliams <i>et al.</i> v. Green River Coal Association	127
King v. Eastern Oregon Land Co.	579	Meagher v. Caldwell	256
Kismet Gold Mining Co., Gowdy <i>et al.</i> (on review)	319	Mee v. Hughart <i>et al.</i>	455
Knight, Osborn <i>et al.</i> v. (on review) ..	216	Melloy v. Fairfield (on review) ..	259
Koontz, Reeves <i>et al.</i> v.	562	Merritt, Willis v.	122
La Bar, Grandin <i>et al.</i> v.	301, 381	Milburn <i>et al.</i> , Huffnan v. (on review)	6
Lake, Hall v. (on review)	2	Miller v. State of Nebraska	348
Lamb v. Adams	548	Minnesota, State of, v. Craig	305
Lamb, Northern Pacific R. R. Co. v.	1	Minnesota, State of, Drewicke v.	148
Lambeck, St. Paul, Minneapolis and Manitoba Ry. Co. v. (on review)	552	Minnesota, State of, Markuson v.	591
		Montana, State of, v. Buley	116
		Montana, State of, v. Silver Star Mining Co.	313

* For "restrictive," in the second line on p. 249, read *retroactive*.

	Page.		Page.
Montgomery <i>et al.</i> , Wilson Creek Consolidated Mining and Milling Co. <i>v.</i>	476	Northern Pacific R. R. Co. <i>v.</i> Wallace	381
Morgan <i>v.</i> Green	297	Northern Pacific R. R. Co., Walters <i>v.</i>	492
Mooers, Fyffe <i>v.</i> (on review)	15	Northern Pacific R. R. Co. <i>v.</i> Walters <i>et al.</i>	331
Moore <i>v.</i> Kellogg	468	Northern Pacific R. R. Co., Wasmund <i>v.</i>	445
Moores <i>v.</i> Sommer (on review)	514	Northern Pacific R. R. Co. <i>v.</i> Treadwell	115
Moss, Dowman <i>v.</i> (on review)	297	Northern Pacific R. R. Co., Wilson <i>v.</i>	247
Moulton, Stillman B.	304	Olson <i>et al.</i> , Power <i>v.</i>	387
Murray <i>v.</i> Skaggs <i>et al.</i>	478	Oregon, State of	178, 460
Nebraska, State of, Miller <i>v.</i>	348	Oregon and California R. R. Co. <i>v.</i> Bagley	392
Needham <i>v.</i> Northern Pacific R. R. Co.	433	Oregon and California R. R. Co., Dyer <i>v.</i>	569
Newman <i>v.</i> Barnes	257	Orne, Lowenstein <i>v.</i>	285, 495
Nichols <i>et al.</i> , City of Guthrie <i>v.</i> (on review)	343	Osborn <i>et al.</i> <i>v.</i> Knight (on review)	216
Niles, Reith <i>v.</i>	415	Otoe and Missouri lands	143
Nilson <i>v.</i> Anderson	138	Quimette <i>v.</i> O'Connor (on review)	243
North Perry Townsite <i>et al.</i> <i>v.</i> Malone	87, 204	Owen <i>et al.</i> , Northern Pacific R. R. Co. <i>v.</i>	324
Northern Pacific R. R. Co.	70, 204, 428	Owens <i>v.</i> State of California (on review)	12
Northern Pacific R. R. Co., Adams <i>et al.</i> <i>v.</i>	529	Parcher <i>v.</i> Gillen	485
Northern Pacific R. R. Co., Ashelman <i>v.</i>	513	Parsons <i>et al.</i> <i>v.</i> Ellis	69, 504
Northern Pacific R. R. Co., Briskey <i>v.</i>	435	Penwell <i>v.</i> Christian	10
Northern Pacific R. R. Co. <i>et al.</i> <i>v.</i> Canady	436	Perdido Land Co., Kendrick <i>et al.</i> <i>v.</i>	288, 529
Northern Pacific R. R. Co., Corlis <i>v.</i>	265	Perry <i>et al.</i> <i>v.</i> Haskins	50, 436
Northern Pacific R. R. Co. <i>v.</i> Drew	380	Petre <i>et al.</i> , Welch <i>v.</i> (on review)	360
Northern Pacific R. R. Co., Fish <i>v.</i> (on review)	15	Phillips, John W.	410
Northern Pacific R. R. Co., Gamble <i>v.</i>	351	Power <i>v.</i> Olson <i>et al.</i>	387
Northern Pacific R. R. Co., Howard <i>v.</i>	6	Powell <i>v.</i> Ferguson	173
Northern Pacific R. R. Co. <i>et al.</i> , Humiston <i>v.</i>	543	Putman, Elijah C.	152
Northern Pacific R. R. Co. <i>v.</i> Lamb	1	Rambo, Baker <i>et al.</i> <i>v.</i>	475
Northern Pacific R. R. Co., Needham <i>v.</i>	433	Randolph, Simon	329, 516
Northern Pacific R. R. Co. <i>v.</i> Owen <i>et al.</i>	324	Reeves, State of California <i>v.</i> (on review)	377, 448
Northern Pacific R. R. Co., Spillock <i>v.</i> (on review)	588	Reith <i>v.</i> Niles	415
Northern Pacific R. R. Co. <i>v.</i> St. Paul, Minneapolis and Manitoba Ry. Co.	454	Reeves <i>et al.</i> <i>v.</i> Koontz	562
Northern Pacific R. R. Co., Romaine <i>v.</i> (on review)	313	Rhodes <i>et al.</i> <i>v.</i> Treas (on review)	186
		Richardson, Florence A.	578
		Richardson, Keithly <i>v.</i>	158
		Ritchie <i>et al.</i> , Crowley <i>v.</i> (on review)	346
		Roach, Sheldou <i>v.</i> (on review) ..	352
		Roberts, Sumner <i>v.</i>	201, 460
		Romaine <i>v.</i> Northern Pacific R. R. Co. (on review)	313
		Rutledge <i>et al.</i> , Gaunt <i>v.</i>	55

TABLE OF CASES REPORTED.

XI

	Page.		Page.
Saabedra, Duran de Chavez <i>v.</i> ...	193	St. Paul, Minneapolis and Mani-	
Scheurman, Giroux <i>v.</i>	546	toba Ry. <i>et al.</i> , <i>v.</i> Bergerud ...	408
Seaver, Carlton, <i>et al.</i>	108	St. Paul, Minneapolis and Mani-	
Shea <i>v.</i> Williams	119	toba Ry. Co. <i>v.</i> Lambeck (on	
Sheldon <i>v.</i> Roach (on review)...	352	review)	552
Shingle Springs and Placerville		St. Paul, Minneapolis and Mani-	
R. R. Co., Dunlap <i>v.</i>	67, 391	toba Ry. Co., Northern Pacific	
Shook <i>v.</i> Douglas (on review)...	331	R. R. Co. <i>v.</i>	454
Silva <i>v.</i> Gonzales	189	Stransky <i>v.</i> Shaut (on review)..	558
Simpson, Jabez B., <i>et al.</i> (on re-		Sullivan <i>v.</i> McPeck (on review)..	411
view)	14	Sumner <i>v.</i> Roberts	201, 460
Skaggs <i>et al.</i> , Murray <i>v.</i>	478	Swarts, Glover <i>et al.</i> <i>v.</i>	480
Spaulding <i>v.</i> Davis	358		
Spencer <i>v.</i> State of Florida	185	Taylor, Smith <i>et al.</i> <i>v.</i>	440
Spirlock <i>v.</i> Northern Pacific R. R.		Taylor, Walker <i>v.</i>	110, 345
Co. (on review)	588	Tennessee Coal, Iron and R. R.	
Smith <i>v.</i> Anderson <i>et al.</i>	580	Co. <i>et al.</i>	28
Smith, Cleaves <i>v.</i> (on review)...	297	The Dalles Military Wagon Road	
Smith, Hillebrand <i>v.</i> (on review)..	456	Co., Duncan <i>et al.</i> <i>v.</i> (on review)	339
Smith <i>et al.</i> , Johnson <i>et al.</i> <i>v.</i> ...	317	The Dalles Military Wagon Road	
Smith <i>et al.</i> <i>v.</i> Taylor	440	Co., Hardman <i>v.</i>	94
Smith, Wheeler <i>et al.</i> <i>v.</i>	395	Thompson, Wares <i>et al.</i> <i>v.</i>	341
Snider's Heirs, Makemson <i>v.</i> (on		Tipton <i>v.</i> Maloney	186
review)	189	Tobin <i>et al.</i> <i>v.</i> Tripp	58
Snowden, West Reno City <i>et al.</i> <i>v.</i>	74	Treadwell, Northern Pacific R. R.	
Sommer, Moores <i>v.</i> (on review)..	514	Co. <i>v.</i>	115
Southern Pacific R. R. Co., Grin-		Treas, Rhodes <i>et al.</i> <i>v.</i> (on review)	186
nell <i>v.</i> (on review)	489	Tustin <i>v.</i> Adams (on review)...	188
Southern Pacific R. R. Co. <i>v.</i> Ka-			
nawyer	500	Union Oil Company	222
State of California	423	Union Pacific R. R. Co. (on re-	
State of California (on review)..	230	view)	161
State of California, Owens <i>v.</i> (on		United States <i>v.</i> Cooper <i>et al.</i> (on	
review)	12	review)	333
State of California <i>v.</i> Reeves (on		United States <i>v.</i> Dayton	54
review)	377, 448		
State of Florida	237	Wagner <i>et al.</i> , Hopkins <i>v.</i> (on re-	
State of Florida, Spencer <i>v.</i>	185	view)	400
State of Idaho, Kent <i>v.</i>	147	Walker <i>v.</i> Taylor	110, 345
State of Illinois, Jefferson County		Wallace, Northern Pacific R. R.	
State of Minnesota <i>v.</i> Craig	184	Co. <i>v.</i>	381
State of Minnesota, Drewicke <i>v.</i>	305	Walters <i>v.</i> Northern Pacific R. R.	
148, 384		Co	492
State of Minnesota, Markuson <i>v.</i>	591	Walters <i>et al.</i> , Northern Pacific	
State of Montana <i>v.</i> Buley	116	R. R. Co. <i>v.</i>	331
State of Montana <i>v.</i> Silver Star		Wasmund <i>v.</i> Northern Pacific	
Mining Co	313	R. R. Co	445
State of Nebraska, Miller <i>v.</i>	348	Wares <i>et al.</i> <i>v.</i> Thompson	341
State of Oregon	178, 460	Watkins, Boswell <i>et al.</i> <i>v.</i> (on re-	
Stich, Henry E	457	view)	12
Stocks <i>et al.</i> , Aspinall <i>et al.</i> <i>v.</i> ...	502	*Weedin <i>v.</i> Lancer	248, 444
Stone <i>et al.</i> <i>v.</i> Connell's Heirs...	166, 448	Welch <i>v.</i> Butler (on review)	8
St. Paul Catholic Mission, Leshner		Welch <i>v.</i> Petre <i>et al.</i> (on review)..	360
<i>v.</i> (on review)	7	West Reno City <i>et al.</i> <i>v.</i> Snowden.	74
St. Paul, Minneapolis and Mani-		Wheeler <i>et al.</i> <i>v.</i> Smith	395
toba Ry. Co	539	White, Anna E	467

* For "restrictive," in the second line on p. 249, read *retroactive*.

	Page.		Page.
White, Martha E.....	52	Wilson <i>et al.</i> , Barbour <i>v.</i>	12, 462
White <i>v.</i> Dodge.....	240	Wilson <i>v.</i> Northern Pacific R. R.	
White <i>v.</i> Linnemann.....	378	Co.....	247, 580
Wilcox, Keagy <i>v.</i>	444	Wilson Creek Consolidated Min-	
Williams, Maria H.....	483	ing and Milling Co. <i>v.</i> Mont-	
Williams, Aspen Consolidated		gomery <i>et al.</i>	476
Mining Co. <i>v.</i>	34, 256	Wilt, Drake <i>et al.</i> <i>v.</i>	2
Williams, Brady <i>et al.</i> <i>v.</i>	533	Windom, Durrell <i>et al.</i> <i>v.</i>	508
Williams, Shea <i>v.</i>	119	Wood <i>v.</i> Beach (on review).....	200
Willis <i>v.</i> Merritt.....	122	Wyatt, Simeon D.....	61
Wilson, Esther L.....	200		

TABLE OF CASES CITED.

[The abbreviation "L. D." refers to this publication; "L. and R.," to the records in the division of Lands and Railroads; "B. L. P.," refers to Brainerd's Legal Precedents; "1 C. L. L.," to Copp's Public Land Laws, Ed. 1875; "2 C. L. L.," to Copp's Public Land Laws, Ed. 1882; "C. L. O.," to Copp's Land Owner; "C. M. D.," to Copp's Mining Decisions; "C. M. L.," to Copp's Mineral Lands; "Lester," to Lester's Land Laws and Decisions; "Rep.," to the Reporter; "S. M. D.," to Sickles's Mining Laws and Decisions; and "C. Cls.," to Court of Claims.]

	Page.		Page.
Adamson v. Blackmore; 16 L. D., 111.....	379	California, State of; 15 L. D., 10.....	424
Aldrich, C. W.; 13 L. D., 572.....	94	California v. Martin; 5 L. D., 99.....	232
Alice Placer Mine; 4 L. D., 314.....	174	California v. Reeves; 23 L. D., 377.....	445
Allen v. Leet; 6 L. D., 669.....	531	California v. United States; 3 L. D., 521..	232
Andrus et al. v. Balch; 22 L. D., 238.....	109	Cameron, John; 7 L. D., 436.....	575
Ard v. Missouri, Kansas and Texas R. R. Co.; 14 L. D., 369.....	162	Carson v. Finity; 10 L. D., 532.....	120
Ard v. Brandon; 156 U. S., 537.....	332, 532	Castello v. Bonnie; 20 L. D., 311.....	164
Arnett, Mary G.; 20 L. D., 131.....	68	Castle v. Womble; 19 L. D., 455.....	423
Aspen Consolidated Mining Co. v. Atkinson; 22 L. D., 8.....	37	Castner, John K. et al.; 17 L. D., 565.....	398
Aspen Consolidated Mining Co. v. Williams; 23 L. D., 48.....	422	Cedar Rapids and Missouri R. R. Co. v. Herring; 110 U. S., 27.....	81
Austin, Newton F.; 18 L. D., 4.....	484	Central Pacific R. R. Co. v. California; 2 C. L. L., 1052.....	232
Austin v. Luey; 21 L. D., 507.....	133	Chambers v. Harrington; 111 U. S., 350....	223
Anway v. Phinney; 19 L. D., 513.....	413	Chapman v. Wagon Road Co.; 13 L. D., 61	501
		Chicago, St. Paul, Minneapolis and Omaha R. R. Co.; 11 L. D., 607.....	183, 221
Baker v. Stewart; 40 Kansas, 442.....	298	Chick et al. v. Willetts; 2 Kansas, 384.....	254
Balch v. Andrus; 22 L. D., 238.....	216, 220	Clarke et al. v. Erwin; 16 L. D., 122.....	324
Bardon v. Northern Pacific R. R. Co.; 145 U. S., 535.....	16, 540	Cleveland et al. v. North et al.; 16 L. D., 484	464
Barnes v. Poirier; 27 U. S., App. 500.....	156	Cochens, Nicholas; 11 L. D., 627.....	510
Bate Refrigerating Co. v. Salzberger; 157 U. S. 1.....	156	Conlin v. Kelley; 12 L. D., 1.....	324
Beane v. Kalashek; 22 L. D., 530.....	581	Corlis v. Northern Pacific R. R. Co.; 22 L. D., 265.....	447
Belk v. Meagher; 104 U. S., 279.....	99	Cooper Mfg. Co. v. Ferguson; 113 U. S., 727.....	322
Bisbing, Mary E.; 13 L. D., 45.....	484	Cormack, Amanda; 18 L. D., 352.....	484
Boyle v. The Northern Pacific R. R. Co.; 23 L. D., 134.....	332	Cornelius v. Kessel; 128 U. S., 456.....	194
Bradford v. Aleshire; 18 L. D., 78.....	551	Crane, George W.; 16 L. D., 170.....	575
Brangan et al. v. Dulaney; 2 L. D., 744.....	115	Craven, Albert G.; 14 L. D., 101 and 140....	250, 557
Brant v. Virginia Coal and Iron Co.; 93 U. S., 326.....	160	Criswell v. Waddingham; 16 L. D., 66.....	511
Bright v. Elkhorn Mining Co.; 8 L. D., 122	70	Crowley v. Ritchie et al.; 22 L. D., 276....	408
Brown v. Naylor; 14 L. D., 141.....	560	Curnutt v. Jones; 21 L. D., 40.....	65
Buena Vista Co. v. R. R. Co.; 112 U. S., 165	146	Darland v. Northern Pacific R. R. Co.; 12 L. D., 195.....	471
Bullard v. Sullivan; 11 L. D., 22.....	53	Davis v. California; 13 L. D., 129.....	232
Burdett; 2 C. L. O., 55.....	356	Davis's Administrator v. Weibbold; 139 U. S., 524-525.....	477
Burns, Frank; 10 L. D., 365.....	321	Dayton, Lyman C.; 10 L. D., 159.....	531
Bush, Zachariah T.; 22 L. D., 182.....	264	Deery v. Craig; 5 Wallace, 795.....	160
Buttz v. Northern Pacific R. R. Co.; 119 U. S., 72.....	501	Deffebach v. Hawke; 115 U. S., 392.....	194, 477
Cagle v. Mendenhall; 20 L. D., 447.....	533	Dermody, Michael; 11 L. D., 504.....	433
Caldwell v. Missouri, Kansas and Texas R. R. et al.; 8 L. D., 570.....	162	Dillivan v. Snyder; 5 L. D., 184.....	53
California and Oregon Land Company; 22 L. D., 170.....	580	Dobbs Placer Mine; 1 L. D., 565.....	531
		Downey v. Rogers; 2 L. D., 707.....	23, 228
		Douglass v. Dickson; 31 Kansas, 310.....	548
		Drake et al. v. Button; 14 L. D., 18.....	512

	Page.		Page.
Drew v. Comisky; 22 L. D., 174.....	164, 482	Harper v. Grand Junction; 15 L. D., 124..	465
Driscoll v. Morrison; 7 L. D., 274.....	531	Hastie; 8 L. D.....	34
Dunlap v. Shingle Springs and Placerville R. R.; 23 L. D., 67.....	458	Hastings and Dakota R. R. Co. v. Whit- ney; 132 U. S., 357.....	16
East Tenn., etc., R. R. Co. v. Frasier; 139 U. S., 288.....	212	Hausen v. Ueland; 10 L. D., 273.....	531
Eddy v. England; 6 L. D., 530.....	559	Hayden v. Jamison; 14 L. D., 537.....	324
Ellis, Joseph; 21 L. D., 377.....	136, 457	Heath v. Wallace; 138 U. S., 573.....	232
Emert, Adolph; 14 L. D., 101.....	557	Heilman v. Syverson; 15 L. D., 184.....	121, 379
English v. Leavenworth, Lawrence and Galveston R. R. Co.; 23 L. D., 343.....	461	Heptner v. McCartney; 11 L. D., 400.....	560
Ewart v. Carey's Heirs; 20 L. D., 214....	298	Hessong v. Burgan; 9 L. D., 353.....	144
Falconer v. Hunt <i>et al.</i> ; 6 L. D., 512.....	34	Hobbs v. Goulette <i>et al.</i> ; 18 L. D., 409.....	565
Farrell <i>et al.</i> v. Hoge <i>et al.</i> ; 18 L. D., 81....	223	Holcomb, Jedediah F.; 22 L. D., 604.....	452, 577
Farrell v. McDonell; 13 L. D., 105.....	559	Holm v. St. Paul, Minneapolis and Mani- toba Ry. Co.; 16 L. D., 251.....	542
Featherspil, John C.; 4 L. D., 570.....	177	Holt, Charles; 16 L. D., 294.....	497
Fleming v. Bowe; 13 L. D., 78.....	146, 178	Holton v. Rutledge; 20 L. D., 227.....	109, 183
Florida Central and Peninsular R. R. Co. v. Heirs of Lewis Bell, deceased; 22 L. D., 451.....	68	Hopeley <i>et al.</i> v. McNeil <i>et al.</i> ; 20 L. D., 87....	70
Fertilizing Co. v. Hyde Park; 97 U. S., 659.	212	Hopkins v. Wagner <i>et al.</i> ; 21 L. D., 485....	400
Fieker v. Murphy; 2 L. D., 135.....	356	Hooper, W. H.; 1 L. D., 560.....	228, 356
Fish v. Northern Pacific R. R. Co.; 21 L. D., 165.....	16	Houston v. Coyler; 2 L. D., 58.....	287
Fish v. Northern Pacific R. R. Co., on review; 23 L. D., 15.....	86, 453, 541	Hudson v. Francis; 15 L. D., 173.....	121
Forsyth v. Wisconsin Central R. R. Co.; U. S. Vol., 159.....	346	Hunt v. Maxwell; 23 L. D., 180.....	511
Foot v. McMillan; 22 L. D., 280.....	318	Hurt v. Griffin; 17 L. D., 162.....	11
Frisbie v. Whitney; 9 Wall., 189.....	144	Iowa R. R. Land Co.; 9 L. D., 370.....	84
Fritzsche, Edward F.; 3 L. D., 208.....	287	Iron Silver Co. v. Cheseman; 116 U. S., 529	399
Fyffe v. Mooers; 21 L. D., 167.....	561	Jackson v. McKeever; 3 L. D., 516.....	5
Gardiner, Robert J.; 19 L. D., 83.....	575	Jackson v. Roby; 104 U. S., 440.....	223
Gibbons v. United States; 9 Wall., 269....	283	Jackson v. Stults; 15 L. D., 413.....	236
Gibson v. Van Gilder; 9 L. D., 626.....	565	Jefferson Davenport; 16 L. D., 526.....	240
Gill v. Webster; 110 Penn. St., 313.....	227	Jenkins <i>et al.</i> v. Dreyfus; 19 L. D., 272....	511
Gillen v. Beebe; 16 L. D., 306.....	485	Johnson v. Towsley; 13 Wall., 72.....	17
Goodale v. Olney; 12 L. D., 324.....	476	Johnson v. Williams; 37 Kansas, 179.....	255
Goodale v. Olney; 13 L. D., 498.....	379	Jones; 9 L. D., 97.....	34
Goodnight, Kisiah; 16 L. D., 319.....	497	Jordan v. Idaho Aluminium M. and M. Co.; 20 L. D., 500.....	329
Good Return Co.; 4 L. D., 221.....	223	Julien v. Hunter; 18 L. D., 151.....	107
Gowdy, W. H., <i>et al.</i> v. The Kismet Min- ing Co.; 22 L. D., 624.....	10, 505	Kansas Pacific R. R. Co. v. Dunmeyer; 113 U. S., 629.....	16, 162
Grandin <i>et al.</i> v. La Bar; 23 L. D., 301....	511	Kansas City, Lawrence and Southern Kansas R. R. Co. v. The Attorney-Gen- eral; 118 U. S., 682.....	87
Grant v. Rutledge; 23 L. D., 49.....	287	Kaweah Cooperative Colony <i>et al.</i> ; 12 L. D., 326 at 330.....	240
Green, John W.; 19 L. D., 465.....	497	Kelso v. Janeway <i>et al.</i> ; 22 L. D., 242....	547
Greenough v. Wells; 19 L. D., 172.....	55	Kelly, Lydia; 8 L. D., 322.....	138
Gregg <i>et al.</i> v. Lakey; 17 L. D., 60.....	497	Kendrich <i>et al.</i> v. The Perdido Land Co....	288
Guerten v. Anderson; 295 L. and R., 169....	479	Ketcham, H. B.; 18 L. D., 93.....	177
Guthrie v. Paine; 13 L. D., 562.....	93	Kilmer v. Wilson; 49 Barbour.....	255
Guyselman v. Schaffer <i>et al.</i> ; 3 L. D., 517..	5	Kimberland v. Northern Pacific R. R. Co.; 8 L. D., 318.....	436
Gwillim v. Donnellan; 115 U. S., 45.....	99	Kiser v. Keech; 7 L. D., 25.....	120
Hall v. Fox; 9 L. D., 153.....	560	Knaggs, Annie; 9 L. D., 49.....	575
Hall v. Russell; 101 U. S., 503.....	168	Knight v. U. S. Land Association; 142 U. S., 178.....	40, 435
Hall v. Stone; 16 L. D., 199.....	318, 476	Koons v. Elsnor; 2 L. D., 65.....	287
Hamilton v. Anderson; 19 L. D., 168.....	130	La Bar v. Northern Pacific R. R. Co.; 17 L. D., 406.....	325, 553
Hansbrough, Henry C.; 5 L. D., 155.....	480	Lachapelle v. Herbert; 18 L. D., 494.....	3
Hanscom v. Sines <i>et al.</i> ; 15 L. D., 27.....	236	La Grande land district, Oreg.; 19 L. D., 449.....	415
Hardin v. Jordan; 140 U. S., 380.....	321, 432	Laird, Maggie; 13 L. D., 502.....	379
Harnick v. Butts <i>et al.</i> ; 20 L. D., 516.....	499	Lake Superior, etc. Co. v. Cunningham; 155 U. S., 354.....	311
Harnick v. Sheppard <i>et al.</i> ; 20 L. D., 516..	499		
Harper, Joseph H.; 23 L. D., 249.....	557		

TABLE OF CASES CITED.

XV

	Page.		Page.
Langford v. Butler; 20 L. D., 76.....	359	Northern Pacific R. R. Co. v. Urquhart; 8 L. D., 365.....	6
Lawrence, Frederick; 23 L. D., 450.....	577	Norton v. Thorson <i>et al.</i> ; 10 L. D., 261.....	58
Lee v. Johnson; 116 U. S., 48.....	146	Noyes v. Mantle; 127 U. S., 343.....	49, 100, 476
Lerne v. Martin; 5 L. D., 259.....	524		
Malone v. Union Pacific R. R. Co.; 7 L. D., 13.....	18, 220	Offutt v. Northern Pacific R. R. Co.; 9 L. D., 407.....	438
Maloy, Albert, v. Plogue, Frederick.....	260	Olney v. Shyrook; 9 L. D., 633.....	565
Mann, Jane; 18 L. D., 116.....	53	Ontonagon and Brule River R. R. Co.; 13 L. D., 463.....	427
Marsh v. Hughes; 22 L. D., 581.....	560	Oregon and California R. R. Co. v. Kuebel; 22 L. D., 308.....	571
Mather <i>et al.</i> v. Hackley Heirs; 19 L. D., 48.....	238	Organ, Kate G.; 20 L. D., 406.....	575
Matthiessen and Ward v. Williams; 6 L. D., 95.....	488	Osborn, A. R., <i>et al.</i> ; 22 L. D., 459.....	217
Maxwell v. Brierly; 9 C. L. O., 50.....	228	O'Toole v. Spicer; 20 L. D., 392.....	203, 401
McDonald <i>et al.</i> v. Hartman <i>et al.</i> ; 19 L. D., 547.....	547	Owens v. Gauger; 18 L. D., 6.....	379
McDonald <i>et al.</i> v. Montana Wood Co.; 35 Fed. Rep., 668.....	224	Parant, Edward; 20 L. D., 53.....	537
McGregor <i>et al.</i> v. Quinn; 18 L. D., 368.....	12, 462	Paulson v. Owen; 15 L. D., 114.....	464
McInnes <i>et al.</i> v. Cotter; 21 L. D., 97.....	318	Peacock v. Shearer's Heirs; 20 L. D., 213.....	32
McIntosh; 8 L. D., 614.....	34	Pearsall v. Great Northern R. R.; 161 U. S., 664.....	212
McLean v. Union Pacific R. R. Co.; 22 L. D., 227.....	94	Pensacola and Louisville R. R. Co.; 19 L. D., 386.....	68
Mendenhall, C. B.; 11 L. D., 414.....	411	Perry <i>et al.</i> v. Hastings; 23 L. D., 50.....	202
Meyers v. Massey; 22 L. D., 159.....	581	Pierce v. Musser-Sauntry Co.; 19 L. D., 136.....	311, 509
Millican v. R. R. Co.; 7 L. D., 85.....	18	Pike's Peak Lode; 14 L. D., 47.....	315
Mills v. Daly; 17 L. D., 345.....	408	Piru Oil Co.; 16 L. D., 117.....	229, 419
Mitchell v. Salen; 16 L. D., 403.....	524	Platt <i>et al.</i> v. Graham; 7 L. D., 229.....	359
Mitchell v. Smale; 140 U. S., 371.....	432		
Montana v. Bayliss; 22 L. D., 629.....	315	Quinn, William T.; 19 L. D., 295.....	12
Morrill v. Northern Pacific R. R. Co.; 22 L. D., 636.....	382, 436		
Morrow <i>et al.</i> v. State of Oregon <i>et al.</i> ; 17 L. D., 571.....	179	Rabuck v. Cass; 5 L. D., 398.....	298
Moulton, Stillman B.; 23 L. D., 304.....	467	Railroad Company v. Griffey; 143 U. S., 32.....	553
Murray, James H.; 6 L. D., 124.....	5	Rathburn v. Warren; 10 L. D., 111.....	3
		Raven v. Gillespie; 6 L. D., 240.....	107
Neal v. Cooley; 18 L. D., 3.....	560	Reed v. Casner; 9 L. D., 170.....	581
Nebraska v. The Town of Butte; 21 L. D., 220.....	426	Reese, Hugh; 10 L. D., 541.....	575
Negus, James D., <i>et al.</i> ; 11 L. D., 32.....	111	Reynolds v. Iron Silver Mining Co.; 116 U. S., 687.....	99
Neilson v. Northern Pacific R. R. Co.; 9 L. D., 402.....	542	Rice v. Lenzshek; 13 L. D., 154.....	476
Nemitz, Rudolph; 7 L. D., 80.....	471	Richmond Mining Co. v. Rose <i>et al.</i> , 114 U. S., 576.....	25
Nettie Lode v. Texas Lode; 14 L. D., 180.....	23	Robbins v. Sackett; 23 Kansas, 301.....	255
Newhall v. Sanger; 92 U. S., 761.....	16	Roeschlaub v. Union Pacific Ry. Co.; 6 L. D., 750.....	471
Nicholson, John W.; 9 L. D., 54.....	547	Rogers, Samuel E.; 4 L. D., 284.....	228
Nix v. Allen; 112 U. S., 129.....	542	Rogers v. Jepson; 4 L. D., 60.....	229
Northern Pacific R. R. Co.; 21 L. D., 412.....	204	Root v. Shields; 1 Wool, 340.....	465
Northern Pacific R. R. Co. v. Barnes; 51 N. W. Rep., 386.....	501	Rucker <i>et al.</i> v. Knisley; 14 L. D., 113.....	130
Northern Pacific R. R. Co. v. Cole; 17 L. D., 8.....	434	Ryan v. Carter; 93 U. S., 78.....	322
Northern Pacific R. R. Co. v. Crosswhite; 20 L. D., 526.....	438	Robertson v. Ball <i>et al.</i> ; 10 L. D., 41.....	264
Northern Pacific R. R. Co. v. Halvorson; 10 L. D., 15.....	471		
Northern Pacific R. R. Co. v. Harris; 12 L. D., 351.....	542	Salt Bluff Placer; 7 L. D., 549.....	229
Northern Pacific R. R. Co. v. Miller; 7 L. D., 100.....	434, 501	Saunders v. Baldwin; 9 L. D., 391.....	526
Northern Pacific R. R. Co. v. North; 22 L. D., 93.....	511	Sawyer v. Northern Pacific R. R. Co.; 12 L. D., 450.....	490
Northern Pacific R. R. Co. v. Stovenour; 10 L. D., 645.....	18	Schuyllkill Navigation Co. v. Moore; 2 Wh., 477.....	226
		Scott v. King; 9 L. D., 299.....	560
		Sears v. Almy; 6 L. D., 1.....	547
		Sethman v. Clise; 17 L. D., 307.....	109, 183
		Shafer v. Butler; 22 L. D., 386.....	27
		Shea v. Williams; 23 L. D., 119.....	379
		Sheldon v. Warren; 9 L. D., 668.....	107
		Shepherd v. Bird <i>et al.</i> ; 17 L. D., 82.....	357

	Page.		Page.
Sherer, George H.; 15 L. D., 563.....	250	Tubus v. Wilhoit; 138 U. S., 134.....	231
Shinn v. Shinn; 42 Kansas, 7.....	298	Tucker et al. v. Florida R. R. and Navigation Co.; 19 L. D., 414.....	227
Shire et al. v. Chicago, St. Paul, Minneapolis and Omaha R. R. Co.; 10 L. D., 85.....	162	Union Colony v. Fulmele et al.; 16 L. D., 272.....	512
Shortt v. Kirkpatrick; 101 Penn. St., 36 ..	226	Union Logging Co. v. Noble; 147 U. S., 165.....	433
Shugren v. Dillman; 19 L. D., 453.....	3	Union Pacific R. R. Co. et al. v. McKinley; 14 L. D., 237.....	221
Simms et al. v. Busso; 14 L. D., 429.....	55	Union Pacific Ry. Co. et al. v. McKinley; 14 L. D., 237.....	511
Simmons v. Wagner; 101 U. S., 260.....	194	United States v. Bank of Metropolis; 15 Pet., 377.....	433
Simonian, Armenag; 13 L. D., 696	379	United States v. Copeland et al.; 5 L. D., 170.....	177
Simser v. Southern Minnesota Ry. Co.; 12 L. D., 386	471	United States v. Cooper et al.; 20 L. D., 403.....	333
Sisemore, William R.; 18 L. D., 44.....	145	United States v. Des Moines Navigation and R. R. Co.; 142 U. S., 510.....	162
Sioux City and Pacific R. R. Co. v. Wrich; 22 L. D., 515	435	United States v. Freeman; 3 Howard, 556.....	322
Skinvilk v. Longstreet et al.; 22 L. D., 32.....	511	United States v. Healy; 160 U. S., 136, 157, 451, 575.....	144
Smith v. Fitts; 13 L. D., 670	264	United States v. Johnson; 15 L. D., 442.....	144
Smelting Co. v. Kemp; 104 U. S., 636.....	223	United States v. McLaughlin; 127 U. S., 428.....	469
Smith v. Malone; 18 L. D., 482.....	346	United States v. Northern Pacific R. R. Co.; 152 U. S., 294.....	73, 266, 447
Smith v. Townsend; 148 U. S., 490	386, 516, 527	United States v. Newman et al.; 15 L. D., 224.....	177
South Oklahoma v. Couch et al.; 16 L. D., 132	286	United States v. Schurz; 102 U. S., 278, 401.....	465
South Star Lode; 20 L. D., 204.....	99	United States v. Wright; 1 McL. C. C., 509.....	481
Southern Pacific R. R. Co. v. Araiza; 57 Fed. Rep., 98.....	501	Utley v. Fee; 33 Kansas, 681.....	255
Southern Pacific R. R. Co. v. Brady; 5 L. D., 407 and 658.....	501	Veatch v. Park; 16 L. D., 490.....	172
Southern Pacific R. R. Co. v. Orton; 6 Sawyer, 157.....	501	Walker, John L.; 10 L. D., 354.....	154, 464
Southwestern Mining Co.; 14 L. D., 596 ..	229	Walker, Hattie E., 15 L. D., 377.....	53
Sparks, Alpha L.; 20 L. D., 75.....	250, 557	Wallace v. Woodruff; 19 L. D., 309.....	58, 287
Spaulding v. Northern Pacific R. R. Co.; 21 L. D., 57.....	71	Wardell, Edwin M.; 15 L. D., 375.....	379
Spencer v. McDougal; 159 U. S., 62.....	501	Waterloo Mining Co. v. Doe; 56 Fed. Rep., 685.....	223
Spitz v. Rodey; 17 L. D., 503.....	524	Webb v. Loughrey et al., on review; 10 L. D., 302.....	560
State of California; 14 L. D., 253.....	179	Webster v. Luther; 163 U. S., 331.....	152, 456, 464
Stayton v. Carroll; 7 L. D., 198.....	560	Weed v. Sampsel; 19 L. D., 461.....	241
Stebbins v. Croke; 14 L. D., 498	220	Weeks v. Bridgman; 159 U. S., 541.....	434
Stephen et al. v. Morris; 21 L. D., 557.....	183	Westenhaver v. Dodds; 13 L. D., 196.....	559
St. Louis, Iron Mountain and Southern R. R. Co.; 13 L. D., 559.....	86	Wheeler et al. v. Smith; 5 Wash., 704.....	396
St. Paul, Minneapolis and Manitoba Ry. Co. v. Bergerud; 23 L. D., 408.....	541	White Extension West Lode; 22 L. D., 677.....	269
St. Paul, Minneapolis and Manitoba R. R. Co. v. Phelps; 137 U. S., 528.....	586	Whitney v. Taylor; 158 U. S., 85.....	16, 453, 541
St. Paul and Pacific R. R. Co. v. Northern Pacific R. R. Co.; 139 U. S., 1.....	409, 455, 540	Willamette Valley and C. M. Wagon Road Co. v. Hagan; 20 L. D., 259.....	501
St. Paul and Pacific R. R. Co. v. Larson; 3 L. D., 305.....	19, 220	Wilson, Madella O.; 17 L. D., 153.....	537
St. Paul and Sioux City R. R. Co.; 6 L. D., 47.....	407	Winona and St. Peter R. R. Co.; 9 L. D., 649.....	86
Stone v. United States; 2 Wall., 525.....	433	Wisconsin v. Wolf; 8 L. D., 555.....	150
Strutz v. Crabb; 19 L. D., 123.....	11	Wisconsin Central R. R. Co. v. Forsythe; 159 U. S., 46.....	59, 550
Sullivan v. Iron Silver Mining Co.; 143 U. S., 431.....	99	Wiseman; 21 L. D., 12.....	34
Sumner v. Roberts; 23 L. D., 201	401	Witter v. Ostroski; 11 L. D., 260.....	565
Sutton et al. v. Abrams; 7 L. D., 136.....	487	Wood v. Beach; 156 U. S., 548.....	501
Sutton v. State of Minnesota; 7 L. D., 562.....	426	Woodward, Ozra M.; 2 L. D., 688.....	557
Swanson v. Galbraith; 21 L. D., 109.....	494	Wolcott v. Des Moines Co.; 72 U. S., 681.....	162
Swineford et al. v. Piper; 19 L. D., 9.....	512, 221	Woolsey v. Chapman; 101 U. S., 755.....	162
Tauer v. Heirs of Walter A. Mann; 4 L. D., 433.....	53	Wright v. Roseberry; 121 U. S., 488.....	233
Taylor v. Jordon; 18 L. D., 471.....	55	Yellow Dog Improvement Co.; 18 L. D., 77.....	497
Telford v. Keystone Lumber Co.; 19 L. D., 141.....	311		
Tilton, Daniel G.; 8 L. D., 368.....	575		

TABLE OF OVERRULED AND MODIFIED CASES.

[From Vol. 1 to 23, inclusive.]

- Aldrich v. Anderson (2 L. D., 71); overruled, 15 L. D., 201.
- Anderson v. Tannehill *et al.* (10 L. D., 388); overruled, 13 L. D., 586.
- Bailey, John W., *et al.* (3 L. D., 386); modified, 5 L. D., 513.
- Baker v. Hurst (7 L. D., 457); overruled, 8 L. D., 110.
- Barlow, S. L. M. (5 L. D., 695); modified, 6 L. D., 648.
- Bartch v. Kennedy (3 L. D., 437); modified, 6 L. D., 217.
- Bivins v. Shelley (2 L. D., 282); modified, 4 L. D., 583.
- Blenkner v. Sloggy (2 L. D., 287); modified, 6 L. D., 217.
- Bosch, Gottlieb (8 L. D., 45); overruled, 13 L. D., 42.
- Box v. Ulstein (3 L. D., 143); modified, 6 L. D., 217.
- Brady v. Southern Pacific R. R. Co. (5 L. D., 407 and 658); overruled, 20 L. D., 259.
- Bradstreet *et al.* v. Rehm (21 L. D., 30); reversed on review, *id.*, 544.
- Bundy v. Livingston (1 L. D., 152); overruled, 6 L. D., 284.
- Burkholder v. Skagen (4 L. D., 166); overruled, 9 L. D., 153.
- Buttery v. Sprout (2 L. D., 293); overruled, 5 L. D., 591.
- Cagle v. Mendenhall (20 L. D., 447); overruled, 23 L. D., 533.
- California, State of (15 L. D., 10); overruled, 23 L. D., 423.
- California, State of (14 L. D., 253); vacated on review, 23 L. D., 230.
- Call v. Swain (3 L. D., 46); overruled, 18 L. D., 373.
- Castello v. Bonnie (20 L. D., 311); overruled, 22 L. D., 174.
- Central Pacific R. R. Co. v. Orr (2 L. D., 525); overruled, 11 L. D., 445.
- Christofferson, Peter (3 L. D., 329); modified, 6 L. D., 284, 624.
- Colorado, State of (7 L. D., 490); overruled, 9 L. D., 408.
- Cornell v. Chilton (1 L. D., 153); overruled, 6 L. D., 483.
- Crowston v. Seal (5 L. D., 213); overruled, 18 L. D., 586.
- Dakota Central R. R. Co. v. Downey (8 L. D., 115); modified, 20 L. D., 131.
- Devoe, Lizzie A. (5 L. D., 4); modified, 5 L. D., 429.
- Dudymott v. Kansas Pacific R. R. Co. (5 C. L. O., 69); overruled, 1 L. D., 345.
- * Elliott v. Ryan (7 L. D., 322); overruled, 8 L. D., 110.
- Emblem v. Weed (15 L. D., 28); overruled, 17 L. D., 220.
- Epley v. Trick (8 L. D., 110); overruled, 9 L. D., 359.
- Ewing v. Rickard (1 L. D., 146); overruled, 6 L. D., 483.
- Fish, Mary (10 L. D., 606); modified, 13 L. D., 511.
- Fitch v. Sioux City and Pacific R. R. Co. (216 L. and R., 184); overruled, 17 L. D., 43.
- Fleming v. Bowe (13 L. D., 78); overruled, 23 L. D., 175.
- Florida Rwy. and Navigation Co. v. Miller (3 L. D., 324); modified (6 L. D., 716); overruled, 9 L. D., 237.
- Florida, State of (17 L. D., 355); reversed on review, 19 L. D., 76.
- Forgeot, Margaret (7 L. D., 280); overruled, 10 L. D., 629.
- Freeman v. Texas Pacific R. R. Co. (2 L. D., 550); overruled, 7 L. D., 13.
- Gallihier, Maria (8 C. L. O., 57); overruled, 1 L. D., 57.
- Garrett, Joshua (2 C. L. O., 1005); overruled, 5 L. D., 158.
- Gates v. California and Oregon R. R. Co. (5 C. L. O., 150); overruled, 1 L. D., 336.
- Gohrman v. Ford (8 C. L. O., 6); overruled, 4 L. D., 580.
- Grinnell v. Southern Pacific R. R. Co. (22 L. D., 438); vacated on review, 23 L. D., 489.
- Gulf and Ship Island R. R. Co. (16 L. D., 236); modified on review, 19 L. D., 534.
- Hardin, James A. (10 L. D., 313); recalled and revoked, 14 L. D., 233.
- Harrison, Luther (4 L. D., 179); overruled, 17 L. D., 216.
- Heilman v. Syverson (15 L. D., 184); overruled, 23 L. D., 119.
- Hickey, M. A. and Edward (3 L. D., 83); modified, 5 L. D., 256.
- Holland, G. W. (6 L. D., 29); overruled, 6 L. D., 639, and 12 L. D., 436.
- Hooper, Henry (6 L. D., 624); modified, 9 L. D., 86, 284.
- Huls, Clara (9 L. D., 401); modified, 21 L. D., 377.
- Hyde *et al.* v. Warren *et al.* (14 L. D., 576); see 19 L. D., 64.
- Jones, James A. (3 L. D., 176); overruled, 8 L. D., 448.
- Jones v. Kennett (6 L. D., 688); overruled, 14 L. D., 429.
- Kackman, Peter (1 L. D., 86); overruled, 16 L. D., 464.
- Kemper v. St. Paul and Pacific R. R. Co. (2 C. L. L., 805); overruled, 18 L. D., 101.
- Kiser v. Keech (7 L. D., 25); overruled, 23 L. D., 119.
- Kniskern v. Hastings and Dakota Rwy. Co. (6 C. L. O., 50); overruled, 1 L. D., 362.
- Laselle v. Missouri, Kansas and Texas Rwy. Co. (3 C. L. O., 10); overruled, 14 L. D., 278.
- Laughlin v. Martin (18 L. D., 112); modified, 21 L. D., 40.
- Leonard, Sarah (1 L. D., 41); overruled, 16 L. D., 464.

* The cases marked with a star are now authority. See *Hessong v. Burgan*, 9 L. D., 153.

XVIII TABLE OF OVERRULED AND MODIFIED CASES.

Lindberg, Anna C. (3 L. D., 95); modified, 4 L. D., 299.
 Linderman v. Wait (6 L. D., 689); overruled, 13 L. D., 459.
 Lockwood, Francis A. (20 L. D., 361); modified, 21 L. D., 200.
 Louisiana, State of (8 L. D., 126); modified on review, 9 L. D., 157.
 Lynch, Patrick (7 L. D., 33); overruled, 13 L. D., 713.
 Maughan, George W. (1 L. D., 25); overruled, 7 L. D., 94.
 McKernan v. Bailey (16 L. D., 368); overruled, 17 L. D., 494.
 McNamara *et al.* v. State of California (17 L. D., 296); overruled, 22 L. D., 666.
 Mather *et al.* v. Hackley's Heirs (15 L. D., 487); vacated on review, 19 L. D., 48.
 Meyer, Peter (6 L. D., 639); modified, 12 L. D., 436.
 Morgan v. Craig (10 C. L. O., 234); overruled, 5 L. D., 303.
 Northern Pacific R. R. Co. (20 L. D., 191); modified, 22 L. D., 224.
 Northern Pacific R. R. Co. v. Bowman (7 L. D., 238); modified, 18 L. D., 224.
 Northern Pacific R. R. Co. v. Burns (6 L. D., 21); overruled, 20 L. D., 191.
 Northern Pacific R. R. Co. v. Miller (7 L. D., 100); overruled, 16 L. D., 229.
 Northern Pacific R. R. Co. v. Yantis (8 L. D., 58); overruled, 12 L. D., 127.
 Nyman v. St. Paul, Minneapolis and Manitoba Rwy. Co. (5 L. D., 396); overruled, 6 L. D., 750.
 Oregon Central Military Wagon Road Co. v. Hart (17 L. D., 430); overruled, 18 L. D., 543.
 Papina v. Alderson (1 B. L. P., 91); modified, 5 L. D., 256.
 Patterson, Charles E. (3 L. D., 260); modified, 6 L. D., 284, 624.
 Pecos Irrigation and Improvement Co. (15 L. D., 470); overruled, see 18 L. D., 168 and 268.
 Phelps, W. L. (8 C. L. O., 139); overruled, 2 L. D., 854.
 Phillips, Alonzo (2 L. D., 321); overruled, 15 L. D., 424.
 Pike's Peak Lode (14 L. D., 47); overruled, 20 L. D., 204.
 Popple, James (12 L. D., 433); overruled, 13 L. D., 588.
 Powell, D. C. (6 L. D., 302); modified, 15 L. D., 477.
 Rancho, Alisal (1 L. D., 173); overruled, 5 L. D., 320.
 Rankin, John M. (20 L. D., 272); reversed on review, 21 L. D., 404.
 * Reed v. Buffington (7 L. D., 154); overruled, 8 L. D., 110.
 Rico Townsite (1 L. D., 556); modified, 5 L. D., 256.
 Robinson, Stella G. (12 L. D., 443); overruled, 13 L. D., 1.
 Rogers, Horace B. (10 L. D., 29); overruled, 14 L. D., 321.
 Rogers v. Atlantic and Pacific R. R. Co. (6 L. D., 565); overruled, 8 L. D., 165.
 * Rogers v. Lukens (6 L. D., 111); overruled, 8 L. D., 110.

St. Paul, Minneapolis and Manitoba Rwy. Co. (8 L. D., 255); modified, 13 L. D., 354.
 Sayles, Henry P. (2 L. D., 88); modified, 6 L. D., 797.
 Serrano v. Southern Pacific R. R. Co. (6 C. L. O., 93); overruled, 1 L. D., 380.
 Shanley v. Moran (1 L. D., 162); overruled, 15 L. D., 424.
 Shineberger, Joseph (8 L. D., 231); overruled, 9 L. D., 202.
 Sipchen v. Ross (1 L. D., 634); modified, 4 L. D., 152.
 Southern Pacific R. R. Co. (15 L. D., 460); reversed on review, 18 L. D., 275.
 Spencer, James (6 L. D., 217); modified, 6 L. D., 772, and 8 L. D., 467.
 State of California v. Pierce (3 C. L. O., 118); modified, 2 L. D., 854.
 State of California v. Smith (5 L. D., 543); overruled, 18 L. D., 343.
 Stricker, Lizzie (15 L. D., 74); overruled, 18 L. D., 283.
 Sweeten v. Stevenson (3 L. D., 249); overruled, 3 L. D., 248.
 Taft v. Chapin (14 L. D., 593); overruled, 17 L. D., 414.
 Talkington's Heirs v. Hempfing (2 L. D., 46); overruled, 14 L. D., 200.
 Tate, Sarah J. (10 L. D., 469); overruled, 21 L. D., 211.
 Taylor v. Yates *et al.* (8 L. D., 279); reversed on review, 10 L. D., 242.
 Traugh v. Ernst (2 L. D., 212); overruled, 3 L. D., 218.
 Tripp v. Stewart (7 C. L. O., 39); modified, 6 L. D., 795.
 Tupper v. Schwarz (2 L. D., 623); overruled, 6 L. D., 623.
 Turner v. Lang (1 C. L. O., 51); modified, 5 L. D., 256.
 Turner v. Cartwright (17 L. D., 414); modified, 21 L. D., 40.
 United States v. Bush (13 L. D., 529); overruled, 18 L. D., 441.
 Vine, James (14 L. D., 527); modified, 14 L. D., 622.
 Walker v. Prosser (17 L. D., 85); reversed on review, 18 L. D., 425.
 Waterhouse, William W. (9 L. D., 131); overruled, 18 L. D., 586.
 Watson, Thomas E. (4 L. D., 169); modified, 6 L. D., 71.
 Weber, Peter (7 L. D., 476); overruled on review, 9 L. D., 150.
 Wickstrom v. Calkins (20 L. D., 459); modified, 21 L. D., 553.
 Wickstrom v. Calkins (20 L. D., 459); overruled, 22 L. D., 392.
 Wilkins, Benjamin C. (2 L. D., 120); modified, 6 L. D., 797.
 Willamette Valley and Cascade Mountain Wagon Road Co. v. Chapman (13 L. D., 61); overruled, 20 L. D., 259.
 Willingbeck, Christian P. (3 L. D., 383); modified, 5 L. D., 408.

* The cases marked with a star are now authority. See Hessong v. Borgan, 9 L. D., 153.

TABLE OF CIRCULARS AND INSTRUCTIONS.

	Page.		Page.
May 14, 1895.—Accounts; unearned fees.	572	November 27, 1896.—Right of way.....	458
August 29, 1896.—Instructions under the act of August 4, 1892.....	322	November 27, 1896.—State selections.....	459
October 16, 1896.—Survey; restoration of lost corners.....	361	December 23, 1896.—Right of way.....	519
		December 26, 1896.—Accounts; unearned fees.....	573

CIRCULARS AND INSTRUCTIONS CITED AND CONSTRUED.

	Page		Page.
May 17, 1877.—Soldiers' additional homestead; 2 C. L. L., 479.....	495	January 13, 1892.—Price of desert land; 14 L. D., 74.....	451
November 7, 1879.—Adjustment of railroad grants.....	18	March 21, 1892.—Right of way; 14 L. D., 338.....	459
January 30, 1883.—Mineral lands; 9 C. L. O., 210.....	357	October 12, 1892.—Building stone, act of August 4, 1892; 15 L. D., 360.....	324
February 13, 1883.—Soldiers' additional homestead; 1 L. D., 654.....	498	February 20, 1894.—Right of way; 18 L. D., 168.....	459
August 4, 1885.—Railroad-indemnity selections; 4 L. D., 90.....	490	June 30, 1894.—Survey manual, tide-water streams.....	394
June 27, 1887.—Desert-land entry; 5 L. D., 708.....	451	June 30, 1894.—Survey manual, mineral land.....	426
September 15, 1887.—Price of desert land; 6 L. D., 145.....	451	July 9, 1894.—State selections, mineral lands; 19 L. D., 21.....	459
February 13, 1889.—Railroad lands; 8 L. D., 348.....	313, 407	November 30, 1894.—Town-site entry; 19 L. D., 334.....	385
April 20, 1891.—Desert entry of unsurveyed land; 12 L. D., 376.....	411	October 30, 1895.—Extension of time for payment; gen. circular, page 25.....	305
April 22, 1891.—School lands; act of February 28, 1891.....	316, 426	October 30, 1895.—Repayment; gen. cir., page 97.....	415
December 10, 1891.—Mining circular, par. 29.....	506	August 29, 1896.—Building stone; 23 L. D., 322.....	330

ACTS OF CONGRESS CITED AND CONSTRUED.

	Page.		Page.
May 23, 1828 (4 Stat., 248), private land claim.....	137	August 18, 1856 (11 Stat., 87), aban'd mil. res.....	237
May 26, 1830 (4 Stat., 405), private land claim.....	137	March 3, 1857 (11 Stat., 195), Minn. R. R. grant.....	540
July 2, 1836 (6 Stat., 676), private land claim.....	130	March 3, 1857 (11 Stat., 251), swamp land.....	184
September 27, 1850 (9 Stat., 496), donation.....	166	March 12, 1860 (12 Stat., 3) swamp land.....	150, 178, 305, 461
September 27, 1850 (9 Stat., 496), sec. 4.....	392	April 11, 1860 (12 Stat., 836), Porterfield scrip.....	321
September 28, 1850 (9 Stat., 519), swamp land.....	305, 461	March 2, 1861 (12 Stat., 239), Territory of Dakota.....	348
February 14, 1853 (10 Stat., 158), donation.....	167	May 20, 1862 (12 Stat., 392), homestead.....	542
March 2, 1853 (10 Stat., 172), sec. 20, Wash. school lands.....	397	July 1, 1862 (12 Stat., 489), Union Pac.....	161
March 3, 1853 (10 Stat., 244), Cal. school lands.....	424	July 2, 1862 (12 Stat., 503), agricultural college grant.....	461
July 22, 1854 (10 Stat., 308), sec. 8, private claim.....	193	July 12, 1862 (12 Stat., 624), Minn. R. R. grant.....	540
August 3, 1854 (10 Stat., 346), certification of granted lands.....	343, 460	March 3, 1863 (12 Stat., 772), R. R. grant.....	343
September 30, 1854 (10 Stat., 1110), art. 2, Indian treaty.....	151	April 19, 1864 (13 Stat., 47), State of Nebraska.....	348
March 2, 1855 (10 Stat., 634), swamp land.....	184	May 5, 1864 (13 Stat., 64), L. S. and M. R. R. grant.....	206, 429
May 15, 1856 (11 Stat., 9), Iowa R. R. grant.....	79	May 5, 1864 (13 Stat., 66), Wis. R. R. grant.....	58, 217, 413
June 3, 1856 (11 Stat., 17), Mobile and Girard grant.....	288	June 2, 1864 (13 Stat., 95), Iowa R. R. grant.....	79
June 3, 1856 (11 Stat., 20), Wis. R. R. grant.....	58, 217, 413	June 25, 1864 (13 Stat., 184), donation.....	167

	Page.		Page.
July 2, 1864 (13 Stat., 356), Union Pac....	161	May 17, 1884 (23 Stat., 24), Alaska.....	419
March 3, 1865 (13 Stat., 526), Minn. R. R. grant.....	540	sec. 8, Alaska..	8, 196
May 1, 1866 (14 Stat., 355), Nor. Pac.....	206	July 5, 1884 (23 Stat., 103), aban'd mil. res.	14, 237, 569
June 21, 1866 (14 Stat., 67), homestead....	458	sec. 5, aban'd mil. res.....	516
July 23, 1866 (14 Stat., 218), swamp land...	231	March 3, 1885 (23 Stat., 371), Indian lands.	145
July 23, 1866 (14 Stat., 218) sec. 6, Cal. school lands.....	424	August 2, 1886 (24 Stat., 214), Indian lands.....	145
July 25, 1866 (14 Stat., 239), Oregon and Cal. R. R. grant.....	73, 392, 571	March 3, 1887 (24 Stat., 556), railroad lands.	579
July 27, 1866 (14 Stat., 292), Atlantic and Southern Pac.....	468, 500	sec. 2.....	407
February 25, 1867 (14 Stat., 409), wagon road grant.....	339	sec. 3.....	327
April 10, 1869 (16 Stat., 57) Northern Pac. grant.....	71	sec. 4.....	108, 288, 310
May 6, 1870 (16 Stat., 121) common R. R. terminal.....	326	sec. 5.....	180, 216, 301, 387, 508, 543
May 31, 1870 (16 Stat., 378) Northern Pac. grant.....	70, 265, 445,	May 14, 1888 (25 Stat., 622), Ark. private entry.....	582
April 28, 1870 (16 Stat., 98), Nebraska boundary.....	348	October 2, 1888 (25 Stat., 526), arid lands..	276, 483
March 3, 1871 (16 Stat., 579), Southern Pac.	468	February 22, 1889 (25 Stat., 676), sec. 10 and 18, school land.....	315, 397, 426
March 3, 1871 (16 Stat., 588), St. P., M. and M. grant.....	408, 540	March 1, 1889 (25 Stat., 757), sec. 2, Okl. lands.....	386
June 5, 1872 (17 Stat., 226), Bitter Root lands.....	358	March 2, 1889 (25 Stat., 854), sec. 2, second entry.....	65
June 8, 1872 (17 Stat., 333), additional homestead.....	154	sec. 3, leave of absence.....	404
June 8, 1872 (17 Stat., 340), Indian lands ..	151	March 2, 1889 (25 Stat., 980), sec. 13, Okl. lands.....	385, 527
June 22, 1874 (18 Stat., 194), R. R. indem- nity.....	387, 565	March 2, 1889 (25 Stat., 1008) R. R. for- feiture.....	312
March 3, 1875 (18 Stat., 99) Lassen county desert lands.....	61	May 2, 1890 (26 Stat., 81), sec. 20, Okl. homestead.....	251, 547
March 3, 1875 (18 Stat., 482) right of way..	67, 458, 519	May 14, 1890 (26 Stat., 109), sec. 4, Okl. town lot.....	196
April 21, 1876 (19 Stat., 35), sec. 1, R. R. withdrawals.....	6, 115, 339, 435, 436	June 20, 1890 (26 Stat., 169), reservoir lands	485
August 15, 1876 (19 Stat., 208), Otoe and Missouria lands.....	144	July 3, 1890 (26 Stat., 215), sec. 11, State of Idaho.....	147
March 3, 1877 (19 Stat., 377), desert entry ..	61, 293, 450, 574	August 30, 1890 (26 Stat., 371), arid lands.	276
June 3, 1878 (20 Stat., 89), timber and stone	322, 330, 413, 517	September 29, 1890 (26 Stat., 496), forfeiture R. R. grants.....	70, 317, 346, 413, 423
June 14, 1878 (20 Stat., 89), sec. 2, timber culture.....	298	September 29, 1890 (26 Stat., 496), sec. 3....	26, 415
March 3, 1879 (20 Stat., 471), Otoe and Mis- souria lands.....	144	September 29, 1890 (26 Stat., 496), sec. 7, in- demnity.....	565
March 3, 1879 (20 Stat., 472), additional homestead.....	383	September 29, 1890 (26 Stat., 496), sec. 8, Mo- bile and Girard lands.....	288
May 14, 1880 (21 Stat., 140), sec. 2, contest- ant.....	183, 264, 524	September 30, 1890 (26 Stat., 684), exten- sion of time for payment.....	304, 467
sec. 3, home- stead settle- ment.....	188	February 28, 1891 (26 Stat., 796), school land.....	315, 423
June 16, 1880 (21 Stat., 287), sec. 2, repay- ment.....	63, 138, 250, 282, 414, 555	March 3, 1891 (26 Stat., 854), sec. 14, pri- vate claim.....	193
May 28, 1880 (21 Stat., 143), Osage land....	144	March 3, 1891 (26 Stat., 1095):	
January 13, 1881 (21 Stat., 315), railroad lands.....	468	sec. 1, timber culture.....	9, 264
March 3, 1881 (21 Stat., 380), Otoe and Mis- souria lands.....	144	sec. 2, desert entry.....	293, 450, 574
March 3, 1881 (21 Stat., 505), mining claim.	257	sec. 4, preemption.....	192, 462
March 3, 1883 (22 Stat., 487), Alabama lands.....	251	sec. 5, homestead.....	462, 547
		sec. 6, homestead.....	305
		sec. 7, confirmation ..	144, 162, 175, 331, 456, 481
		secs. 11 and 16, Alaska.....	417
		secs. 12, 13, and 14, Alaska.....	7, 245, 280, 283, 335, 337, 442
		sec. 17, reservoir sites.....	484
		secs. 18-21, right of way.....	275, 458, 519
		June 25, 1892 (27 Stat., 59), forfeited rail- road lands.....	416

	Page.		Page.
August 4, 1892 (27 Stat., 348), building stone.....	322, 329, 413, 516	July 26, 1894 (28 Stat., 123), time for proof and payment extended.....	248, 293, 304, 467
August 5, 1892 (27 Stat., 390), railroad lands.....	586	August 4, 1894 (28 Stat., 226), extension of time on desert entries.....	293
January 31, 1893 (27 Stat., 427), forfeited railroad lands.....	416	August 18, 1894 (28 Stat., 397), sold. additional homestead.....	123, 502
February 15, 1893 (27 Stat., 456), repayment.....	282	August 23, 1894 (28 Stat., 491), abandoned military reservation.....	14, 237, 567
March 3, 1893 (27 Stat., 568), Otoe and Missouri land.....	144	December 29, 1894 (28 Stat., 509), second homestead entry.....	404
March 3, 1893 (27 Stat., 572), Stateselection.....	147	January 21, 1895 (28 Stat., 635), right of way.....	519
March 3, 1893 (27 Stat., 593), solds. additional certificate.....	495	February 15, 1895 (28 Stat., 664), abandoned military reservation.....	237
March 3, 1893 (27 Stat., 640), Cherokee outlet.....	386, 535	January 23, 1896 (29 Stat., 4), R. R. lands.....	26
December 12, 1893 (28 Stat., 15), forfeited railroad lands.....	416	March 2, 1896 (29 Stat., 42), railroad lands.....	445, 569
July 6, 1894 (28 Stat., 122), donation claims.....	569	April 7, 1896 (29 Stat., 90), Ark. private cash entry.....	582
July 16, 1894 (28 Stat., 109), Utah school lands.....	569	May 14, 1896 (29 Stat., 120), right of way.....	519
July 26, 1894 (28 Stat., 122), donation.....	166	May 21, 1896 (29 Stat., 127), right of way for pipe line.....	521

REVISED STATUTES CITED AND CONSTRUED.

	Page.		Page.
Section 2258.....	465	Section 2326.....	23, 70, 113, 258, 395
Section 2274.....	190	Section 2333.....	99, 477
Section 2275.....	315, 423	Section 2347.....	112, 119, 128
Section 2276.....	315, 423	Section 2348.....	110, 127
Section 2288.....	189	Section 2351.....	111
Section 2289.....	462, 547	Section 2357.....	451, 574
Section 2290.....	462	Section 2362.....	138
Section 2291.....	155, 159, 304, 458, 568	Section 2389.....	76, 562
Section 2294.....	140	Section 2372.....	389
Section 2301.....	305	Section 2387.....	76, 419, 562
Section 2306.....	123, 152, 465, 498	Section 2388.....	76, 562
Section 2318.....	323, 399, 477	Section 2448.....	136, 457
Section 2319.....	330, 399, 477	Section 2449.....	461
Section 2320.....	227, 357, 399, 476	Section 2455.....	590
Section 2322.....	357	Section 2488.....	230
Section 2323.....	223	Section 2490.....	308
Section 2324.....	223, 269	Section 2631.....	480
Section 2325.....	70, 173, 398		

RULES OF PRACTICE CITED AND CONSTRUED.

	Page.		Page.
Rule 1.....	314	Rule 70.....	412
Rule 2.....	314	Rule 78.....	401
Rule 3.....	314	Rule 82.....	412
Rule 7.....	142	Rule 86.....	413
Rule 35.....	140	Rule 95.....	530
Rule 48.....	562	Rule 114.....	244, 406
Rule 53.....	414, 444		

DECISIONS

RELATING TO

THE PUBLIC LANDS.

RAILROAD GRANT—LANDS EXCEPTED—TIMBER CULTURE CLAIM.

NORTHERN PACIFIC R. R. CO. *v.* LAMB.

Rights under the timber culture law are initiated by application to enter, and prior improvement of the land covered thereby will not operate to exclude the same from indemnity selection.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
July 1, 1896. (A. E.)

This is an appeal from your office decision of May 18, 1895, rejecting the application of Maggie A. Lamb, widow of John K. Lamb, to make timber culture entry of the SE. $\frac{1}{4}$ Sec. 21, T. 11 N., R. 39 E., Walla Walla, Washington.

This action by your office was taken because the Northern Pacific Railroad Company had made selection of the land on January 5, 1884, as indemnity for lost lands within the granted limits.

At a hearing ordered to determine the status of the land at the date of the selection, it was shown by the applicant that the deceased, John K. Lamb, began to improve and cultivate the land in the year 1880, and continued to cultivate and improve the same until his death in November, 1888.

On December 29, 1888, Maggie A. Lamb, his widow, presented an application to make timber culture entry of the land, alleging the above facts of improvement.

After due notice a hearing was had, and the local office recommended that the railroad selection be canceled, and the applicant be permitted to make entry.

In the decision appealed from, your office held that the claims asserted for this land at the date of selection were not such as would defeat the right of the railroad company under its indemnity selection.

For this reason the application of Maggie A. Lamb was held for rejection.

While the testimony introduced by Mrs. Lamb shows that the improvement and cultivation of the land were continuous from 1880

until 1888, it does not show that deceased claimant ever lived upon the land or was qualified to enter the same under the settlement laws.

As rights under the timber culture law are not initiated until application to make entry, improvement prior to that time would not confer a right sufficient to defeat selection by the railroad company.

Your office decision is therefore affirmed.

HALL v. LAKE.

Motion for review of departmental decision of March 11, 1896, 22 L. D., 296, denied by Acting Secretary Reynolds, July 1, 1896.

CONTEST—SOLDIERS' HOMESTEAD—AMENDMENT.

DRAKE ET AL. v. WILT.

A contest against a soldier's homestead declaratory statement is invalid, and a subsequent amendment thereof does not confer any priority as against an intervening contest begun after the homesteader has made entry under his declaratory statement.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(W. A. L.) July 1, 1896. (P. J. R.)

On May 2, 1894, Isaac Wilt filed his soldier's declaratory statement for the NW. $\frac{1}{4}$ of Sec. 12, T. 26 N., R. 14 W., Alva land district, Oklahoma.

On May 3, 1894, J. H. Drake filed an affidavit of contest against said declaratory statement, alleging that Wilt was then the owner of one hundred and sixty acres of land in the State of Nebraska.

On May 11, 1894, Wilt filed a motion to dismiss said contest.

On October 1, 1894, the day set for the hearing of Wilt's motion, Drake filed an affidavit to amend his affidavit of contest and asked fifteen days in which to prepare and file an amendment, which is as follows:

That the contestant is informed by the register of deeds in Douglas county, Nebraska, that Isaac Wilt was the owner of the SE. $\frac{1}{4}$ of section 3, Tp. 16, R. 11, in that county, and that on May 5, 1894, three days after the filing of his declaratory statement herein, the contestee caused two deeds to be recorded in the office of said register of deeds, one by himself and wife to H. Misfelt, and the other from Misfelt to his wife, conveying said land to his wife, and wants time in which to obtain the date of the acknowledgment of the deeds, the name of the officer before whom they were acknowledged, and a copy of the deeds.

On October 1, 1894, the motion of Wilt to dismiss was overruled.

On October 2, 1894, Wilt made homestead entry No. 6073 of the land in dispute, based on his soldier's declaratory statement.

On October 3, 1894, the application of Drake to amend was allowed.

On October 9, 1894, George S. Hamilton filed affidavit of contest

against Wilt's homestead entry, alleging the disqualification of Wilt; and on the next day Hamilton filed an application to intervene in the contest of Drake for the purpose of showing the insufficiency of the same, and asking that the application of Drake to amend be refused.

On October 17, 1894, Drake filed his amended affidavit of contest.

On October 20, Hamilton filed a motion to dismiss Drake's contest.

November 26, 1894, was set for hearing argument upon Hamilton's motion to dismiss Drake's contest.

On December 14, 1894, the local officers overruled Hamilton's motion to dismiss, and held that he was a stranger to the record and could not be heard.

From this decision Hamilton appealed, and on March 14, 1895, your office held that the order of the local officers was purely interlocutory in its nature, and from it no appeal would lie either by Hamilton or Wilt, and that Hamilton cannot be heard to move the dismissal of Drake's contest.

On May 9, 1895, Hamilton appealed; and on June 27, 1895, your office denied his right to appeal from the decision of March 14, 1895.

On April 15, 1895, Drake filed a supplemental affidavit of contest, alleging that Wilt had wholly abandoned the land covered by his entry, and that said abandonment had existed for more than six months since filing his soldier's declaratory statement; and that he has changed his residence therefrom and has failed to cultivate and improve the land, and that this cause of action had not accrued at the date he filed the contest against said tract, on the 3rd day of May, 1894.

On May 23, 1895, Hamilton filed a motion asking that he be substituted as the first contestant in the cause. June 10, 1895, was set for hearing of the supplemental affidavit of contest filed by Drake, but no hearing was had on that date because of Hamilton's motion filed on May 23, 1895.

On July 8, 1895, counsel for George S. Hamilton filed a petition for a writ of certiorari, requiring your office to forward his appeal and the record to the Department, in the case of *J. H. Drake v. Isaac Wilt*. Said petition shows substantially the foregoing history of the case at bar.

On September 28, 1895, the case was carefully considered by the Department, when it was held that

The contest of Drake against the soldier's declaratory statement of Wilt was clearly void (*Lachapelle v. Herbert*, 18 L. D., 494), and raises the question whether Drake was entitled to amend his void contest, subsequently to the intervention of the contest of Hamilton initiated against Wilt's homestead entry.

It was also held that the decision of the local officers was not—purely interlocutory, but on the contrary, that it was the determination of a substantial right, to-wit: Hamilton's claim to the prior right to contest Wilt's entry, and is appealable. *Shugren v. Dillman* (19 L. D., 453); *Rathburn v. Warren* (10 L. D., 111).

Your office was thereupon directed to certify to the Department the

record in the case and suspend all further action until the matter is passed upon as presented by the record.

The following is a copy of Hamilton's affidavit of contest, viz:

Personally appeared before me, the undersigned F. P. Alexander, register of the United States land office at Alva, O. T., George S. Hamilton, of Stafford county of Kansas, who upon his oath says: that to the best of his knowledge and belief Isaac Wilt who made homestead entry No. 6073 at the district land office at Alva, O. T., on the 2d day of October, 1894, based upon H. D. S. No. 466 made at the same land office on the 2d day of May, 1894, for the NW. $\frac{1}{4}$ section 12, township 26, north of range 14 west of Indian meridian, is and was at the time said H. D. S. No. 466 and said homestead entry No. 6073 were made, disqualified from making homestead entry and perfecting title thereunder, for the reason that the said Isaac Wilt is and was at the time of filing said H. D. S. No. 466 and making said H. E. No. 6073 the owner of 160 acres of land in fee simple in the county of Douglass and State of Nebraska, contrary to the provisions of section 20 of the act of Congress approved May 2nd, 1890.

And that he the said entryman has entirely abandoned the said land and has expressed himself to the effect that he had no intention or expectation of ever residing upon, cultivating or improving the said land.

And this the said contestant is ready to prove at such time and place as may be named by the register and receiver for a hearing in said case; and he therefore asks to be allowed to prove said allegations, and that homestead entry No. 6073 may be declared canceled and forfeited to the United States, he the said contestee, paying the expenses of such hearing.

GEORGE S. HAMILTON.

Subscribed in my presence and sworn to before me this 9th day of October, 1894.

F. P. ALEXANDER, *Register*.

Also appeared at the same time and place John B. Kelsey and Alice H. Kelsey who being first by me duly sworn on oath say that they are acquainted with the tract of land described in the within affidavit of George S. Hamilton, and know from the personal statements of the homestead entryman Isaac Wilt to them the said affiants that the statements made in the said affidavit are true.

JOHN B. KELSEY.

ALICE H. KELSEY.

Subscribed in my presence and sworn to before me this 9th day of October, 1894.

F. P. ALEXANDER, *Register*.

In his appeal he alleged the following specifications of error, viz:

First. That the appeal of Hamilton was interlocutory in its nature, the same having been an appeal from an order of the local land office refusing him the right to intervene, upon a properly verified showing of his interest in the subject-matter, declaring him a stranger to the record and denying him the right to be heard to a motion to dismiss the previous contest.

Second. That no appeal will lie from an order of the local office which places a contestant in the position of a second contestant, even though it be shown that the alleged first contest is on its face a nullity and void.

Third. That Hamilton could not be heard to move the dismissal of Drake's contest and that the decision of the local office to that effect was correct.

Fourth. In effect; that intervenor Hamilton did not show such an interest in the subject-matter as would entitle him to intervene and to be heard in support of his motion to dismiss Drake's contest.

Fifth. In effect; that the application of Drake to be allowed to amend to a certain specified extent, gave him the right to amend to a greater extent and to set up new matter, to the injury of a second contestant.

Sixth. In effect; that such amendment even if properly allowed cured the original defect or gave the Department jurisdiction over the subject-matter of the particular case.

Seventh. In effect; that the original contest of Drake could be amended after the filing of the contest of Hamilton and the intervention of his adverse right.

Eighth. In effect; that the amended affidavit of contest of Drake sets up good grounds of contest.

Ninth. In effect; that either the original affidavit of contest of Drake or the amendment thereof, is sufficiently corroborated to confer jurisdiction upon the Department in the absence of the issuance of notice.

Tenth. In effect; that jurisdiction of the Drake contest has ever vested in the Department, in the absence of the issuance of notice.

Eleventh. That the affidavit of contest of a second contestant must remain on file, unacted upon, until the final determination of the prior contest.

It is contended by appellant that the refusal to allow him to intervene, and to dismiss the previous contest of Drake was, as to him as intervenor, final, and his acquiescence, without appeal, in this order, would have concluded him.

In the case of *Jackson v. McKeever* (3 L. D., 516) it was held (syllabus): "An appeal will lie from an order refusing to grant a hearing if it amounts to a denial of right."

This rule was followed in the case of *Guyselman v. Schaffer et al.*, decided by Secretary Teller June 7, 1883 (Ib., 517).

The Department held in the case of *James H. Murray* (6 L. D., 124):

Though an appeal will not lie from a decision of the Commissioner ordering a hearing, the refusal to order a hearing is, when it amounts to the denial of a right, appealable.

At the time Drake initiated his contest Wilt had not made his homestead entry for the tract described in his soldier's declaratory statement; nor had he made his entry for said land on the date Drake asked for leave to amend his affidavit of contest.

It has been repeatedly held by the Department that there is nothing in a soldier's declaratory statement which is contestable. It is a mere notification that at a future time the person filing it intends to claim the land described. It does not segregate the land. Any qualified homesteader may make entry over it and force the soldier to a hearing.

Hamilton's was the first valid contest initiated after Wilt made his homestead entry; and the amended affidavit filed by Drake October 17, 1894, cannot be considered by any rule of the Department as being entitled to a priority of record over that filed October 9, 1894, and must be considered as a new contest and second to the contest of Hamilton.

After full consideration of the whole record in the case at bar, and the law governing the same, the Department finds that the contest initiated by Drake May 3, 1894, was void *ab initio*; and as Hamilton's contest was the first valid contest filed against Wilt's homestead entry No. 6073, the decision of your office is hereby reversed, and Hamilton may be permitted to prove the truth of the allegations made by him against said homestead entry.

HUFFMAN v. MILBURN ET AL.

Motion for review of departmental decision of March 24, 1896, 22 L. D., 346, denied by Acting Secretary Reynolds, July 1, 1896.

RAILROAD GRANT—WITHDRAWAL—SETTLEMENT RIGHT.

HOWARD v. NORTHERN PACIFIC R. R. CO.

The withdrawal on general route for the branch line of this road did not operate to reserve lands for the benefit of the main line.

A settlement right, acquired prior to the receipt of notice at the local office of the withdrawal on definite location, is within the protective provisions of section 1, act of April 21, 1876.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
July 1, 1896. (E. M. R.)

This case involves the SW. $\frac{1}{4}$ of Sec. 33, T. 28 N., R. 42 E., Spokane land district, Washington.

The record shows that on November 26, 1890, Rowland R. R. Hazard made homestead application to enter this tract, accompanied by affidavits showing settlement on the land March 6, 1884, which showing was borne out by evidence submitted at a hearing between the parties.

This tract is within the forty miles limit of the main line of the Northern Pacific railroad company, as definitely located August 30, 1881, and was withdrawn on map of general route August 15, 1873, for the branch line.

The local officers rejected this application to enter because settlement was made subsequently to the definite location of the road. Upon appeal your office decision of May 9, 1895, was rendered, and though it was then shown that the order of withdrawal on the definite location was not received at the local office until June 8, 1884, the decision of the local officers was affirmed, it being held that this tract of land had been in a state of reservation by reason of the withdrawal for the benefit of the branch line August 15, 1873, and on account of such reservation settlement could not inure to the detriment of the title of the railroad company.

Among the various questions suggested for determination by the facts as set out, the only one necessary to be decided in this case is the effect of the withdrawal on account of the branch line in 1873, upon the grant in behalf of the main line.

In the case of Northern Pacific railroad company v. Urquhart (8 L. D., 365), it was held, syllabus:—

A withdrawal on general route made for a branch line of this road, will not operate to reserve lands for the benefit of the main line.

The settlement and occupancy of a qualified pre-emptor, existing at the date of definite location, are sufficient to except the land covered thereby from the operation of the grant.

This case appears to be in all essential respects similar to the one at bar, and under the act of April 21, 1876 (19 Stat., 35), the settlement of the appellant being prior to the reception of notice at the local office of the withdrawal upon definite location, his right under said settlement is protected and he will be allowed to make entry.

Judgment reversed.

LESHER *v.* ST. PAUL CATHOLIC MISSION.

Motion for review of departmental decision of March 26, 1896, 22 L. D., 365, denied by Acting Secretary Reynolds, July 1, 1896.

ALASKA—ACT OF MARCH 3, 1891.

McCOLLUM FISHING AND TRADING CO.

The right of purchase conferred by the act of March 3, 1891, upon individuals or corporations engaged in trade or manufactures in Alaska, is limited to land actually occupied for such purposes, not to exceed in any case one hundred and sixty acres.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
July 1, 1896. (W. M. B.)

This is an appeal by the McCollum Fishing and Trading Company from your office decision of May 8, 1895, wherein was suspended survey No. 56, made by Clinton Gurnee, Jr., U. S. deputy surveyor, under provisions of sections 12 and 13, act of March 3, 1891 (26 Stat., 1095), of a tract of land containing 145.60 acres, used for trading purposes and situate on Pirate Cove and Unga Straits, Popoff Island, district of Alaska; said survey being suspended for the reason that more land is embraced therein and claimed by the company than is actually occupied or used by the claimants for their business.

In your said office decision you say:

It is suggested that if the survey was amended by beginning at the south end of course No. 3; thence along the line of ordinary high water mark to the south end of course No. 11; thence southwesterly to the point of beginning, final action by this office would be greatly facilitated. Such a survey would include about 20 acres, besides all the land occupied by the claimants for their business.

Claimants in appealing from your office decision file assignments or error as follows:

1. That the survey contains no more land than allowed by the statute of March 3, 1891.
2. That the field notes of the survey are made pursuant to the monuments and boundaries of the company's claim.
3. That the claimant is entitled to 160 acres; that in analogy with the federal and state laws said company should be allowed the lands in any form, so as within the quantity, and conforming to company limits and are adjoining; that such area is necessary to include the improvements of the company and allow shipping grounds and water privileges on the shores of the bay.

There are two courses marked upon the plat hereto appended as No. 3, and so designated in the field notes, but the one referred to as No. 3 in your office letter of May 8, 1895, must necessarily mean *meander* course No. 3, which being the case, an emendation of the survey in accordance with suggestion contained in your office letter, under the state of facts recited, would give appellants all the land to which, it would appear, they are entitled under the law.

There is no force in the contention that the survey and field notes thereof, are made pursuant to the "monuments and boundaries" of the company's claim, for the act of March 3, 1891, did not confer upon individuals or corporations engaged in trade or manufactures in the District of Alaska the absolute and unconditional right to purchase one hundred and sixty acres of land for such purposes, but only gave the right to purchase so much land as might be actually occupied for said purposes, "not to exceed," in any case, one hundred and sixty acres.

This survey does not only fail to comply with the statute with respect to marking off a tract of land, embracing such particular portion as is actually occupied by the claimants, "as near as practicable in a square form," but it is notable for the remarkable irregularity of the form of the tract claimed, which takes in not only the entire water front on Pirate's Cove, but covers also an extended line along the coast of Unga Straits, which would give to said claimants, in case the survey was approved in its present form, an undue control over and power to prevent vessels from landing and trading along the coast of that portion of Popoff Island.

The contention that the said company is entitled, from "analogy with the federal and state laws," to one hundred and sixty acres of land in any form, so it is adjoining, is without force, since it is provided in section 8 of the Act of May 17, 1884 (23 Stat., 26), that "nothing contained in this act shall be construed to put in force in said district (Alaska) the general land laws of the United States."

The sale and disposal of the public lands, other than mineral, in the District of Alaska, are regulated entirely by the statutes herein cited, and not, as is seen, by the general land laws affecting the public domain.

For the reasons herein given your office decision suspending survey No. 56 in its existing form is hereby affirmed.

WELCH v. BUTLER.

Motion for review of departmental decision of November 2, 1895, 21 L. D., 369, denied by Acting Secretary Reynolds, July 1, 1896.

BLACK QUEEN LODGE *v.* EXCELSIOR No. 1 LODGE.

Motion for review of departmental decision of March 24, 1896, 22 L. D., 343, denied by Acting Secretary Reynolds, July 1, 1896.

TIMBER CULTURE ENTRY—COMMUTATION.

JAMES H. LANGSFORD.

A timber culture entryman is not entitled to commute his entry under the act of March 3, 1891, if he is not a bona fide resident of the State in which the land is situated.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
July 1, 1896. (J. L.)

This case involves the NW. $\frac{1}{4}$ of section 18, T. 12 S., R. 17 W., Wakeeny land district, Kansas.

On March 26, 1888, James H. Langsford made timber culture entry No. 12,475 of said tract.

On October 29, 1894, he made final proof and payment for said tract and was awarded by the local officers final receipt and certificate No. 12,780, under the 5th proviso in section 1 of the act of March 3, 1891 (26 Statutes, 1095). His final proof failed to show that he was an actual *bona fide* resident of the State of Kansas, as required by said proviso. His own affidavit showed that he had been absent from Kansas for two years.

On April 30, 1895, your office suspended and held for cancellation Langsford's final certificate for an affidavit showing that he was a *bona fide* resident of Kansas at the time of commuting his said entry; and instructed the local officers to notify him that unless evidence of such residence be furnished within sixty days after notice, or an appeal be taken, "his final certificate which is hereby held for cancellation, will be canceled without further notice from this office."

Langsford was duly notified, and within sixty days filed his appeal to this Department.

Your office decision is clearly right, and it is hereby affirmed. (See Circular of October 30, 1895, pages 35 and 204.)

HALLING *v.* CENTRAL PACIFIC R. R. Co.

Motion for review of departmental decision of March 27, 1896, 22 L. D., 408, denied by Acting Secretary Reynolds, July 1, 1896.

OKLAHOMA LANDS—SETTLEMENT RIGHT.

PENWELL *v.* CHRISTIAN.

The conditions attendant upon the opening of Oklahoma to settlement require the recognition of extremely slight initial acts of settlement in determining priorities between adverse claimants, if such primary acts are followed by residence within such time as clearly shows good faith.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
July 1, 1896. (R. F. H.)

D. H. Penwell appeals from your office decision of July 6, 1895, dismissing his contest against homestead entry No. 117 of Rial Christian, made September 18, 1893, for lots 3 and 4 and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 31, T. 27 N., R. 1 E., Perry land district, Oklahoma Territory.

The facts are sufficiently stated in your said office decision.

The question presented is whether the prior act of settlement made by contestant, taken in connection with his subsequent acts, are such as to constitute his rights as a homestead claimant superior to those of the entryman. The evidence shows that the contestant was first upon the land, in the race on September 16, 1893, but that his primary acts of settlement were slight, and consisted in sticking a stake three or four feet long in the ground near the south line, with a red handkerchief attached to the stake, and on the next day he dug a hole near his stake about two feet deep and three or four feet across. Prior to his digging this hole the entryman had dug a small hole near the northwest corner of the tract, about a spade deep and two feet across, making a mound of the dirt, so that the only act of the contestant done prior to the entryman consisted in setting said stake with his handkerchief attached, and the question is whether this act is such an assertion of title as will defeat the entry of Christian. Ordinarily it would not be deemed sufficient, in the absence of actual notice to the entryman, but in cases of this nature, where the good faith of both parties is established and neither party is guilty of laches, I am of the opinion that the only sound rule that can be adopted is to award the land to the person who was first upon the land and performed any act that evinces an intention to assert title.

In the race for lands in Oklahoma Territory, the sticking of a stake with a flag or card attached was the recognized method of asserting possession, and too many cases have been adjudicated in accordance with the rule above stated to justify a departure therefrom.

In the acquisition of homesteads in Oklahoma under the proclamation of the President and under the rules and regulations which anticipated the rush or race that would inevitably occur in the efforts of claimants to secure their homesteads, and which rules and regulations sought to secure to all equal opportunity and fairness in competing for prior possession or settlement, and where the rights of contestants for

a certain tract are in other respects equal, the maxim of *qui prior est tempore, potior est jure* applies, and he who was first in point of time in reaching the tract, and performed some act which signified an intention to claim it as his own, and followed such primary act by residence within such reasonable time as clearly shows his good faith, should be held to have the better title. No safer rule can in my opinion be applied in such a case than that he has the better title who was first in point of time. This rule was recognized in the case of *Hurt v. Giffin* (17 L. D., 162), wherein it was held that priority of right might properly be accorded to one who first reaches the tract and puts up a stake with the announcement of his claim thereon, and such initial act of settlement is duly followed by residence in good faith.

That case also recognized the peculiar and special conditions under which the homestead claims were initiated in Oklahoma, and as the government created the condition, justice and a due administration of the law requires the recognition of the conditions in the adjudication of cases arising out of them.

As was said in *Hurt v. Giffin* (17 L. D., 166-7)—

It is a notorious fact, that in the great race for homes in the Territory, he who first reached a tract and staked it, was regarded as the prior settler, and as eager as men were to secure homes, this kind of settlement was generally respected by the honest people who rushed into the Territory, for as a matter of fact, to stake a claim, or dig a hole, or put up a wagon sheet or tent, was about all that the great majority of the settlers could accomplish in the afternoon of the 22d of April, 1889, circumstanced as they were, and very many settlements have been held valid in Oklahoma, that were no better indicated, fixed and determined than was the settlement of *Hurt*. This settlement has been diligently followed up, until it has ripened into a good home, good faith being manifest at all times.

Had it not been for *Giffin's* interference, he would have had his filing on the land, and every act would have related back to the moment he went upon the land and staked it, intending to make it his home.

In the case of *Strutz v. Crabb* (19 L. D., 122), citing the case of *Hurt v. Giffin* (17 L. D., 162), it was held that digging a small hole was not an act to constitute sufficient notice to the public of an intention to claim the land. None of the cases cited in support of the proposition announced in *Strutz v. Crabb* were Oklahoma cases, nor growing out of conditions similar to those existing under the opening of the Oklahoma lands, nor was the case of *Strutz v. Crabb* an Oklahoma case, but involved a homestead entry in South Dakota, and to apply the holding in that case to cases involving the question of priority of settlement in Oklahoma in homestead cases would defeat the rules and regulations as well as the spirit of the law, which was designed to award the land to the first qualified settler who settled upon the land and complied with the law.

I am of the opinion that the case of *Strutz v. Crabb* is not authority in determining the question as to what constitutes an act of settlement in homestead entries in Oklahoma under the law and the President's

proclamation opening the lands in that Territory to settlement and entry.

I am further of the opinion that the act of Penwell on September 16th, followed as it was by residence on the 5th and 6th of October, 1893, and continuous residence and cultivation, should be held to entitle him to rights superior to those of Christian, and your said office decision is accordingly reversed.

OWENS *v.* STATE OF CALIFORNIA.

Motion for review of departmental decision of March 26, 1896, 22 L. D., 369, denied by Acting Secretary Reynolds, July 1, 1896.

BOSWELL ET AL. *v.* WATKINS.

Motion for review of departmental decision of March 11, 1896, 22 L. D., 297, denied by Acting Secretary Reynolds, July 1, 1896.

PRACTICE—INTERVENER—RIGHT OF APPEAL.

BARBOUR *v.* WILSON ET AL.

The right to intervene, and be heard on appeal, may be properly accorded a protestant who shows an interest in the subject matter of a contest.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
July 1, 1896. (A. B. P.)

This is an application by George H. Barbour asking that the record and proceedings in the case of Arthur P. Heywood *v.* William Wilson and the Castle Land Company, involving the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ (lots 5 and 6), Sec. 24, T. 8 N., R. 8 E., Helena, Montana, be certified to this Department for consideration and action.

It appears that the case referred to is the sequel of the case of McGregor *et al.* *v.* Quinn, decided by this Department April 5, 1894 (18 L. D., 368), wherein Sioux half-breed scrip location made by one William T. Quinn, covering the land in question was canceled—motion for review having been denied October 10, 1894 (19 L. D., 295).

It further appears that prior to the date of said decision of April 5, 1894, the Castle Land Company became the transferee of the land in question by deed of conveyance executed by one Messena Bullard, its attorney, to whom the land had been conveyed by Quinn the day after his said scrip location was made.

In support of the present application it is alleged, in substance, that the said Castle Land Company had, prior to the said decision in McGregor *et al.* *v.* Quinn, sold and conveyed to applicant and various and

sundry other parties by deeds of general warranty a large number of town lots from said land, the title whereto necessarily failed upon the cancellation of said scrip location made by said Quinn, and that thereupon a number of suits had been brought in the courts against the said company by its said lot grantees, seeking to recover the purchase money paid by them; that immediately after the said adverse decision upon the company's said motion for review in *McGregor et al. v. Quinn*, it set about to procure title to the land by some other means, and in its endeavor so to do it had procured the entry of said land for its own benefit through the aid of one William Moses, a professional scrip dealer and entry maker of Denver, Colorado, under soldier's additional homestead application filed October 30, 1894, by one William Wilson who had been brought from the State of Illinois for the purpose; that as soon as Wilson's entry was made he conveyed the land to said Moses, whereupon Moses at once conveyed the same to the company, and as soon as the company had obtained its deed from Moses it proceeded to set up its newly acquired title as a defence in all the suits brought against it by its said lot grantees, as aforesaid, of whom this applicant was one; that thereupon a contest was instituted by Arthur P. Heywood against said Wilson entry, based upon the facts aforesaid, alleging the same to have been fraudulently made; that a hearing was had upon the contest, whereat the entry was defended by the Castle Land Company, Wilson not appearing. It is the record in that case which is now asked to be certified here.

As grounds for the writ of certiorari it is alleged, in substance, that the Heywood contest was carried on partly at the expense of applicant and other lot grantees similarly situated; that the local officers found for the defendant company, and the company thereupon induced Heywood to waive his right of appeal, which he did; that an application to intervene, accompanied by an appeal from the decision of the local officers, was filed by this applicant, but the same was denied by your office, the decision of the local officers held to be final in view of Heywood's waiver of his right of appeal, and the Wilson entry confirmed. An appeal from your said office decision was thereupon filed by H. F. Collett and this applicant, as interveners and parties in interest, but your office held that they had no such interest as entitled them to the right of appeal, or to intervene and be heard, and declined to recognize their said appeal. Certiorari is now asked by Barbour on the ground of his alleged standing as a party in interest, and also, as a friend of the government.

Barbour and Collett appear from the facts alleged to be lot purchasers from the said company and to have furnished part of the money to carry on the Heywood contest, being interested in the subject matter thereof because the title to their lots was necessarily involved in the controversy. I think they have shown such an interest as entitles them to be heard and that their application to intervene and appeal, in

view of the circumstances, should have been allowed. Clearly it is to their interest to see that the company furnishes them a good title, and in view thereof it is their right to protest against the title which the company is endeavoring to procure, if it is in fact defective as they allege. The validity of that title was directly in issue in the Heywood contest, and it is now averred that Heywood was induced by the company not to appeal, thus leaving those who had aided him in carrying on the contest, because of their interest in the same, without remedy, unless they are allowed to intervene and be heard. The applicants to intervene stand in the position of protestants in interest. They are interested in the title which it is proposed to acquire from the government, and in my judgment that interest is such as entitles them to be heard before the title passes out of the government. If tainted with fraud the title would not be good, and might be assailed and overthrown even after patent.

Moreover, the application presents such a case, in my opinion, as calls for the exercise of the supervisory authority vested in the Secretary of the Interior in matters involving the disposition of the public lands.

You are therefore directed to certify the record and proceedings in the case to this Department for consideration and such action as may be found necessary and proper.

JABEZ B. SIMPSON ET AL.

Motion for review of departmental decision of February 4, 1896, 22 L. D., 97, denied by Acting Secretary Reynolds, July 1, 1896.

ABANDONED MILITARY RESERVATION—PRICE OF LANDS.

FORT CUMMINGS.

Lands within an abandoned military reservation subject to disposition under the act of August 23, 1894, belonging to the single minimum class, must be sold at \$1.25 per acre, though appraised at a less figure.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
July 1, 1896. (A. M.)

Under cover of your letter of the 1st instant you submitted the report of the appraisers appointed to appraise the lands in the abandoned military reservation of Fort Cummings, New Mexico, under the provisions of the act of July 5, 1884, 23 Stat. 103.

The area of the reservation is 23,150 acres, and, with the exception of a few subdivisions valued at \$1.25 per acre, the lands have been valued by the appraisers at ten cents and twenty-five cents per acre in about equal proportions. The general appraiser reports that the

appraisers look on the lands as valueless, because there is no water with which to irrigate them, that so far as known the lands contain no minerals and that there is but one person living on the entire reservation. These conditions account for the low valuation.

By reason of the area and date of transfer of the reservation the lands thus appraised are subject to disposal under the act of August 23, 1894, 28 Stat., 491. This act opens the lands to settlement under the public land laws, and requires parties making homestead entries thereof to pay for the lands "not less than the value heretofore or hereafter determined on by appraisal nor less than the price of the land at the time of the entry."

Under the circumstances of the case you have expressed the opinion that, as the lands are of the single minimum class, valued at \$1.25 per acre, they cannot be disposed of at a less figure, notwithstanding the lesser valuation placed thereon by the appraisers, in view of the wording in the act, viz: "nor less than the price of the land at the time of the entry." In accordance with this view you have recommended that the price be fixed at \$1.25 per acre and have prepared and submitted instructions to the local officers at Las Cruces, New Mexico, for the disposal of the lands, with the necessary exception of certain named tracts, on that basis.

I concur in your view respecting the price that must govern the disposal of the lands and it is hereby fixed at \$1.25 per acre.

The instructions refer to those of the 25th ultimo to the same officers respecting the disposal of the lands in the Fort Craig abandoned military reservation as a guide in the disposal of the lands in this reservation. They thus follow the ruling laid down in departmental decision of April 9, 1895, 20 L. D., 303, and have been approved.

TYFFE *v.* MOOERS.

Motion for review of departmental decision of September 23, 1895, 21 L. D., 167, denied by Acting Secretary Reynolds, July 1, 1896.

RAILROAD GRANT—LANDS EXCEPTED—PRE-EMPTION FILING.

FISH *v.* NORTHERN PACIFIC R. R. CO. (ON REVIEW).

An uncanceled pre-emption filing of record at the date when a railroad grant becomes effective excepts the land covered thereby from the operation of the grant, even though at such time the statutory life of the filing has expired.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1896. (F. W. C.)

With your office letter of November 23, 1895, was forwarded a motion filed on behalf of the Northern Pacific R. R. Company, for the review

of departmental decision of September 23, 1895 (21 L. D., 165), in the case of George Fish against said company, in which it was held (syllabus) that—

An uncanceled pre-emption filing of record at the date when a railroad grant becomes effective excepts the land covered thereby from the operation of the grant, even though at such time the statutory life of the filing has expired.

This land is within the primary limits of the grant for the road extending from Portland, Oregon, to Tacoma, Washington, as shown by the map of definite location filed May 14, 1874. It is also within the primary limits of the grant for the Cascade branch of said road, as shown by the map of definite location filed March 26, 1884.

One Edward Davis filed a pre-emption declaratory statement covering this land on January 13, 1870, in which settlement was alleged December 21, 1869.

Said filing was never consummated to cash entry, but was of record uncanceled at the date of the filing of the map of definite location on account of both lines named, and was, under the authority of the decision of the Supreme Court in the case of *Whitney v. Taylor* (158 U. S., 85), held to be sufficient to except the land covered thereby from the operation of the grant for said company.

The motion questions the correctness of the application of the decision of the court in the case named, to the facts in this case, urging that the filing in question was an expired filing, that is, the pre-emptor had failed to make payment within the statutory period, which expired before the filing of said maps of definite location, while in the case before the court, the filing by Jones had not expired at the date of the filing of the map of definite location. Further, that the construction placed upon the decision of the court reversed the uniform decisions of this Department for the past thirty years upon mere *dicta*.

We will first look to the decision of the court. In said decision the court first reviews its previous decisions holding lands to be excepted from railroad grants on account of certain claims, viz: (1) In the case of *Kansas and Pacific Ry. Co. v. Dunmeyer* (113 U. S., 629), an abandoned homestead entry of record at the date of definite location; (2) *Hastings and Dakota R. R. Co. v. Whitney* (132 U. S., 357), a homestead entry based upon an illegal affidavit; (3) *Bardon v. Northern Pacific R. R. Co.* (145 U. S., 535), an illegal pre-emption entry of record at the date of the passage of the act making the grant, and (4) *Newhall v. Sanger* (92 U. S., 761), a claim under an invalid Mexican grant undetermined at the date of definite location, and thus proceeds:

Although these cases are none of them exactly like the one before us, yet the principle to be deduced from them is that when *on the records of the local land office* there is an existing claim on the part of an individual under the homestead or pre-emption law, which has been recognized by the officers of the government and *has not been canceled or set aside*, the tract in respect to which that claim is existing is excepted from the operation of a railroad land grant containing the ordinary excepting clauses, and this notwithstanding such claim may not be enforceable by the

claimant, and is subject to cancellation by the government at its own suggestion, or upon the application of other parties. It was not the intention of Congress to open a controversy between the claimant and the railroad company as to validity of the former's claim. It was enough that the claim existed, and the question of its validity was a matter to be settled between the government and the claimant, in respect to which the railroad company was not permitted to be heard. The reasoning of these cases is applicable here. Jones had filed a claim in respect to this land, declaring that he had settled and improved it, and intended to purchase it under the provisions of the pre-emption law. Whether he had in fact settled, or improved it was a question in which the government was, at least up to the time of the filing of the map of definite location, the only party adversely interested. And if it was content to let that claim rest as one thereafter to be prosecuted to consummation, that was the end of the matter, and the railroad company was not permitted by the filing of its map of definite location to become a party to any such controversy. The land being subject to such claim was, as said by Mr. Justice Miller, in *Railway Company v. Dunmeyer*, *supra*, "excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds."

The above will be seen to refer generally to pre-emption claims and if the decision ended here, I do not doubt that all would agree that an expired filing while of record was as effectual against a railroad grant as one unexpired.

The court, however, then proceeds to analyze the grounds on which the company seek to evade the effect of the filing by one Jones, which is made the basis for holding the lands there in question to have been excepted from its grant, viz:

First, Jones never acquired any right of pre-emption because he never in fact settled upon and improved the tract; second, the land was unsurveyed at the time of the alleged settlement, and the filing was not made 'within the three months after the return of the plats of surveys to the land office,' (10 Stat., 246), and was therefore an unauthorized act; third, that whether the filing was made in time or not, as it was not followed by payment and final proof within the time prescribed, all rights acquired by it lapsed, the filing became in the nomenclature of the land office an 'expired filing,' and the land was discharged of all claim by reason thereof.

Upon the first proposition, the court holds that the acceptance of the declaratory statement by the local officers is *prima facie* evidence of the *bona fide* character of the claim, and that the filing of the statement was, in the strictest sense of the term, the assertion of a pre-emption claim, and when noted upon the records it was officially recognized as such.

It was in this connection that the court states:—

Indeed, this declaratory statement bears substantially the same relation to a purchase under the pre-emption law that the original entry in a homestead case does to the final acquisition of title. The purpose of each is to place on record an assertion of an intent to obtain title under the respective statutes. "This statement was filed with the register and receiver, and was obviously intended to enable them to reserve the tract from sale, for the time allowed the settler to perfect his entry and pay for the land." *Johnson v. Towsley*, 13 Wall., 72, 89. By neither the declaratory statement in a pre-emption case nor the original entry to a homestead case is any vested right acquired as against the government. For each fees must be paid by the applicant, and each practically amounts to nothing more than a declaration of intention. It is true one must be verified and the other need not be, but this does not

create any essential difference in the character of the proceeding; and when the declaratory statement is accepted by the local land officers and the fact noted on the land books, the effect is precisely the same as that which follows from the acceptance of the verified application in a homestead case and its entry on the land books.

In some of the briefs filed on behalf of the grant claimants interested in the decision of the question now under consideration, it is urged that by referring to the decisions of the Department named, the court recognizes and approves of the holdings made therein as to the effect of pre-emption filings, and, as the decision in the case of *R. R. Co. v. Stovenour* (10 L. D., 645), holds that "expired filings" do not defeat the grant, it was not the intention of the court to overrule such holding.

In this connection I desire to call attention to the decision in the case of *Millican v. R. R. Co.* (7 L. D., 85), referred to in said decision of the court.

In that case the land was included within the limits of the withdrawal on general route of 1879 and fell within the primary limits on definite location as shown upon the map filed May 24, 1884.

The land involved was filed for by one Wilson May 2, 1879, prior to the filing of the map of general route. The same person made a second filing on March 3, 1883.

Millican applied to enter the land in 1886, alleging it to have been excepted from the grant by reason of the claim of Edward Wilson. Hearing was duly ordered, and upon the testimony adduced it was found that—

The evidence shows that Wilson built a house upon said land about May, 1879, resided therein and improved his claim for about one year, when according to the testimony of one witness, "he seems to have neglected it;" that upon making said second filing, he returned to said land, cultivated and improved it, and built another house and dug another well; that said second filing is invalid, but the claim under the first filing still of record is good, "except as against another settler," and served to except said land from the operation of the grant to said company.

From the foregoing, it is apparent that the claim of the company was properly rejected, for, at the date of the withdrawal on general route, and also when the line of the road was definitely located, *there was a preemption filing of record*, which had attached to the land in controversy, and the company can not question the validity of said filings. *William H. Malone v. Union Pacific Railway Company* (7 L. D., 13).

It might be here stated that under the early rulings of this Department in the administration of railroad land grants, the exception in favor of preemption claims, found in all the land grants, was construed, in effect, to be a mere saving clause in favor of the individual claimant, and not as excepting the land covered thereby from the operation of the grants, that is, unless the filing was consummated into cash entry it was held not to effect the grant.

In departmental circular approved November 7, 1879, containing regulations concerning railroads, the rulings respecting pre-emption claims are summed up as follows:

2. A pre-emption claim which may have existed to a tract of land at the time of the attachment of a railroad grant, if subsequently abandoned and not consum-

mated, even though in all respects legal and *bona fide*, will not operate to defeat the grant, it being held that upon the failure of such claim the land covered thereby inures to the grant as of the date when such grant became effective.

Under this ruling, therefore, no hearings can be ordered for the purpose of ascertaining the facts respecting the settlement, occupation, improvement of the land, etc., by such pre-emption claimant, for even if such facts were established, still, under the decision, the land inures to the grant.

Under this ruling the great majority of railroad conflicts have been disposed of and the lands shown by the records to be covered by filings, whether expired or unexpired, so long as they were not perfected, have been patented on account of the grants.

This ruling prevailed until the decision of this Department in the case of *Malone v. Union Pacific Ry. Company* (7 L. D., 13), where, for the first time, the *record* of a filing not perfected, was held to be sufficient to defeat the grant in favor of another claimant.

This decision was rendered July 9, 1888. It is true that in the case of *Railroad Co. v. Larson* (3, L. D., 305), and a few other cases, it was held that a pre-emption filing capable of being perfected, defeated an indemnity withdrawal or excepted lands from certain grants, but these cases were not based upon the record of the filing, but upon testimony showing that the pre-emptor had continued to reside upon and claim the land, and was, even to this extent, in conflict with the circular of 1879, before quoted.

I admit that the Stovenour decision, made in 1890, intimated that the claim under the filing expired at the time within which proof was required to be made by law, and ceased to be effective as against the grant unless the party continued in possession, and that this decision has been since followed.

This has been but a few years, and the decision in the Millican case was cited in the Stovenour decision and has never been reversed.

Just here I might say that the decision in the Stovenour case is, to my mind, unsupportable except upon the theory that the filing, uncanceled, defeats the grant.

If the filing expires, or ceases to exist, as against the grant, at the time set under the pre-emption law within which to make proof, then the mere fact that the party continues to reside thereon does not affect the grant, for the right of pre-emption in him is gone with his expired filing, and he can no more initiate a new claim to the land formerly filed for by continuing to reside thereon, than he could to a different tract than that first filed for.

The law allows but one filing. If his claim under his filing is made to depend upon the showing of continued residence, by so holding, we permit the company to question his compliance with law in the matter of residence, which it has been specifically and repeatedly ruled by the courts cannot be done.

The second objection urged by the company to the filing by Jones, was that he failed to file within three months from date of settlement,

but this the court held was a question that could not be raised by the company.

The third objection was that he had failed to make proof within the time required by law.

The court does not pass upon the sufficiency of this objection, but answers it by quoting from the decision of this Department to show that the time has not expired at the date of the attachment of rights under the grant.

In view of this fact it is urged that so far as the principles announced in said decision may embrace expired filings, that they are *dicta*.

Dicta are judicial opinions expressed by the judge on points that do not necessarily arise in the case. If it may be conceded that they are *dicta*, it can not be denied that they are amply supported in the argument of the court, by authority; that they are held as opinions by the unanimous bench. If the opinions expressed are *dicta*, such *dicta* are strong enough to be followed with safety.

I regard the conclusions set out above as more than the mere *dicta* of the court. I rather regard them as adjudications in one view of the case presented. But inasmuch as the final decision in the particular case was rested on a ground which did not involve the direct reasoning submitted, the opinion of the court may technically be called *dicta*; nevertheless, such *dicta* would be usually recognized by all courts as authority.

From a review of the matter, I adhere to the previous decision made, and hold that the land covered by Davis' filing was excepted from the company's grant.

The motion is accordingly denied.

MINING CLAIM—ADVERSE CLAIM—JUDICIAL PROCEEDINGS.

CATRON ET AL. *v.* LEWISHON.

In determining whether an adverse judicial proceeding has been instituted within the statutory period, the Department will not undertake to review an order of a court of competent jurisdiction recognizing the initiation of such proceedings within said period, while the suit so begun is pending within said court.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 7, 1896. (C. J. W.)

It appears by the record before me that Leonard Lewishon filed his application for patent for the Mountain View, Colusa and Grayhorse lode claims and Grayhorse Mill Site, surveys No. 952, A. B. C. and D., in the Santa Fe, New Mexico, land district; that during the period of publication, on April 23, 1895, T. B. Catron *et al.*, claiming the San Pedro placer claim, filed their protest and adverse claim against said entry; that on October 21, 1895, the attorney for Lewishon presented

his affidavit to the local office, alleging that no suit in support of said adverse claim had been brought in any court of competent jurisdiction within thirty days after filing said adverse claim; that he had examined the records of the district court having jurisdiction of the land in controversy on the 23d day of May, and found that no action had been instituted; that a certificate that no suit or action of any character was then pending was prepared for the clerk's signature on the evening of that day with the promise of said clerk that it would be signed the following day; that during the forenoon of May 24, the clerk informed him, that the presiding judge of said district court had directed said clerk to file a declaration in ejectment of said Thomas B. Catron *et al.*, as of the 21st of May, 1895, and that the judge had made and caused to be entered on the record of said court an order, which reads as follows (omitting caption):

It being made to appear to the court that plaintiffs left with the clerk of this court declaration in the above case on the evening of May 21, 1895, and that it was not filed by the clerk for the reason that the plaintiffs did not pay the advance fee as required by law, and that such fee has been paid at this date, it is ordered that the clerk file said declaration as of the date of May 21, 1895. And it is so ordered.

(Signed by Associate Justice.)

May 24, 1895.

It is also stated in said affidavit that the clerk of said court informed this affiant—

that on the evening of May 21, 1895, after he had closed his office, Charles A. Speiss met said clerk upon the street and handed him a declaration in said case and requested him to file the same; that said clerk informed him that he would not file the same until the advance fee required by law was paid. Thereupon Speiss said he would come the next day and pay the same, and the clerk again told him that it would not be filed unless said advance fees were paid; that said Speiss did not come the next day as he said he would, and the fee for filing the same was not paid said clerk until the 24th day of May A. D., 1895, and but for the order heretofore mentioned the clerk would have filed said declaration of that date.

On the 21st day of October, 1895, the clerk of the district court made a certificate, in which he certifies:

That there is now no suit or action of any character pending in said court involving the right of possession to any portion

of the ground in controversy,

and that there has been no litigation before said court affecting the title to the said group or any one of the said claims or any part thereof for over two years last past other than what has been finally decided in favor of the present claimant, Leonard Lewishon, or his assignees, except No. 3579, T. B. Catron *et al.*, v. Leonard Lewishon, which was not actually filed until May 24, 1895, and would have been marked filed as of that date, except for the order of the court, a copy of which is hereto annexed, the fees required by law not having been paid until that date.

The applicants for patent applied to purchase said land, and the local officers, on December 2, 1895, held:

We being of the opinion that said suit was not filed within the thirty days allowed, as we did not consider the papers were filed until the filing fee was paid as

stated in the clerk's certificate, did, on October 22, 1895, dismiss said adverse claim and notify T. B. Catron, attorney for the adverse claimants, of such dismissal, for the reason that he did not commence suit within the time allowed by law.

The local officers transmitted all the papers in the case to your office, together with the appeal of Catron *et al.* Your office by letter of January 17, 1896, reversed the action of the local officers on the following ground:

Whether the suit upon said adverse claim was commenced within the statutory period is the question to be determined, and the decision of that question involves the validity of the order of the court to the clerk thereof, which order is recited above. I am of the opinion that the power to annul and vacate said judicial order is vested by law in the courts of the Territory of New Mexico and not in this office, and until said order shall have been regularly vacated, I am bound to respect it.

Thereupon, the mineral applicants prosecute this appeal, assigning several grounds of error, but on the following the case may be disposed of:

1st. That under the laws of New Mexico suit was not brought within thirty days from the time notice was given said adverse claimants.

2d. The district court of Santa Fe had not acquired jurisdiction of said cause at the time of making said *nunc pro tunc* order of the judge entered in said case, and said order is wholly void.

3d. Said *nunc pro tunc* order was made *ex parte*, and said applicant has not by any summons or other process (up to this time) been brought into said court to plead or answer said complaint, and thereby be given an opportunity by said court to set aside and vacate said illegal order made in violation of the express statutes of this Territory.

(In connection with this specification of errors is presented the certificate of the clerk of said court, under date of February 12, 1896, wherein it is shown, "that there is no return in my office showing the service of any summons or other process upon the above named defendant, Leonard Lewishon, requiring him to appear or plead to the declaration in the above entitled suit.)

The contention of counsel for appellants is, that under the laws of the Territory of New Mexico suit cannot be commenced until the advance fee required by law shall have been paid; that said advance fee was not paid within thirty days as limited by the United States statute in which suit can be brought in support of an adverse claim, and that the court did not have jurisdiction of the cause at the time the order was issued.

By the Compiled Laws of New Mexico (1884), section 1867, it is provided:

The filing in the clerk's office of the petition, declaration, bill or affidavit, upon the filing of which process is authorized by law to be issued, with intent that process shall issue immediately thereupon, which intent shall be presumed unless the contrary appear, shall be deemed a commencement of the action.

Also by section 1907, it is provided:

All suits at law in the district courts shall be commenced by filing a declaration in office of the clerk of said court, etc.

By section 1262 of said statute, and also by Laws of New Mexico (1889), Chap. 69, p. 146 *et seq.*, and Laws of New Mexico (1893), p. 126 *et seq.*, it is made the duty of the clerk of the district court to collect part fees in advance.

The Commissioner of the General Land Office reversed the ruling of the local officers on the ground that the power to annul the judicial order of May 24th, rested in the courts of the Territory of New Mexico and not in his office.

The Department, it would seem, has the power to determine for itself the question of fact in each case as to whether or not action has been commenced within the statutory period, as is indicated in the cases of *Downey v. Rogers* (2 L. D., 707), and *Nettie Lode v. Texas Lode* (14 L. D., 180).

No certified transcript of the record showing the declaration and the entry of filing upon it is in evidence, though this would be the best evidence, yet it is virtually conceded that such declaration has been filed and that the official notation of the date of filing entered thereon is May 21, 1893, which would be within the statutory period. What is asked of the Department in the first instance, is that this official entry upon the declaration showing the date of filing shall be held to be false.

In the cases cited, wherein it was held by the Department that judicial proceedings based on an adverse claim filed out of time, and such proceedings not begun within the prescribed period, do not preclude the allowance of a mineral entry, the fact of filing out of time appeared as a record fact, and required only a computation of the number of days to make such fact appear. These cases are not necessarily authority for doing what this Department is asked to do in this case. It is not so much construction of section 2326, Revised Statutes, or any other United States statute applicable to the case, which is now sought, as it is a construction of a statute of the Territorial legislature in reference to the collection of fees in advance, which applies to all suits brought in the Territorial courts.

The decision invoked is that the judge of the district court has committed error in construing a territorial statute in relation to what constitutes filing or the commencement of a suit in New Mexico under its laws. It is, in effect, a collateral attack upon the judgment of a court of competent jurisdiction.

It has been shown that under the laws of New Mexico, suit is commenced by filing a declaration in the office of the clerk. By another law of the Territory, it is made the duty of the clerk of the district court to collect fees in advance. It may be said then that a suit is commenced when a declaration is filed in the office of the clerk, and that it becomes the duty of the clerk to collect fees in advance.

It appears from the facts as stated, that when the declaration was presented to the clerk, the party was notified that it would not be filed until the fees were paid; that the party promised to pay the fees and

the clerk retained the papers until the fees should be paid. There is no doubt that the handing to the clerk at his office, a paper which is required to be filed in his office, is filed, whether the fact be entered upon the paper by the clerk or not. The entry is a clerical duty imposed by law upon the clerk, with the performance of which duty the party submitting the paper is in no way concerned. It seemed that the clerk treated the paper as filed, subject to the payment of the fees before it would be so entered, for he accepted it and became its custodian. The fact then is that it was handed to him on the 21st, in time, and was treated by him as filed, except on account of non-payment of fees, and if the non-payment of fees be not under the law of New Mexico a condition precedent to the filing, then both in fact and in law, the paper was filed on the 21st.

It may be a condition precedent to filing, but it does not appear to be from the statutes cited; nor do they authorize the conclusion that it is; but rather, that a certain part of the fees are due in advance and it is made the duty of the clerk to collect it. The statute is in reference to the duty of the clerk, and contains no provision declaring the filing nugatory by the non-payment of fees. If it had been intended that the filing should not be legal until the fees were paid, a very few words would have sufficed to make this point clear. If the statute had declared that it was the duty of the plaintiff to pay the fees when he filed his declaration, it would not have made the filing void, but the attorney who filed it would simply have failed to discharge his duty and, presumably, there would have been adequate means of reaching such breaches of duty.

Whether the handing of the paper to the clerk, under the circumstances detailed, amounted to a filing in office in the meaning of the law, need not be now considered, but the judge who made the order directly to be considered, seems to have been of the opinion that it was. That he entertained that opinion is evidenced by the fact that when the clerk failed or refused to file the paper as of the date of May 21st, by which it is to be understood that he failed and refused to endorse the same as filed on the 21st, the judge by an order of his court required him to do so. This order is referred to in some of the pleadings as a *nunc pro tunc* order, but it does not purport to belong to this class of orders and cannot properly be so styled. It does not recite anything which indicates that it is an order which should have been passed on the 21st, but rather that it is an appropriate order as of the 24th, the date it bears. The order would appear to have been made on the complaint of some one, who presumably made it appear to the court that the clerk had received a declaration on the 21st; that it was not filed by the clerk for the reason that the plaintiff did not pay the advance fee required by law, and that it appearing to the court that such fee had been paid by the date of the order, the clerk was ordered to file the declaration as of the date May 21st.

Upon the statement of facts presented, the court was evidently of the opinion that there had been a legal filing of this declaration with the clerk of his court on the 21st; that for an unsatisfactory reason the clerk refused to endorse that filing, and the court then directed it to be done, subsequently to such filing. This may have been an improvident judgment or order of the court, but it is to be presumed that if this is so, and was so shown to the court, the court would on such showing revoke it. It is an interlocutory order which does not purport to dispose of the case; belongs to the class of orders which the court might lawfully make, and to a class from which there is no appeal, under the general rule, until the case, on its merits, is passed upon.

There can be no doubt that the question of the legality of this filing received judicial consideration and was passed upon by the court and held to be legal. The case to all intents and purposes is in court and before a tribunal having jurisdiction of the subject-matter. It is insisted that the order itself admits the fact that the fees might be lawfully demanded in advance and that they were not paid until the 24th, the day after the expiration of the thirty days; and therefore that it proves the want of jurisdiction of the court, and itself falls because of want of jurisdiction.

This conclusion rests upon the hypothesis that the penalty for a failure to pay the lawful fees at the time of filing his paper by a suitor, can be nothing else than to make the filing nugatory and void, and that this results by necessary implication because the statute provides no specific penalty. This evidently is exactly what the judge who passed the order disbelieved, and therefore held that the law provided no such penalty.

Section 2326 Revised Statutes, prescribes the duty of the adverse claimant to commence proceedings within a court of proper jurisdiction, within thirty days, to determine the question of the right of possession. Should he fail to do so, by this statute it is prescribed that such failure shall be a waiver of his adverse claim. But the statute goes further, and prescribes that upon payment of fees and of five dollars per acre for a claim, and the filing of the copy of the judgment roll with the register of the land office, that he is entitled to a patent. Evidently the idea of this statute is, that the court shall determine who is entitled, and while such determination is made upon the contingency of the filing of his proceeding in the court, it is nevertheless the clear intent of this statute that contest of claims of this character shall be determined by a court of competent jurisdiction.

In *Richmond Mining Co. v. Rose et al.*, 114 U. S., 576, it was urged that the court acquired no jurisdiction because fees required by the statute were not paid at the time of the filing, to which the supreme court, on page 583, replies as follows:

What constitutes the commencement of an action in a State court, being matter of State law, the decision of that court on this point is not a federal question, and is not therefore reviewable here.

These propositions also answer the objection of non-payment of fees to the State, which is purely a matter of State concern, and if it could in any manner avail the defendant it must have been by motion at the time, and before demurring or answering to the merits.

The right of this Department, where it is clearly shown by dates that the proceedings were not begun within the given period of thirty days, to proceed with its own ruling on the assumption that there was a waiver of the adverse claim, seems to be settled.

The point of trouble in this case, however, is that it is insisted that the filing was not in time, notwithstanding the fact that the court, by solemn order, when attention was called to the alleged illegal filing, sanctioned it, and assumed jurisdiction, and the effect of holding the order void would be to make a departmental ruling in relation to a proper construction of the statutes of New Mexico, so as to deny to the courts of that State jurisdiction in a matter which they had directly assumed on consideration of the express jurisdictional question.

Whether rightfully or wrongfully, there is a case pending in the district court in New Mexico, to determine the question of right of possession. If there is no jurisdiction the point can be clearly made and decided by the court; if it should not be prosecuted with reasonable diligence to final judgment, we have authority that the Department may then step in and declare that the adverse claim is waived; but where the very question at issue is involved in a pending case and the court has assumed jurisdiction, and an opportunity is afforded the parties to have a judicial decision not only of the question of jurisdiction but of the merits of the case as well, it seems to me that it is now premature for the Department to declare that the court entertaining the case had no jurisdiction.

Your office decision is therefore approved.

RAILROAD LANDS—ACT OF JANUARY 23, 1896.

BROWN v. ANDERSON ET AL. (ON REVIEW).

Under the provisions of the amendatory act of January 23, 1896, an applicant for the right of purchase, accorded by section 3, act of September 29, 1890, to settlers who have gone upon railroad lands with a view to purchasing the same from the company, is not required to show actual residence, if he has enclosed and cultivated the land applied for.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 7, 1896. (C. W. P.)

This is a motion, on the part of Henderson Brown, for review of the decision of the Department of September 23, 1895, in the above entitled case.

The land involved is the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 5, township 14 S., range 7 E., San Francisco land district, California.

There is a full statement of the case in 21 Land Decisions, p. 193, and it need not be here repeated.

The assignments of error set out in the motion for review need not now be considered, in view of the act of Congress approved January 23, 1896, amending the act of forfeiture, in which it is provided:

That section three of an Act entitled "An act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes," approved September twenty-ninth, eighteen hundred and ninety, and the several acts amendatory thereof, be, and the same is, amended so as to extend the time within which persons entitled to purchase lands forfeited by said act shall be permitted to purchase the same, in the quantities and upon the terms provided in said section, at any time prior to January first, eighteen hundred and ninety-seven: *Provided*, That actual residence upon the lands by persons claiming the right to purchase the same shall not be required where such lands have been fenced, cultivated, or otherwise improved by such claimants, and such persons shall be permitted to purchase two or more tracts of such lands by legal subdivisions, whether contiguous or not, but not exceeding three hundred and twenty acres in the aggregate.

In the decision of the Department in the case of *Shafer v. Butler*, on review (22 L. D., 386), it is held that, under the laws, as amended, residence is not necessary to be shown in support of an application to purchase under the third section of the act of forfeiture, and as it was shown in that case that the land had been improved to great value by the parties through whom Shafer obtained possession of the land; and that Shafer settled upon the land with the intention of purchasing the same of the railroad company, and continued the improvement and cultivation of the same, and was in peaceable possession thereof at the time Butler made his homestead entry, it was held that Shafer was entitled to purchase the land under the third section of the act, as amended.

In the case at bar, it is alleged by Henderson Brown in his application to purchase:

That in 1881 the deponent went into possession of the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ Sec. 5, T. 14 S., R. 7 E., M. D. M., and has held possession thereof ever since; that at the time of going into possession of the land deponent purchased the land from parties then in possession who had purchased from six others, and who had applied to purchase said lands from the Southern Pacific Railroad Company as early as 1872. That deponent purchased said lands for a valuable consideration and with the intention of purchasing them from said Southern Pacific Railroad Company as soon as the land should be subject to sale. That deponent has been ready and anxious to purchase at all times since 1881; that deponent has two houses upon said land and has it enclosed with other and adjoining land and has used it for pasture purpose since 1881;

and it appears from the evidence that he went into possession of the land on July 1, 1878, by purchase from John H. Carlisle; that in 1879 he, with other neighbors, put a fence around it; that he used the land for grazing purposes generally, but at different times had cultivated

about seventy-five acres of it; that he had been in continuous possession of the land since date of his purchase; that when he went into possession of the land his intention was to purchase it from the railroad company, and he knew said lands were claimed by said company; that John H. Carlisle had made no application to purchase the land from said railroad company, at date of his purchase of same; that he had applied to purchase no other land under the provisions of said act of September 29, 1890; that he had about twenty-two hundred (2200) acres of land fenced, the possessory right of which he had purchased, including sections 5 and 11 and portions of sections 1, 3 and 9; that he made application to purchase a portion of section 1 from the Southern Pacific Railroad Company prior to September 29, 1890, and made application to purchase from said company the N. $\frac{1}{2}$ and the SW. $\frac{1}{4}$ of Sec. 11, twenty-five years prior to hearing; that there were a three room house, a dairy house and a corral on the land when he purchased it from Carlisle; and that he was in possession of the same at the time E. A. Brown and A. S. J. Anderson were allowed to make their homestead entries.

These facts entitle Henderson Brown to purchase the land under the third section of the act of September 29, 1890 (26 Stat., 96), as amended by the act of January 23, 1896.

The decision of the Department of September 23, 1895, is therefore revoked, and upon the completion of said purchase, the homestead entries of E. A. Brown and A. S. J. Anderson will be canceled.

PRACTICE—REVIEW—RELINQUISHMENT—TRANSFeree.

TENNESSEE COAL, IRON AND RAILROAD COMPANY ET AL.

Affidavits should not be submitted with a motion for review for the purpose of supplying facts that should have formed a part of the case as presented in the first instance.

A transferee whose title is acquired after cancellation of an entry is charged with notice of such action.

The rule that a relinquishment executed after final proof, and after sale of the land, is invalid, can not be invoked on behalf of one who fails to show, under oath, any interest in the land, or that the entryman in fact had complied with the law.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1896. (P. J. C.)

A motion for review of departmental decision of March 6, 1896, has been filed by the Tennessee Coal, Iron and Railroad Company and Joseph Moses.

It appears by the record that John D. Maddox on August 11, 1881, made homestead entry of the SE. $\frac{1}{4}$, Sec. 25, Tp. 17 S., R. 7 W., Montgomery, Alabama, land district, alleging settlement November 15, 1875;

that on November 22, 1881, he made final entry of the same, and receiver's receipt issued therefor. In the published notice of final proof the following names are given as witnesses: Andrew J. Bespey, Andrew J. Vines, Lot V. Vines, and Dorcas Maddox. Andrew J. Vines appeared as a witness, and in answer to the question, "Are you interested in this claim?" says, "No,—and I further swear that the witness Dorcas Maddox is in no way related to or connected with claimant." This witness signed his proof with "his mark," and it is attested by E. K. Fulton. The other witness is described in the body of the proof as "Lot or Latty V. Vines." In answer to the question quoted above, he says: "No, and I further swear that I am the identical Lot V. Vines advertised as a witness for claimant, and further that claimant is of no kin to the witness Dorcas Maddox." His signature, Latty V. Vines, is also by "his mark," but it is not attested. These are the only witnesses whose testimony is in the record.

On August 30, 1882, your office directed the local officers to order hearings in a number of cases including this, the general allegations to be,—want of good faith in making the entry; non-compliance with the law in respect to residence, improvement and cultivation and that the land was not subject to entry by reason of being mineral in character. They were also instructed to confer with a special agent in regard to the hearings. Notice of contest was served, fixing the date of hearing December 13, 1882. The hearing was continued from time to time, until February 9, 1883. Subsequently an affidavit and relinquishment of Maddox was filed. In this affidavit he states that he never resided on, or occupied the land as a homestead; that he entered it under instruction from E. K. Fulton; that he made final proof, but never had the final receipt in his possession, but that it was "in the possession of one Latta Vines, from whom he can not get it." He swears "that he makes this relinquishment of his own free will and accord without the influence of any person or persons, and without the advice of any person or persons whatever." This affidavit, which contains a formal relinquishment, was sworn to February 1, 1883.

Another formal relinquishment was executed by Maddox February 16, 1883.

The record, as made in the local office, shows this: "Feby. 20, '83. Received relinquishment of John D. Maddox." On August 20, 1890, Joseph Moses made homestead entry of the tract, alleging settlement December 18, 1878. Your office by letter of October 17, 1890, on the report of a special agent, of September 18, 1890, held Maddox's entry for cancellation, by a letter addressed to the local officers. In reply thereto, the register states that their records show that on February 16, 1883,

said Maddox executed a relinquishment to the United States, and the same was filed February 20th, 1883, and the same was noted on the records and placed with other papers in the case. We now enclose the relinquishment, and ask if it will be necessary to carry out the instructions contained in your letter "P" October 17, 1890.

By letter of December 10, following, your office advised the local officers that the relinquishment had been received, and on that day Maddox's entry had been canceled on your office records, and that no further action was necessary under your office letter of October 17, 1890.

On August 22, 1894, Moses made a relinquishment of his homestead entry, and on August 24, following, an attorney forwarded the petition of the Tennessee Coal, Iron and Railroad Company and Joseph Moses, dated August 22, 1894, praying for a re-instatement of Maddox's homestead entry for the reasons:

1st. That the claimant John D. Maddox, sold the surface of this land to L. V. Vines on December 11th, 1881, who transferred the same to Joseph Moses on December 11th, 1888.

2d. That claimant John D. Maddox, sold the mineral right from this land to E. K. Fulton on November 26th, 1881, and on December 2d, 1881, E. K. Fulton transferred the same to Thomas Peters.

On July 26, 1882, Thomas Peters transferred the same to the Birmingham Coal, Coke & Iron Company.

The Birmingham Coal, Coke & Iron Company, after a consolidation with the Platt Coal & Coke Company, transferred the same to the Tennessee Coal, Iron & Railroad Company, which company still own all the mineral rights on said land and have continuously paid the State and county taxes assessed on the same.

3d. That at the time, viz., February 16th, 1883, John D. Maddox signed a relinquishment to said land, he did so under duress and under threats made by Special Agent Mabson, as is shown by the sworn affidavit, signed by him, on the 8th day of August, 1891, also the affidavits of William Vines, Jr., and John C. Vines, which affidavits are hereto attached and made a part of this petition.

4th. That at the time, viz., February 16th, 1883, that John D. Maddox signed said relinquishment, he, Maddox, had no right, claim, title, or interest in said land, or any portion of it, to relinquish, and such fact is shown by the records to be known by Special Agent Mabson at that time.

5th. That at the time and several years prior thereto, viz., February 16th, 1883, that John D. Maddox signed the said relinquishment, he in fact had no interest to relinquish, having transferred all of his interest to E. K. Fulton and L. V. Vines, viz., on November 26, 1881, and on December 11th, 1881.

6th. That your petitioners respectfully submit that Joseph Moses who is one of your petitioners, has this day relinquished his homestead entry on said land No. 24420, in order that this petition may be considered and granted, and each of your petitioners, respectfully ask that the homestead entry of John D. Maddox No. 11892, final proof No. 2343, reinstated and patent issue to and in the name of the said John D. Maddox.

"In addition to the statements contained in the attached petition," the Tennessee Company also submitted a statement, that it had no notice of the contest against the Maddox entry, or of the relinquishment filed by him, and "did not until a recent date learn that said land had been re-entered by Joseph Moses." Neither the "petition" nor "statement" is sworn to.

The affidavits referred to as accompanying the petition, three in number, were all sworn to in the month of August, 1891. Maddox states that he made his final proof before the clerk of the county court,

and got his final receipt on the 22d of November, 1881; that he sold the mineral rights in said lands to E. K. Fulton on the 26th of November, 1881; that he sold the

surface of said lands to L. V. Vines (who was one of the witnesses to his final proof) on the 1st of December, 1881. . . . That sometime after he got his final receipt . . . he got notice from the land office at Montgomery that his entry was contested;

that early in 1883 he got a message from a special agent in Birmingham informing him that he "was liable for criminal prosecution for fraud in making his entry"; but if he would "relinquish his entry he would not be prosecuted;" that by reason of this threat he became alarmed, went to Birmingham and made his relinquishment, not knowing that he had no right to relinquish after he had sold the land.

William Vines, jr., says he is a brother-in-law of Maddox; that Maddox told him about this message from the government agent; that he was very much alarmed, and at his request Vines accompanied him to Birmingham, when they met the agent, "who told them that Maddox was liable to criminal prosecution for fraud in making his entry" and that he could avoid the prosecution by relinquishing it, "though Mabson, (the special agent) was told and knew that Maddox has sold all his interest in the land."

John C. Vines, another brother-in-law, says he knows Maddox got the message, and "is informed and believes" that he went to Birmingham and relinquished his entry.

By letter of December 21, 1894, your office refused the application for re-instatement of the Maddox entry, and canceled the entry of Joseph Moses on his relinquishment. Your office decision is upon the grounds, that when Maddox's entry was canceled in local office on February 20, 1883, on his relinquishment, there was no notice on its records of any transfer, nor had the government any knowledge thereof; that the mortgagees, transferees or parties "had no appearance in the case which would entitle them to notice of the order of August 30, 1882, ordering a hearing;" that the petitioners do not submit any evidence that they are *bona fide* purchasers of the land or mineral rights therein; that the failure of Maddox to appear at the hearing and his subsequent relinquishment were a virtual acknowledgment of the truth of the charges, and the entry was thereby properly canceled; that the subsequent investigation of a special agent and action thereon by your office of October 17, 1890 and December 10, following has no bearing on the question at issue.

On appeal your office judgment was formally affirmed, and it was said:

In addition to the reasons assigned by you for refusing to re-instate said entry, it is to be observed that the applicants herein do not aver that Maddox's entry was improperly canceled on the merits of the case, or that he had complied with the homestead law.

The motion for review sets forth fourteen alleged errors. They are stated at great length in argumentative form, and not "concisely and specifically without argument" as required by the Rules of Practice. The motion will therefore be disregarded except as to such points of objection as the Department considers material in disposing of the case.

With the motion for review are filed two affidavits, one by G. F. McCormack, who says that he is the general manager of the Tennessee Company;

that said company has claimed to own, and has a deed to and has paid taxes for a number of years past on the mineral interest of the land (described,) as is shown in the abstract now on file. That the said company purchased the mineral interest in said land in good faith and for a valuable consideration; that said purchase was made for the use and benefit of the company, and that the said company had never sold said mineral interest or any part thereof.

The "abstract now on file" mentioned above is not found in the record.

The other is made by Maddox, in which he swears, "that he resided upon said land and had improvements on it of considerable value, before he made his entry, and that he made his entry in good faith and complied with the homestead laws of the United States." The balance of his affidavit is simply a reiteration of the one filed with the petition wherein he recites his reasons for giving his relinquishment, but in this affidavit he states that he made it under duress.

The evident intention in presenting those affidavits is to overcome the objection made in the decision of your office, affirmed by the Department, that the petitioners did not aver that they were *bona fide* purchasers of the mineral rights in the land, and the decision of the Department quoted above that there was no allegation that Maddox had complied with the homestead law. In other words, on this motion for review, parties are attempting by affidavits recently executed to overcome the objections raised in the departmental decision to the sufficiency of the showing then made, and upon which this proceeding was instituted. These matters are now for the first time presented to the Department. In discussing this loose method of practice the Department said in *Peacock v. Shearer's Heirs* (20 L. D., 213):

Such practice will not be permitted. Every fact alleged in the affidavits accompanying the motion was, or should have been, known to the plaintiff when he made his original motion for re-instatement, and should have then been presented. The Department will not tolerate the practice of parties waiting until it has announced its determination of a given proposition, and then in a motion for review permit them to present, as a specification of error, matters calculated to cover the objections of the Department to the original proceedings. Trials by piecemeal will not be sanctioned.

This language is particularly pertinent as applied to the case at bar. But aside from this, the sworn statement of Maddox in 1896, that he had complied with the homestead law, would not be accepted now to overcome his affidavit made in 1883, when his mind would naturally have been fresh on the subject, that he had not complied with the law.

The prominent features that stand out in bold relief in this case are not in themselves calculated to convince one of that degree of honesty and good faith, which are required in obtaining title to the public

domain. Here is a homestead entry made August 11, 1881: November 15, final proof is made, and final certificate issued November 22, following; November 26, four days thereafter, all mineral rights are transferred to Fulton, a witness to the mark of Andrew J. Vines, a final proof witness. On December 1, nine days after final proof, the surface rights is conveyed to Lot V. Vines, one of the final proof witnesses; on February 1, 1883, the entryman makes affidavit, "of his own free will and accord without the influence of any person or persons, and without the advice of any person or persons whatever," that he did not comply with the law in making his entry, and "that he entered said land under the instructions of one E. K. Fulton;" the petition for re-instatement is not made under oath, and it is to be observed that the Tennessee Company neither in its petition, or "statement" or in any other paper it has filed, gives the date at which it acquired any right to the land. It will also be noticed that the affidavits of Maddox and of the two Vines, his brothers-in-law, filed with the petition, were made in August, 1891; two on the 8th, the other on the 19th, and that they were not presented to your office until August 24, 1894. Thus three years elapsed between their execution and their presentation. It is a singular co-incidence that the statute of limitations for prosecutions for perjury under the United States statute expired practically simultaneously with the presentation of these affidavits. It might be pertinent to ask why this company held these affidavits for this period of time, and made no move toward re-instatement. It says, in its statement, as if for an excuse for not moving in the matter earlier, "that they (the company and Moses) only learned of said relinquishment at a recent date." Moses, when he made his homestead entry,—August 20, 1890,—must have had personal knowledge of the relinquishment, because he got the surface right by deed from Vines, December 11, 1888, under which he claims to have held possession of the land, and he must have known that the record was clear or he could not have made entry. And the company knew at least three years before moving of the condition of the record, if not, where was the necessity of procuring these affidavits?

But aside from all this, there is a statement in the record, made September 12, 1890 by "Wm. R. Barker for Tennessee Coal, Iron & Railroad Company" which shows that the Tennessee Company acquired its alleged right to the land December 31, 1888. It would seem to be idle to attempt to argue that this company was not charged with full knowledge of the condition of the record at that time. The Maddox entry had then been canceled on the record almost five years.

The petition could not be considered in the interest of Moses alone. His entry, so far as the records of the local office show, was a valid one when made and was validly existing when he made his relinquishment. It is difficult to harmonize his prior status in regard to the land with his relinquishment and petition in the present proceedings. But in whatever view it might be considered from a moral standpoint, his

petition for re-instatement of the Maddox entry could not be entertained, for the reason that he has not disclosed any interest in the land. Whatever right he acquired, if any, under his deed from Vines for the surface, was absorbed by his homestead entry, which he voluntarily relinquished.

It is urged that the doctrine announced in *Falconer v. Hunt et al.* (6 L. D., 512), wherein it is decided that, "a relinquishment executed after final proof, and after the entryman had parted with all interest in the land, is null and void," should govern here. But this rule cannot be applied to the case at bar, primarily for the reason that the petitioners do not show any interest in the land under oath, or that there was a compliance with the law on the part of the entryman. In all the cases following the doctrine of the *Falconer* case, it will be found that there was a *prima facie* showing made by affidavits of the interest of the petitioner, and his ability to prove a compliance with the law on the part of the entryman. (See *Hastie*, 8 L. D., *McIntosh Id.*, 614; *Jones*, 9 L. D., 97; *Paul v. Wiseman*, 21 L. D., 12).

The plea of duress cannot be accepted under the circumstances under which the affidavits of Maddox and Vines were presented, and for the further reason that it is presumed that the officers of the land department perform their duties in a lawful and regular manner, and in the absence of any better showing than that submitted here, it will not be assumed that the special agent by threats and intimidation procured the relinquishment.

The motion is denied.

MINERAL LANDS—AGRICULTURAL ENTRY—PROCEEDINGS ON PROTEST.

ASPEN CONSOLIDATED MINING CO. v. WILLIAMS.

A mineral claimant, who in his application temporarily excludes part of his claim in conflict with an adverse agricultural entry, does not thereby absolutely waive and renounce all claim to the land so excluded, but may thereafter assert his right thereto, by way of protest against the proof of the agricultural entryman. In proceedings under a protest against an agricultural entry, in which the mineral character of the land is alleged, the burden of proof is with the agricultural claimant, if the land is returned as mineral in the surveyor-general's report then in force.

The burden of proof rests with a protestant who attacks an agricultural entry on the ground of the "known" mineral character of the land at date of entry, irrespective of the fact that the land may have been returned as mineral after the allowance of the agricultural entry.

Under the supervisory authority of the Department, and in the interest of the government, evidence filed after the close of the hearing, and the appeal from the decision thereon, may be considered.

Land containing gold in sufficient quantities to justify men of ordinary prudence in the expenditure of money and labor in mining developments must be regarded as mineral in character.

The absence of active mining operations will not be held to negative an allegation as to the mineral character of the land, where such land is at the time involved in litigation.

A pre-emption entry, covering land that is mineral in character, and made with the knowledge of prior mineral locations thereon, and of the fact that the land was at such time regarded by many in the vicinity as valuable for the mineral therein, must be canceled as having been allowed for "known" mineral land.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1896. (A. B. P.)

The record in this case shows that on December 4, 1882, John R. Williams filed his pre-emption declaratory statement for the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 12, T. 10 S., R. 85 W., and the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 7, T. 10 S., R. 84 W., Leadville land district, Colorado, alleging settlement April 12, 1881.

On November 25, 1884, upon the application of Williams, your office allowed him to amend his filing so as to embrace the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said Sec. 7, T. 10 S., R. 84 W., subject, however, to any prior valid adverse claim.

On February 11, 1885, Williams submitted his proofs and was allowed to make cash entry for the land covered by his amended filing. It will be observed that his entry embraces only one of the forty-acre tracts covered by his filing as originally made. This he claims was due to the mistake of the party who made out his original papers for him.

It is proper to state in this connection that said township 10 S., range 84 W., was originally surveyed in December, 1881, and plat thereof filed in the Leadville office July 19, 1882, but the same was suspended by your office September 18, 1886.

Two additional or supplemental surveys were made under the direction of your office in 1889 and 1890, respectively, and plats filed, but both were suspended April 24, 1891. The latest and final subdivisinal survey of said township, and of the several sections therein, was made by Deputy Surveyor Edward S. Snell in 1891. This survey was approved by your office December 30, 1891, and plat filed in the local office at Glenwood Springs February 8, 1892. By this survey the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section 7 was found to contain less than forty acres, and the same has since been designated as lot 4.

The Aspen Consolidated Mining Company—a body corporate—is the owner of all title or rights that pertain to the Fowler, Fields and Lux placer mining claims, which appear to have been located and duly recorded by the original owners in May or June, 1883. These claims are situated along the Roaring Fork River, and include, to the extent of their length, the entire bed of the river except at a few places in its meanderings where there are sharp curves or bends. They conflict with the Williams entry to the extent of about twenty-eight acres. This conflict embraces a portion of the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ (now lot 4), Sec. 7, which was covered by Williams' original filing, and also a por-

tion of the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 7, not within his original, but within his amended filing.

On March 4, 1891, the said company filed in the local office at Glenwood Spring sits protest against the issuance of patent to Williams, wherein, after setting forth the existence of said placer mining claims, and the conflict, substantially as just stated, it is alleged, in effect:

(1) That the land embraced by the said conflict is not agricultural but placer mining ground; and

(2) That Williams' filing and entry were not made in good faith to obtain the land for agricultural purposes but in fraud of the pre-emption law for speculative purposes.

On November 23, 1891, before said protest was acted upon by your office, the said company filed in the local office its application for patent embracing the entire area of said placer claims, and notice thereof appears to have been duly published and posted.

On January 23, 1892, your office ordered that a hearing be had for the purpose of determining whether the land embraced in said conflict was known to be mineral in character at the date of the entry by Williams.

The hearing did not take place, however, until March 20, 1893, and was not concluded until nearly a month later. In the meantime, to wit, August 18, 1892, the company filed its application to purchase the land embraced in said placer claims, expressly excluding, however, "temporarily . . . pending the determination of the titles" to the various tracts involved, under hearings already ordered and others applied for, the land within the Williams' conflict, and also all other conflicts disclosed by the survey and plat of said placer claims accompanying the said application, and also the original application for patent. The application as thus presented was allowed and entry was thereupon duly made of the area not in conflict.

Under date of August 23, 1893, the local office reported the result of the hearing and their finding upon the evidence, which, after a lengthy discussion of the case in various stated aspects, is, in effect, that the land in controversy was not at the date of Williams' entry, or prior thereto, of any value for placer mining purposes, but is valuable for agricultural purposes. And they thereupon recommended that the entry of Williams be approved and passed to patent, and that the protest of the plaintiff company be dismissed and its entry canceled for failure to establish the mineral character of any of the land embraced in the placer locations. This, though the issue related to the character of the land in the Williams conflict only. Other recommendations were made which are not material to the issue.

Upon appeal from said finding, your office, on May 21, 1894, affirmed the same upon the question as to the character of the land, and held further that the plaintiff company, by its said temporary exclusion of conflicts, as stated, must be considered as having waived and abandoned all right, title or claim to the excluded tracts.

At the hearing the burden of proof was placed upon the company against its protest, and that view was sustained by your office decision.

The case is now before the Department upon appeal by the company from said decision.

It is not deemed material that the several specifications of error—eight in all—contained in the appeal, should be here set forth in detail. It is sufficient to say that they, in substance, deny the correctness of said decision in the three following essential particulars:

- (1) In respect to the said temporary exclusion of conflicts.
- (2) In placing the burden of proof upon the company; and
- (3) In affirming the finding below upon the question of the character of the land.

These several assignments will be considered in the order stated.

I. It is proper to state in connection with the first question thus presented that on July 21, 1894, counsel for Williams filed a motion to dismiss the said appeal on the alleged ground that in view of the effect given by said decision to the company's application to purchase, it had become a protestant without interest, simply, and therefore was not entitled to the right of appeal. This motion your office overruled, August 25, 1894, upon the stated ground that, even though the exclusion of conflicts operated *ipso facto* as the relinquishment by the company of all right to the excluded tracts, yet such relinquishment could serve only to relegate the company to its possessory rights (if any it had) by virtue of the locations under which it claims; and therefore the interest it asserted was such as entitled it to the right of appeal. The motion has been renewed here upon the same grounds urged before your office.

This whole question was recently considered and passed upon by the Department in the case of the Aspen Consolidated Mining Company v. John Atkinson, decided January 4, 1896 (22 L. D., 8).

In that case it was held, in substance, that a mineral claimant, who in his application to purchase temporarily excludes part of his claim in conflict with an adverse agricultural entry, does not thereby absolutely waive and renounce all claim to the tract excluded, but may thereafter assert his right thereto by way of protest against the proofs of the agricultural entryman.

That case was similar to the present one in respect to the question now being considered, and applying here the rule there announced, it follows that your office erred in holding that the stated temporary exclusion by the company from its application to purchase operated as an abandonment or relinquishment of all right or claim to the land so excluded. In addition to this, the application to purchase on its face clearly shows that no such relinquishment or abandonment was intended or contemplated by the company, but that the purpose was to obtain title to that part of the land as to which there was no dispute, without waiving any rights the company had with respect to the

disputed tracts; and it would therefore work great injustice to the company to give to its application an effect wholly different from that intended, and yet rigidly hold it bound thereby with no right of amendment. It is unnecessary to discuss the question as to the correctness of the position taken by your office in allowing the appeal, inasmuch as the motion to dismiss must, in view of what has already been said, be disallowed.

II. The burden of proof.

It appears from the records of your office that in or about the year 1882 the land in said township 10 S., range 84 W., was returned by the surveyor general as "rocky and mountainous," and the soil in and around section 7, in said township, as "third rate." This return remained in force at the date of the Williams entry.

By a later survey, however, namely, that made by Deputy Surveyor Snell, as aforesaid, the lands in the valley of the Roaring Fork in and around Aspen were returned as mineral, and the lands embraced by, and in the immediate vicinity of, the placer claims now under consideration, were stated to be valuable for placer mining and rich in placer gold. This return also shows that it is based upon a personal inspection of the land by the deputy surveyor who made it. The plat of this later survey was not filed in the local office, as we have seen, until February 8, 1892, after a hearing in this case had been ordered. It is worthy of note, however, that at the date when the hearing was ordered, all former surveys of said township had been suspended, and there was, therefore, at that date, no effective return of the land in existence. The later mineral return was the only one in force at the date the hearing took place.

Of course, if the former non-mineral (hardly agricultural) return had been still in force at that date, there could be no question that the burden of proof was properly placed upon the company in this case. But such was not the fact. That return had not only been suspended, but the records of your office disclosed the later mineral return.

In the decision complained of it was held, in effect, that said later return of the land as mineral, made subsequent to the date of Williams' entry, could not affect the question of the burden of proof. This view is apparently based upon the idea that, inasmuch as the question whether the land was known to be mineral at the date of said entry is the main issue involved, the burden of proof should be determined by the returned character of the land as of that date. Whether based upon such premise or not, the conclusion does not appear to be a sound one.

It is undoubtedly true that the main issue involved is, whether the land in question was known to be mineral at the date of Williams' entry. This issue, however, is presented in a twofold aspect:

- (1) As to the character of the land; and
- (2) If mineral, was it known to be such at the date of said entry?

In its first aspect the issue on behalf of the protesting company would unquestionably be supported by any evidence tending to show the present mineral character of the land, for the simple reason that if mineral now, it has been so for ages, and was so at the date of Williams' entry.

The mineral return which accompanied the Snell survey, and which was the only return in force at the date of the hearing, constituted, therefore, a *prima facie* showing that the land was mineral in character, as well at the date of Williams' entry as at the date when the return was made; and in view thereof I am clearly of the opinion that it rested upon Williams to overcome by proofs the effect of that return, and the burden was therefore upon him to show its incorrectness. The authorities are numerous upon the proposition that the returned character of land establishes a *prima facie* showing which places the burden upon the party who claims the land to be of a different character. They need not be here cited.

The second aspect of the issue is entirely different from the first, and presents a different state of facts. Here the record of the entry made by Williams, and the proofs upon which the same is based, constitute a *prima facie* showing in his favor, which is not affected by the subsequent return of the land as mineral, and even though he should fail to establish the non-mineral character of the land, it would still rest with the protesting company to show that its mineral character was known at the date of his entry. If he is found to have successfully carried the burden placed upon him by the surveyor's return classifying the land as mineral, the controversy would be thereby ended in his favor without more saying. If, however, he is found to have failed in this, it will still remain to be determined whether the land was known to be mineral at the date of his entry, and upon this aspect of the main issue the burden is shifted from Williams to the company. I am therefore of the opinion that your office erred in placing the burden of proof, without qualification, upon the protesting company.

III. Was the land known to be mineral at the date of Williams' entry, February 11, 1885?

As already suggested, this is the main issue involved in this case. Its twofold nature has been explained, and in view thereof it is to be borne in mind that in considering the evidence upon the question of the character of the land the burden of proof rests upon the entryman Williams.

The testimony of a large number of witnesses was submitted at the trial below on behalf of each of the contending parties. The record, though already voluminous, has been considerably added to by the filing of additional evidence by each party against the objection of the other, since the appeal was taken. For the consideration of this additional evidence the supervisory authority vested in the Secretary of the Interior in such matters is invoked.

In view of the standing of the government as an interested party in all cases like the present one, and the consequent obligation resting upon the Secretary, as the head of the Land Department (*Knight v. U. S. Land Association*, 142 U. S., 178-181); and also in view of the magnitude of the interests involved in this case, it has been determined to consider all the evidence, whether submitted at the trial below or filed since the appeal.

It should be stated in this connection that the record is burdened with a great mass of evidence of which a very large part has no direct bearing upon any of the issues. Much of this irrelevant matter results from insinuations freely indulged in throughout the entire progress of the hearing, against the character of the opposing parties and witnesses, the only effect of which has been to engender a feeling of bitterness which is to be regretted. Such testimony, as a general rule, can serve no good purpose, and much valuable time and labor would be saved by a consistent endeavor in all cases, to confine the evidence to the questions at issue. The whole mass, however, has been gone over and examined with care, and neither time nor labor has been spared in the endeavor to arrive at the facts of the case.

For the entryman Williams the testimony of himself and fifteen others was submitted at the trial below. From his own evidence it appears that he is a miner by occupation, and that before going to Aspen he had drifted around in Montana and Wyoming, mining and prospecting for six or seven years; that he prospected around Leadville, Colorado, for three or four weeks immediately prior to going to Aspen, where he arrived in the spring of 1880, at which time the place was a small mining settlement of less than one hundred people, only about thirteen of whom had been there during the previous winter; that at that time it was not known in what formation the mineral was to be found and no mining was carried on, but the people "were mostly prospectors, prospecting for mines;" that he went upon his pre-emption claim in June, 1880, and remained there about three months, living in a tent; that he then left the land and went up to the head of Difficult Creek and up Castle Creek, Maroon, and about Ashcroft, and spent most of his time prospecting for mines; returned to the land in the fall and put a stake on it, but had not then made up his mind to take it, and did not do so until the spring of 1881, and about June of that year he brought his family on from Pennsylvania, and settled on his claim; that there was then a shaft being sunk on the J. C. Johnson mining claim about one thousand feet from the exterior boundaries of his pre-emption, and mineral was discovered therein about July 1, 1881; that he lived in Aspen during the winters of 1881-2 and 1882-3, and on the land during the summers and during the winter of 1884 following, and cultivated portions of the same in potatoes and various kinds of garden vegetables during those years, and in 1884 ran a dairy on it and did quite a large business that year in selling dairy products, and each year he sold produce from the ranch, as he called it.

He is acquainted with the placer claims in question—had heard of them in 1883 or 1884. Had placer-mined in the Black Hills of Dakota and in Montana and prospected in Colorado before going to Aspen; that he has prospected the Roaring Fork, but found nothing to justify the location of these claims, and had panned there before taking up his agricultural claim but got all told only about eight or nine colors, and they were found down near the mouth of the Maroon. He also panned the ground covered by these placers in 1892, with Hooper, Herrick and others for the purpose of preparing affidavits to be used by the Mollie Gibson Company against these placer people; that he panned six or seven days and got only four or five colors; that he had also very recently panned the ground in conflict here and failed to get a color. He says that no portion of the placer claims is valuable for placer mining purposes, and there is no gold in them; that his pre-emption claim is worth from two hundred to three hundred dollars per acre for agricultural purposes, but has no value for placer purposes at all; that he had made a living there, had a dairy there, had sold over two thousand dollars worth of potatoes in one year, and had made considerable money there. He estimates the entire product of his ranch for the years 1881 to 1885 at \$5,000. The altitude of his claim is between seven and eight thousand feet above sea level.

He further states that there were no improvements of any consequence upon the ground covered by the placer claims in 1883 when they were located; that the Aspen district is a mineral country, but there is no mineral around where the ranches are; that the J. C. Johnson mine, near his claim, is now a rich, paying mine, that the Cowenhoven Tunnel is situated on the easterly forty acres of his claim for the distance of about one thousand feet; that generally speaking the richest pay in placer mining is found at bed-rock, but the formation of the Roaring Fork is not favorable for the discovery of gold by placer mining, and says, "there is no gold there no matter what it looks like;" that he is interested around Aspen in the Schiller, the Oro, the Branch, the Mint, and the Tenderfoot mines; the Sunday, and the Alva Adams; the Cowenhoven Tunnel, and the Pride of Aspen; and in the Legal Tender, Mount Hope and Gavin—a group of mines—in the Independence District; that there are gold mines, both placer and lode, at Independence along the Roaring Fork, about eighteen miles above Aspen, embracing between two and three hundred acres, owned by himself and one R. J. Bolles, the latter being also one of the owners of the Mollie Gibson mine; that he was interested in those Independence mines from the time that Bolles became interested, and that may have been as early as 1886, and had shipped ore from them that ran one hundred dollars in gold to the ton; that there are paying mines in the vicinity of the easterly lines of his pre-emption claim, one of them being the Mollie Gibson, about five or six hundred feet distant, which is one of the most valuable mines in the world, but was in debt when he proved up in

1885; that the Smuggler, about two hundred feet distant, is a mine now but was not in 1835; that he visited the Smuggler shaft in 1880, and was aware of its workings when he took up his pre-emption, but never heard of the Mollie Gibson until 1884; that the Roaring Fork River is a winding stream such as would form riffles and bends calculated to catch gold carried from the veins above.

The other witnesses for Williams are, Lee Hayes, J. W. Atkinson, D. W. Brunton, T. O. Clark, J. E. McClure, J. W. Elliott, Peter Lux, J. D. Hooper, L. J. Herrick, J. J. Warnock, Daniel George, D. R. C. Brown, D. K. Hessong, Andrew M. MacFarlane and L. C. Welman. The testimony of nearly all of them is generally to the effect that the land embraced in the Williams entry and the placer claims is wholly valueless for placer mining purposes, but is good agricultural land, and they variously estimate its value for agricultural purposes at from \$100.00 to \$500.00 per acre, its close proximity to the markets being one of the principal elements considered in their estimates. The soil is shown to be a black sandy loam from six inches to four or five feet in depth, underlaid with large deposits of boulders, gravel and sand. Portions of the Williams entry are shown to have been cultivated to potatoes and various kinds of vegetables and to have produced well. Wheat and oats also to a limited extent appear to have been raised upon it. It is admitted, however, by nearly all the witnesses that though land may be agricultural, that fact is no evidence that it may not contain mineral.

Brunton was introduced as a mineral expert. He describes the Roaring Fork valley as having been formed by glacial action, and claims that by reason thereof it is not a place where placer deposits are likely to be found. Indeed, he avers that such deposits are almost unknown in valleys formed by such action. Other witnesses, however, and among them several practical miners, described the Roaring Fork as a valley in which the indications are all favorable to placer mining. It also appears that Brunton, together with Atkinson, Clark, McClure, Elliott, Lux and Hayes, about two weeks before giving their testimony, examined all the land embraced by the placer locations, spending parts of several days in the work. They claim to have thoroughly panned the ground, and although they found gold in small quantities at various places, they discovered none on the land in conflict, and none anywhere, they say, of sufficient consequence to justify the expenditure necessary to placer mining; and they state, most of them in positive terms, that the land is wholly valueless for placer purposes. Brunton appears to be interested in various mining enterprises and is the General Manager of the Cowenhoven Tunnel, but upon being asked whether he is interested in it, says he is not a stockholder, and simply gets a salary as manager.

Lux was one of the original owners of the placer claims but sold out early in the action.

Of the other witnesses, Hooper, Herrick, Hessong and Warnock appear to have examined the land in the placer locations with Williams in June, 1892, for the purpose of becoming witnesses for the Mollie Gibson Mining Company in a controversy between that company and the Aspen company. They admit having been employed by the Mollie Gibson company and that they were well paid for their services. They did some panning and discovered some colors of gold, but say, in substance that the land is far more valuable for agricultural than for placer mining purposes. Brown, MacFarlane and Welman testify from a general knowledge of the land that it is very valuable for agricultural purposes, but worth nothing for placer mining. Brown is especially severe in his denunciation of the placer claimants and shows considerable bitterness of feeling towards them. He declares that the ground in the placers, and in the Williams ranch, "for mineral purposes is of no value at all."

The remaining witness, George, was one of the original owners of the George placer, adjoining the Fowler, and subsequently became interested in the latter. He retained his interest until 1889, when sale was made through his co-owner Fowler to the Aspen Company. Notwithstanding his connection with these claims, he says they have no placer value.

From the testimony for the Aspen Company it appears that the Fowler, Fields and Lux placer mining claims were located, surveyed and marked upon the ground and notices duly recorded in May or June, 1883, at which time Aspen was still a small village. A number of persons were originally interested in the claims and in the Van Cleve and George placers, located about the same time, among whom was D. D. Fowler, who claims to have discovered mineral in the land as early as 1881. They were surveyed for patent in 1890-'91 by United States Deputy Mineral Surveyor John H. Marks, who says in his field notes that the survey "is identical with the respective locations" as originally made. The surveyor general's certificate filed in the company's application for patent shows that more than the requisite amount of annual assessment work had been done upon the several locations up to that date, and that such work inured to the benefit of all the claims.

Speaking of the development workings upon the claims, Deputy Mineral Surveyor Marks in his report says:

By these developments it was found that the auriferous ground or placer deposit was one continuous strata going deep under the bed of the river throughout the entire claim.

The witnesses who testified for the company on this point are, Carl Spangler, D. D. Fowler, William Mc. Wilson, J. W. Calvin, David Welch, Samuel Martin, Josiah Tippet, Theodore Krauss, Thomas F. Harkins and Louis Zahl. Their testimony is based upon personal examination and is generally to the effect that the altitude of the land

is too high for agricultural purposes, and that all the surface indications, as well as discoveries of gold made in prospecting the same, are favorable to placer mining and show that there are rich deposits of placer gold at bed-rock.

Fowler is an experienced placer miner. Says he has prospected the ground time and again all over the river bottom and in a hundred or more other places, and always found gold; that he first discovered the gold in 1881, but made no locations until 1883. Several attempts were made by the original locators to sink shafts to bed-rock, but quick-sand was encountered, and for lack of means to properly carry on the work they failed. He says he has no doubt of the existence of rich deposits of gold in these claims at bed-rock, and that what is needed is sufficient capital to properly develop and mine the same.

Spangler is the President of the Aspen Company. He went to Aspen in the spring of 1889 before the purchase by his company of these claims, and spent a week examining and prospecting them. He required Fowler to pan the ground at such places as he directed, some fifty or a hundred pans or perhaps more, and says they obtained a great many parts of gold, enough to satisfy him that gold existed in the ground in paying quantities. He had some of the samples taken by him tested, and upon finding them to be gold he made a report favorable to the purchase of the claims by his company.

Wilson, Calvin and Welch examined the claims together in March, 1893, and say they discovered gold in them sufficient to justify a prudent man in expending money to mine and develop the same to bed-rock; that they are located favorably for placer mining upon a large scale; that they panned the ground thoroughly, including six or eight places on the conflict with the Williams entry, and got colors there. At least two-thirds of the pans produced colors, the largest product being sixty or seventy-five colors to the pan. They also took a sack of dirt at haphazard from the claims which they securely kept, and a portion of it was afterwards panned in the local office during the progress of the hearing and disclosed, according to the testimony of Williams, twenty-three colors of shot gold. Other witnesses counted more than twenty-three colors.

These three men appear to be above reproach and thoroughly reliable. They are about the only witnesses, however, against whom some aspersions have not been cast in this case. Wilson is a practical miner. They say the sack of dirt was taken at a point selected by themselves and just as deposited by nature and was kept in that condition until panned in the local office. The question is raised as to whether this sack of dirt came from above or below the mouth of Castle Creek, which empties into the Roaring Fork below the land in controversy here. The evidence on this point is meagre, but shows that the dirt came from a point a short distance above the county bridge. This bridge is shown to span the Roaring Fork a short distance above the mouth of Castle Creek.

Harkins and Tippet, both practical placer miners, say the land is of drift or wash formation, composed of gravel and black sand, and is placer ground favorably situated for placer mining, with ample supply of water. Tippet further says that he found plenty of quartz there as good as he ever saw, and a great deal of black sand. He thinks the supply of gold for these placers has come from the head of Difficult Creek, where he says there are leads of iron quartz from which he has recently taken assays that netted over two ounces of gold. Other witnesses say that the principal sources of supply are the gold veins or lodes at Independence, about eighteen miles up the river, as to the existence of which there seems to be no controversy.

Martin saw the panning in the local office and testifies that he has found similar colors and larger ones on these placers; that he has panned the ground and has gotten as many as thirty-six colors of gold to the pan and has found lots of fine shot gold. Zahl is a jeweler, who tested the samples taken from the land by Spangler and says he found them to be gold. Krauss is a chemist and assayer, who being in Aspen on a visit in 1885 says he examined the claims for Fowler, and the result showed them to be valuable placer grounds; that he assayed some of the metal taken by himself from the placers by the panning process, and it figured out fifty cents worth of gold to the cubic yard.

A certified copy of the return by United States Deputy Surveyor Snell of townships nine and ten—the latter embracing the Williams entry and these placers—which accompanies the report of his said survey thereof (1891), was filed by the company. The following extracts bearing particularly upon this controversy are taken from that return:

In the valleys is found a rich deep alluvial loam susceptible of producing heavy crops of all vegetables and cereals with irrigation. Practically all of the valley lands have been located and filed upon by people contemplating tilling the soil or with a view to secure lands fabulously rich and valuable for mineral, both placer and other deposits Placer deposits were first discovered along the Roaring Fork in township ten in 1882, since which time mining interests have steadily advanced and numerous deposits of mineral both placer along the river, and veins in the mountains to the southwest, have been discovered and developed, till now these townships embrace a region of mining activity unparalleled in the State. Among the many developments and enterprises here, the project to wash the entire bed of the Roaring Fork River for a distance of several miles is especially worthy of note.

The river in its course through these placer grounds described in my notes, flows in a bed some eighty feet below the general level of the valley, and is within thirty feet of bed-rock as is shown by the extensive improvements on the placers, which however have been carried only to such an extent as to prove beyond a doubt the value of the mineral deposits embraced thereby I made a personal test of these strata in several places along the river, and was thereby convinced of the real worth of the lands for the purpose claimed. I was advised that it was the intent of the company controlling these claims to put in a complete system of dams, flumes and pipes for hydraulic mining in the near future. The history and record of placer mining along California Gulch near Leadville, to which this case is analogous, will surely justify such an expenditure of money.

It is further shown that after the examination made by Spangler as stated, the Aspen Company people sent an attorney from Washington at a cost of eight hundred dollars, including expenses, to investigate the title, and upon his report that the title appeared of record in good shape, the claims were purchased at a price of about \$14,000; that the Aspen Consolidated Mining Company was thereupon organized and the title conveyed to it; and the company has since expended about \$15,000 on these claims in trying to clear up the title and in other ways. It also appears that there exists in Aspen considerable bitterness of feeling against the company, presumably due to its efforts to perfect its title against various and sundry conflicts. Spangler states that he was unable on account of this feeling to obtain the attendance of witnesses he otherwise could have gotten. Zahl says that upon the occasion of one of his visits at Aspen to have assessment work done he was advised to stay away from the claim or his life would be in danger.

It further appears that in July, 1887, the then owners of these and the George and Van Cleve placer claims, among whom was the witness George, acting for himself and two others, sold and conveyed to the D. and R. G. R. R. Company the right of way for its road-bed through the claims for a consideration of \$1,425 cash.

From the evidence filed since appeal it appears that the entryman Williams, on February 19, 1892, sold and conveyed to David R. C. Brown (the same Brown who was a witness at the hearing) the easterly forty acres of his entry, "together with all the improvements upon said land situate," for the stated consideration of \$110,000, and, on February 23, 1892, said Brown conveyed said forty acres of land and improvements to one Joel T. Vaile for the consideration of one dollar; that under a charter of the last mentioned date, but not recorded until June 9, 1893, the Free Silver Mining Company was organized with a stated capital of \$5,000,000, with the said David R. C. Brown as its President, one of its stated purposes being "to acquire, sell, lease and operate mines and mining properties bearing gold and silver" and other metals, in the State of Colorado; that on July 1, 1893, said Brown and Vaile by their joint deed conveyed said forty acres and improvements to said Free Silver Mining Company for the consideration of one dollar, and on the same date said company by its said President executed a mortgage upon said forty acres and improvements, excepting a small portion in conflict with the Emma Lode mining claim, to secure its bonds for a loan of \$100,000 to be used in the purchase of machinery and in the development of said land as mining property. It will be remembered that the Cowenhoven Tunnel, of which Branton is the General Manager, is situated on this forty acre tract; also that Williams testified at the hearing that he was then interested in it, although it now appears that he had previously conveyed the property away. His said deed to Brown was not recorded until June 7, 1893, after the hearing had ended.

It further appears that by deed of March 30, 1895, the Free Silver Mining Company conveyed to the Smaggler Mining Company a portion of said forty acres, probably about one-half thereof or less, for the consideration of \$25,000 cash, and the further sum of \$50,000 to be paid out of the returns from ores to be extracted therefrom; and that by contract of the same date, between said companies, it was agreed, among other things, that the former company should speedily sink a working shaft upon the premises to the depth of twelve hundred feet, and that upon certain stated terms the latter company should have the use thereof in the development of its said purchase.

On June 24, 1895, counsel filed the affidavit of Williams, Brunton, Hessong, MacFarlane and Atkinson, in substance reiterating their views expressed as witnesses, relative to the character of the land, and further stating that no assessment work was done on the placer claims for the years 1893 and 1894; and also the affidavit of James M. Downing to the effect that no notice in lieu of assessment work for those years had been given. Further affidavits of Williams and Brown to the effect that the former has no interest in either the Free Silver or Smuggler mining companies were filed December 4, 1895. Later still the affidavits of said Williams and Brown to the effect that the actual consideration of the deed of February 19, 1892, was \$20,000, instead of \$110,000, were filed; and also the further affidavits of Brunton and Brown, apparently in explanation of the various transactions of the Free Silver and Smuggler mining companies relative to the said forty acres of land and of the location of the Cowenhoven Tunnel thereon. Brunton states in this his last affidavit that "he is one of the original projectors and owners of the Cowenhoven Tunnel," although in his testimony he denied being interested therein except as General Manager.

Such is believed to be a fair resume of the evidence upon this branch of the case. In view thereof I am unable to escape the conviction that the land in controversy contains valuable mineral deposits such as the mining statutes declare to be "free and open to exploration and purchase." There can be no question that gold has been discovered on these claims, nor do I think there can be any reasonable doubt upon the whole evidence that it exists in sufficient quantities to justify men of ordinary prudence in the further expenditure of money and labor in their development (*Castle v. Womble*, 19 L. D., 455). Considerable money and labor were expended by the original owners, who appear to have been men of ordinary prudence, and much larger expenditures have been made by the persons composing the Aspen company, who appear to be business men of character and standing. All parties admit that in placer mining the richest deposits are generally found at bed-rock; and in this case the heavy preponderance of the evidence points, in my judgment, irresistibly to the conclusion that the working and development of these claims will disclose valuable deposits of mineral, and that in this respect the locations are such as are entitled to

the protection guaranteed by the mineral laws. True, no active mining operations have been carried on by the company since its purchase, and much is attempted to be made of this fact. The record discloses, however, that nearly the entire claim is covered by conflicts, and that, so to speak, almost every foot of the ground has been or is being stubbornly contested. Under such circumstances it would seem impossible for the company to carry on active and expensive mining operations until the conflicts have been adjusted. Active mining operations are not essential in order to establish the mineral character of land (*Johns v. Marsh*, 15 L. D., 196), and such a requirement under the circumstances of this case would be wholly unreasonable.

The good faith of Fowler, one of the original owners, has been attacked, and, also, to some extent, that of the present owners. The principal assaults have been made upon Fowler. His evidence, however, does not stand alone, but is abundantly supported by other witnesses and completely sustained by the reports and field notes of two deputy surveyors, as we have seen, based upon personal tests and examinations. The claims were located at a time when Aspen was not a town of any consequence, and they appear to closely follow the bed of the river. It seems unreasonable, therefore, that they could have been taken up for other than mining purposes.

There is no evidence to support the insinuations indulged in by some of the witnesses—Brown especially—to the effect that the present owners purchased the claims with the view to obtaining the valuable improvements thereon.

These charges and insinuations by Williams and Brown cannot have much weight, in view of their testimony at the hearing that the whole of the former's entry is agricultural land and of no value at all for mineral purposes, while at the very time they were so testifying there was in existence, but kept from the public records, the aforesaid deed of February 19, 1892, conveying forty acres of the land at an enormous price to be used for mining purposes. Williams also testified at the trial that he was then interested in the Cowenhoven Tunnel, notwithstanding the existence at that time of his said deed conveying to Brown the forty acres on which the Cowenhoven Tunnel is located, "together with all improvements;" and on November 30, 1895, he made an affidavit to be used in this case wherein he says that since said conveyance he has had no interest whatever in said forty acres of land or any part thereof. Brunton, another witness for Williams, to whose evidence considerable importance is sought to be attached, contradicts his own testimony relative to the Cowenhoven Tunnel, as we have seen, by an affidavit recently filed under the changed condition of things.

Considerable evidence was introduced upon the question of the compliance with the law by the mineral claimants in various and sundry particulars, and especially in respect of the annual assessment work required. That question, however, is not material to the present con-

trovery, inasmuch as it could not avail the agricultural entryman, even if it were shown that there was a failure in these respects. They are matters, so far as this case is concerned, between the government and the mineral claimants.

The evidence also discloses the existence of extensive improvements upon these placer claims estimated by some of the witnesses to be of great value. But few of these improvements are upon the land here in controversy, and none of any material consequence is shown to have existed at the date the placer claims were located and the locations recorded. They must be considered, therefore, as having been erected with full notice of these locations, and their existence cannot affect the question here.

A careful consideration of the whole record has produced the conviction that the land in conflict between the placer claims and said agricultural entry is mineral in character, and I must therefore so hold. No other part of the Williams entry, however, is in controversy in this case.

The only remaining question to be determined is, whether the land was known to be mineral at the date of Williams's entry. Here, as we have seen, the burden is on the protesting company.

The evidence on this point is that mineral was discovered in the placer claims, and they were located and their boundaries surveyed and marked on the ground and the locations recorded in 1883. The field notes of Deputy Mineral Surveyor Marks show that his subsequent survey of the claims (1890-'91) was based upon and is identical with the original locations.

Among the original locators were Lux and George, two of the defendant's witnesses. Of his other witnesses Herrick says he is acquainted with the river bed along where "these placers were staked out," and he thinks he first heard of the claims in 1883. McClure says he heard so much talk about them in 1883 that he went and prospected them for his own satisfaction. Atkinson says he heard in 1883 of gold being discovered in the claims, and "saw them working there." Williams himself says he heard of some work being done on the placer claims in 1883 or 1884, and "seen them do some work there at that time." Other witnesses testify as to the known existence of the claims in 1883 and 1884, and also as to gold having been discovered in them.

As against this showing nothing is presented by the record except the evidence denying the mineral character of the land, which, of course, involves a denial that it could have been known mineral land.

In the case of *Noyes v. Mantle* (127 U. S., 354) it was held by the supreme court that:

Where a location of a vein or lode has been made under the law, and its boundaries have been specifically marked on the surface so as to be readily traced, and notice of the location is recorded in the usual books of record within the district, we think it may safely be said that the vein or lode is known to exist, although personal knowledge of the fact may not be possessed by the applicant for a patent.

. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the applicant with the existence of the vein or lode.

While the court in that case had under consideration the location of a lode or vein, there can be no question that the language used is equally applicable to placer locations. The decision of the court is therefore directly in point, and would seem to be a controlling authority. Independently thereof, however, I am persuaded by the facts of this case that Williams knew at the date of his amended filing, as well as at the date of his entry, of the existence of the placer locations, and that the land embraced thereby was claimed as mineral land; and that many other people in and around Aspen knew the land to be mineral. I am constrained to hold, therefore, that at that date the area embraced by the conflict here presented was known mineral land, and in view thereof the entry of Williams must to that extent be canceled. It is not intended, however, to express any opinion as to the character of the land covered by said entry outside the said conflict. That question is not involved in this controversy.

Under date of October 21, 1895, an opinion was handed down in this case embodying conclusions in some respects different from those herein set forth, but was subsequently recalled for further consideration. That opinion is now hereby revoked, and the case will be finally adjudicated upon the principles announced in this opinion.

NOTICE OF SETTLEMENT CLAIM—PRIORITY OF SETTLEMENT.

PERRY ET AL. v. HASKINS.

The notice of a claim given by settlement is confined to the technical quarter section on which the settlement is made.

A contestant alleging priority of settlement, as against the right of a record entryman, is not entitled to a favorable judgment, if the fact as alleged is not established by some preponderance of the testimony.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 7, 1896. (C. J. W.)

George F. Haskins made homestead entry No. 11, for lots 2 and 3 and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 15, T. 29 N., R. 12 W., Alva, Oklahoma, on September 18, 1893.

On September 26, 1893, Ezra Perry filed affidavit of contest against said entry, alleging prior settlement as to lot 2 and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said section; also that said entry was fraudulent by reason of Haskins having entered the Cherokee Outlet in violation of the President's proclamation.

On September 30, 1893, Hattie M. Davis filed an affidavit of contest against said entry, alleging that she was the first settler; also that Haskins was not a qualified homesteader.

A hearing was ordered between the parties for June 13, 1894, at which time the parties appeared and submitted testimony.

On January 7, 1895, the local officers rendered their decision, in which they recommended that Haskins' entry be held subject to the prior right of Ezra Perry as to lot 2 and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the contest of Hattie M. Davis be dismissed.

From this decision Haskins and Miss Davis appealed. On June 15, 1895, your office passed upon the several grounds presented by said appeals, and affirmed the decision of the local officers as between Haskins and Perry, but modified their decision as between Haskins and Miss Davis, by directing that they be allowed to divide lot 3, and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ equitably between them, and that failing to agree upon such division, it be sold to the highest bidder.

From this decision Haskins and Miss Davis have appealed to the Department.

The most important questions presented by the appeals are, first, as to the qualifications of Haskins and Perry as settlers, and, second, as to who made settlement first as between Haskins and Miss Davis.

Your office found that the charge of disqualification was not sustained against either Perry or Haskins, and that finding is approved. As neither Haskins nor Miss Davis made settlement on the NE. $\frac{1}{4}$, and Perry did settle on it before Haskins made homestead entry, since he is found to be a qualified settler, his right to lot 2 and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ would seem to be settled. The settlement of Haskins and Davis being upon the NW. $\frac{1}{4}$ was no notice to Perry that they, or either of them, claimed anything on the NE. $\frac{1}{4}$, and did not therefore operate as an appropriation of the NE. $\frac{1}{4}$. It is a well-established doctrine, that actual settlement upon and possession of any subdivision of a quarter-section will constructively extend to and embrace all of its subdivisions, but will not extend beyond them. *Pooler v. Johnson* (13 L. D., 134). The date of Haskins' entry, therefore, fixes the date of his claim to the NE. $\frac{1}{4}$, and as Perry's settlement upon it preceded the entry, this part of the entry must fall.

The evidence shows that Haskins and Miss Davis made their respective settlements on September 16, 1893, and near the same time, upon fractional NW. $\frac{1}{4}$ of Sec. 15. On September 18, 1893, Haskins made homestead entry No. 11, which embraces both the fractional NE. $\frac{1}{4}$ and the fractional NW. $\frac{1}{4}$ of said section. Haskins followed his settlement and entry promptly by improvements and the establishment of residence, and the main question remaining to be determined, is whether or not Miss Davis has made good the allegation in her affidavit of contest, that she was the first settler upon the land. The entry must either stand or fall. If the proof shows that Miss Davis preceded Haskins in reaching the land and performing the first acts of settlement upon it, as she alleges is true, then the entry must fall, but if the proof fails to show that, then the entry must stand. The local officers express

the opinion that she has failed to show by a preponderance of the evidence that her settlement was prior to that of Haskins. On this subject your office says:

Davis and Haskins both rely on their acts of settlement. The evidence shows that they were on the line, separated from each other by the fence enclosing the booth, one of them at the SE. and the other at the SW. corner of said enclosure; that at the signal given Haskins took one step and commenced to dig a hole and Miss Davis stuck a stake.

Your office finds that the testimony is conflicting, but that Miss Davis does not show by a clear preponderance thereof, that she performed the first act of settlement, but that the acts were simultaneously performed by her and Haskins.

It is to be borne in mind that the allegation of Miss Davis is that her settlement was prior to that of Haskins, and not that it was made at the same time. Her undertaking was to show that it was prior. If she had only alleged simultaneous settlement, her affidavit would have stated no cause of action as against the entry, and would have been demurrable. Having alleged priority of settlement, she must show by some preponderance of the testimony, that her settlement was prior, or her case fails, and the entry must stand. That she has failed to do this, is the conclusion reached by the local officers and your office, and that conclusion is concurred in here.

The other questions presented by the assignment of errors do not affect the merits of the case, and need not be considered.

Your office decision is affirmed, as far as the same relates to Perry's contest, and reversed as to the contest of Miss Davis, which is dismissed, and Haskins' entry held intact as to the fractional NW. $\frac{1}{4}$ of section 15, T. 29 N., R. 12 W.

HOMESTEAD ENTRY—MARRIED WOMAN—WIDOW.

MARTHA E. WHITE.

Where a single woman makes a homestead entry and thereafter marries a man who has a similar claim, and the husband dies, the widow is entitled to submit proof under the claim of her deceased husband, and also maintain her own claim, by compliance with the law in the matter of residence, if no adverse right attached thereto during the time her legal residence was on the land covered by her husband's entry.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 7, 1896. (W. A. E.)

On October 27, 1890, Martha E. Church made homestead entry, No. 6584, for the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 14, T. 12 S., R. 62 W., Pueblo, Colorado, land district;

and on December 6, of the same year, Richard H. White made homestead entry No. 6662, for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 2, and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 11, T. 12 S., R. 62 W., same land district.

December 31, 1890, said Martha E. Church and Richard H. White were married, and lived together as husband and wife until the time of his death, which occurred July 3, 1891.

September 10, 1894, Mrs. White submitted final proof on her deceased husband's entry.

March 12, 1895, your office approved said entry for patent and at the same time held Mrs. White's entry for cancellation, assigning as reason for this action, that:

It appears from the record in these two cases that Mr. and Mrs. White intended to maintain separate residences at the same time, so that by virtue of such residence they could perfect title to the lands covered by their respective entries. This can not be done. See cases of Hattie E. Walker, 15 L. D., 377; and Jane Mann, 18 L. D., 116.

Mrs. White's appeal brings the case before the Department.

The testimony and affidavits submitted show that from the date of their marriage to June 6, 1891, Mr. and Mrs. White resided upon her claim; that on the latter named date they moved on to his claim, where they resided until July 3, 1891, when he died; and that shortly after the death of her husband Mrs. White moved back to her own claim, where she has since resided.

"A husband and wife, while they live together as such, can have but one residence, and the home of the wife is presumptively with her husband." *Bullard v. Sullivan*, 11 L. D., 22. From June 6, 1891, to the date of the death of Richard H. White, Mrs. White's legal residence was with her husband on his claim and she stood in the position of having abandoned her own claim. After his death she was under no legal obligation to continue her residence on his claim in order to perfect title thereto. *Tauer v. Heirs of Walter A. Mann*, 4 L. D., 433. She might reside where she pleased. She chose, as shown by the testimony, to renew her residence upon her own claim.

In the case of *Dillivan v. Snyder*, 5 L. D., 184, it was held that a widow may make in her own right a homestead entry, though at such time holding land covered by the homestead entry of her deceased husband upon which final proof has not been made.

No adverse right had attached to Mrs. White's claim during her temporary abandonment of residence thereon and she still had time, after her return, to comply with the legal requirements in regard to residence. I am consequently of the opinion that your office decision holding her entry for cancellation was erroneous. Departmental decision of June 13, 1896, (not yet promulgated) is revoked and set aside. Your office decision is reversed, and Mrs. White's entry will remain intact, subject to compliance on her part with law.

RE-INSTATEMENT—INTERVENING ENTRY—COMPLIANCE WITH LAW.

UNITED STATES *v.* DAYTON.

An entry inadvertently canceled on the report of a special agent, pending the application of the entryman for a hearing, should be reinstated, with due opportunity given for the entryman and intervening claimants to be heard.

A timber culture entryman cannot be required to show compliance with the law after his entry is canceled, and while the land is covered by the intervening entry of another.

A timber culture entry will not be canceled for failure to secure satisfactory results while in good faith on the part of the entryman is manifest.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 7, 1896. (C. W. P.)

I have considered the case of the United States against Lyman C. Dayton, involving his timber culture entry, No. 5259, of the SE. $\frac{1}{4}$ of Sec. 2, T. 122 N., R. 64 W., Watertown land district, South Dakota.

The entry was made March 10, 1882.

Upon a report of a special agent, "that five acres had been broken late in the fall of 1882, and seven acres late in the fall of 1883, some sod plowed under in the fall of 1884, and since then nothing done except a little pretended cultivation until July, 1886, when seven acres were plowed, but not planted or cultivated. The balance of the tract said to have been broken is now a mass of weeds and grass. Not two hundred live trees on the land. Entire want of good faith shown by claimant," the entry was held for cancellation by your office on June 22, 1887.

Owing to the application of Dayton for a hearing being mislaid in the local office, the entry was erroneously canceled on March 12, 1889. On March 18, following, J. H. Hauser made timber culture entry of the land. Afterwards Dayton's application for a hearing having been found, a hearing was ordered by your office on August 18, 1891, "with the view of reinstating Dayton's entry, if found, in all respects, valid, and in the event of such finding, to cancel that of Hauser." On April 15, 1893, the register and receiver rendered a decision adverse to Dayton, and recommending that Dayton's entry should not be reinstated, and that Hauser's entry should remain intact. Dayton appealed. Your office reversed the judgment of the local officers, reinstated Dayton's entry, and held Hauser's entry for cancellation.

Hauser has appealed to the Department. I agree with your office decision, that the cancellation of Dayton's entry being illegal, it should have been reinstated, a hearing ordered on the special agent's report, and Hauser required to show cause why his entry should not be canceled. William E. McIntyre (6 L. D., 503); Fleetwood Lode, (12 L. D., 604); Southern Pacific R. R. Co. *v.* Stillman, (14 L. D., 111).

But this error was in effect cured by the hearing which was had pursuant to your office order of August 18, 1891, and the parties in interest have therefore had their day in court.

Testimony was taken on both sides, and shows that during the first year (1882) five to seven acres of land were broken; that the next year (1883) seven more acres were broken in the early summer, and the land broken in the preceding year harrowed and sowed to oats; that in 1884 the land was re-plowed and planted to tree seeds of elder and ash; that in 1885 the land was plowed and seven acres planted to tree seeds; that in 1886 trees only came up on about three acres, which were cultivated by claimant, and nine acres plowed and planted to seed; that in 1887, the trees planted in 1886 came up and were cultivated during the spring, but died during the summer; that the land was cultivated and nine acres plowed back and planted to tree seeds; that in 1888, not a great many of the seeds planted in 1887 came up, but that the trees growing were cultivated, and the rest of the land, about nine acres, plowed back, and about three acres planted to tree seeds.

On March 12, 1889, Dayton's entry was canceled, and on March 18, following, Hauser was allowed to make entry of the land, which conferred upon him the right of possession (*Sinms et al. v. Busse*, 14 L. D., 429). After that Dayton was not required to cultivate the land, and it is not necessary to inquire whether anything was done by him upon the land or not.

As is usual in cases of this character the evidence as to the condition of the ground, the cultivation of the trees and the growth of weeds is conflicting, but, in my judgment, the government failed to show by a preponderance of the evidence submitted, that the claimant had not acted in good faith, or that he had not planted and re-planted the land, and endeavored to promote the growth of trees. Owing to his absence from the land, his ill health and bad judgment in planting, he appears not to have obtained as good results as some of his neighbors, but I am of opinion that what he did manifested good faith—a *bona fide* effort to comply with the law, which is held in the recent decisions of the Department to excuse a failure to comply with the letter of the law. (*Taylor v. Jordan*, 18 L. D., 471; *Greenough v. Wells*, 19 L. D., 172.) Consequently I am of opinion that your judgment, reversing the register and receiver, is correct. The decision appealed from is therefore affirmed.

HOMESTEAD CONTEST—DEATH OF ENTRYMAN—AMENDMENT.

GAUNT v. RUTLEDGE ET AL.

In a contest against the entry of a deceased homesteader the heirs should be made party thereto, but, if they are not so included in such proceeding, and the Commissioner thereafter remands the case with leave to amend, such right of amendment, so allowed, is not defeated by a subsequent intervening contest.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1896. (J. L. McC.)

On April 10, 1890, John C. Stewart made homestead entry for lots 4 and 5 of Sec. 12 T. 12 N., R. 5 W., I. M. Oklahoma land district, O. T.

It is shown that he resided upon said tract until his death, which occurred on January 26, 1891. He was about seventy years of age. So far as known he left no widow nor descendants. Whether he died testate or intestate does not appear.

After his death one Rebecca A. McKeurley claimed to be his niece, only heir at law and devisee.

On June 23, 1891, Sarah R. Rutledge bought from said Rebecca A. McKeurley her relinquishment to the United States of all her right title, and interest, in and to the land embraced in the entry of said Stewart, deceased, paying therefor a tract of land in Kansas, valued at \$700 or \$800. The next day (June 24, 1891), said relinquishment was filed in the local office, Stewart's entry was canceled, and Sarah R. Rutledge was allowed to make homestead entry of the land.

The relinquishment was transmitted to your office, which, by letter of August 3, 1891, refused to accept it, because no satisfactory evidence was submitted to show her right under the law to the land in question, and directed the local officers as follows:

You will therefore reinstate said entry on your records, advise all parties in interest of the action taken, and at the same time notify McKeurley that before her right to relinquish said entry can be recognized by this office, it will be necessary for her to produce evidence, under the seal of the proper court, showing that she is either devisee or only heir of said Stewart.

On October 6, 1892, Mrs. Rutledge filed her affidavit of contest against Stewart's homestead entry, alleging that he had

wholly abandoned the tract, and changed his residence therefrom for more than one year since making said entry, . . . and that said abandonment now exists, [and] that said tract is not settled upon and cultivated by said party as required by law.

The local officers accepted said contest affidavit, and fixed the date of hearing for December 1, 1892. At that date no one appeared for Stewart or his heirs. An *ex parte* hearing was had, at which Mrs. Rutledge and one other witness testified to abandonment as alleged, adding that to the best of their knowledge and information said Stewart was dead and had no living heirs. The local officers thereupon found that abandonment existed as charged.

Notice of the decision was served upon defendant by registered letter, mailed to his last known address; but was returned to the local office uncalled for. The local officers thereupon transmitted a report of their proceedings to your office.

On March 14, 1893, your office notified the local officers that their proceedings in the case had been irregular and improper in entertaining a contest against a dead man; and returned the record to them with instructions concluding as follows:

The papers in the case are herewith returned, with leave to said Rutledge to file a new and amended affidavit against said homestead entry, making the heirs of the entrymen, including said Rebecca A. McKeurley, parties defendant, and proceed to a hearing, after due service of notice. In case no defense is interposed upon proper

service of notice, the testimony heretofore presented may be presented in evidence, upon which you will render your decision and give the usual notice thereof, and in due time report to this office.

On April 6, 1893, Mrs. Rutledge filed a new affidavit of contest against the entry, alleging that Mr. Stewart died prior to February 24, 1891; that neither Rebecca A. McKeurley nor any other heirs of said Stewart had resided upon or cultivated the land since his death, and that she, the said McKeurley, and the said heirs, had wholly abandoned the land for more than one year.

On that same day (April 6, 1893), but an hour or two earlier, one William H. Gaunt filed affidavit of contest against Stewart's entry, alleging that Stewart had died in the year 1891; that his heirs, if any, were unknown; that they had for more than six months wholly abandoned the land; and praying that he be permitted to prove said allegations.

On April 21, 1893, the local officers made an order allowing Gaunt to make service of notice of hearing by publication, making Mrs. Rutledge a party defendant; and May 31, 1893, was fixed as the date of hearing.

On the same day, April 21, 1893, counsel for Mrs. Rutledge filed a motion, praying that a notice of hearing of her original contest, filed October 6, 1892, be issued; that said contest be considered prior and superior to that of Gaunt, filed April 6, 1893; and that Gaunt's contest be suspended until after the final termination of her contest.

This motion the local officers overruled, and ordered that all parties claiming any interest in said homestead entry be made parties.

On the day fixed for the hearing in Gaunt's contest (May 31, 1893, *supra*), both Gaunt and Mrs. Rutledge appeared by their attorneys. Neither Mrs. McKeurley nor any other heirs of Stewart appeared, and their default was entered. Testimony was taken in support of Gaunt's contest affidavit.

It appearing that Mrs. Rutledge had not made service as directed in your office letter of March 14, 1893 (*supra*) her contest was continued until August 15, 1893. On that day she appeared with her attorneys, and renewed her motion that her contest be considered prior and superior to Gaunt's; and to suspend further action on Gaunt's contest until the termination of her own. This time the local officers sustained said motion. Thereupon Mrs. Rutledge's contest was proceeded with and closed, and decision rendered by the local officers in her favor. From this action and decision Gaunt appealed to your office, contending that Mrs. Rutledge ought not to have been allowed to amend her contest against a deceased entryman in the face of his intervening adverse right.

Your office decision of January 11, 1894, affirmed that of the local officers.

Thereupon Gaunt appeals to the Department.

It is to be observed that Mrs. Rutledge's original contest against Stewart's entry was accepted by the local officers. If there was any error in proceeding to a hearing on her first contest affidavit, it was the

fault of the officers of the government in misleading her by such acceptance. If they had rejected it, and so notified her, a very different question might have arisen. Again, your office, upon receiving the record, returned it, giving her permission to file an amended affidavit which she did within a reasonable period. The manifest trend of departmental decisions is, to allow amendments, even in the face of an intervening claim, unless they introduce a substantially new ground of contest, or otherwise differ essentially from the original affidavit, so as to prejudice the right of the intervening claimant. In the case at bar, on the contrary, if Mrs. Rutledge were inhibited from amending her original affidavit, it would be greatly to her prejudice and loss, she having previously furnished all the proof necessary to show abandonment and to secure the cancellation of Stewart's entry, while the intervening claimant had done nothing whatever.

In the case of *Wallace v. Woodruff* (19 L. D., 309, syllabus), the Department held:

The amendment of an affidavit of contest relates back to the original, and excludes intervening contests, where the said amendment does not introduce a new ground of contest, but merely makes more specific and definite the original charge.

Still more completely on all-fours with the case at bar was that of *Norton v. Thorson et al.* (10 L. D., 261), in which the departmental decision is correctly summed up by the syllabus as follows:

The death of the entryman prior to the initiation of contest being shown, . . . the contestant should be required to make such heirs parties defendant, by amendment of the charge and due service of notice. The right of the contestant to thus amend on suggestion of the entryman's death is not defeated by an intervening contest.

The decision of your office was correct, and is hereby affirmed.

RAILROAD GRANT—INDEMNITY WITHDRAWAL—CONFLICTING GRANTS—FORFEITURE.

TOBIN ET AL. *v.* TRIPP.

The status of lands withdrawn by executive order for indemnity purposes under the grant of 1856, for the benefit of the Omaha company, and afterwards falling within the primary limits of the grant of 1864, to the Wisconsin Central, was changed by operation of the latter grant, and definite location thereunder, from lands reserved by executive order for indemnity purposes, to granted lands, and, on the failure of the latter company to construct its road opposite said lands, the grant therefor was forfeited, and the title to the lands embraced therein restored to the United States; and by the terms of the act of forfeiture said lands were made subject to settlement after the passage thereof.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1896. (F. W. C.)

With your office letter of May 16, 1896, was forwarded a motion for review of departmental decision of March 27, 1896, in the case of

Thomas Tobin and Claud Goff *v.* Winfield Tripp, involving the SE. $\frac{1}{4}$ of Sec. 21, T. 48 N., R. 8 W., Ashland land district, Wisconsin.

With your office letter of May 22, 1896, was also forwarded a motion for review of said decision, filed on behalf of Robert W. Parsons, intervenor; also a letter from Claud Goff in which he asks for a "review or re-hearing of said decision."

As stated in the previous opinion in this case this tract is within the fifteen-mile indemnity limits of the grant made by the act of June 3, 1856, to aid in the construction of the Bayfield Branch of the Chicago, St. Paul, Minneapolis and Omaha Railroad, and is also within the ten-mile primary limits of the grant made by the act of May 5, 1864, to aid in the construction of the Wisconsin Central Railroad.

At the time of the adjustment of the Omaha grant it was held that the reservation for indemnity purposes on account of that grant was sufficient to defeat the attachment of rights under the grant of May 5, 1864, for the Wisconsin Central Railroad, and this tract, with others, not being needed in the satisfaction of the Omaha grant, was ordered restored to entry on November 2, 1891.

Under the terms of this order of restoration acts performed prior to the day set for the opening were held to be ineffectual as the initiation of a settlement right.

By the decision of the Supreme Court in the case of the Wisconsin Central Railroad Company *v.* Forsythe (159 U. S., 46) the previous construction of this Department, as to the effect of the indemnity reservation under the act of 1856 upon the grant made by the act of 1864 for the Wisconsin Central Railroad, was reversed; and following the interpretation of the acts of 1856 and 1864, made by the court, it was held, that the land in question was a part of that granted to aid in the construction of the Wisconsin Central Railroad, and as it was opposite the unconstructed part of that road it was further held, that it was restored to the public domain by operation of the forfeiture declared in the act of Congress approved September 29, 1890, commonly known as the general forfeiture act.

Under the provisions of the act of 1890 settlement rights were protected, and in the decision under review, as it was shown that Tripp was the prior settler and claimant for this land, he was accorded the right of entry under his application, which was presented on November 2, 1891.

In said decision it was stated that:

Your office decision further held that Tobin's settlement made upon the S. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ did not protect him in any claim to any part of the SE. $\frac{1}{4}$, the tract here in question. . . . Tobin failed to appeal from your office decision, so he is not a party to the present controversy.

In his motion Tobin alleges that an appeal was duly filed, and upon inquiry at your office it is learned that such is a fact. Said appeal bears date of having been filed in the local office on March 14, 1893,

within time. It was not forwarded, however, to this Department, with the record made, but appears to have been in some way mislaid. Its consideration, however, will not alter the judgment previously rendered in favor of Tripp, for the reason that Tobin does not claim to have settled upon the land until after midnight of the day preceding the opening, namely, November 2, 1891, while Tripp was shown to have settled upon the land in 1890.

Goff's request for a review or re-hearing presents nothing in support thereof and is accordingly denied.

The motion filed on behalf of Robert W. Parsons, intervenor, does not disclose the nature of his interest in the tract, otherwise than, in concluding, said motion states:

We therefore, for these reasons, respectfully move review and reconsideration of your decision of March 27, 1896; the rejection of the pending applications to enter, and the allowance of the application of Robert W. Parsons.

In forwarding the papers you fail to make any reference to Parsons' connection with this case, but it is presumed from the above statement that Parsons has applied to make entry of the land involved. His motion might be denied for the reason that he is not a proper party to the controversy which was before the matter of consideration by this Department, but as this case was the first in which the decision of the court in the case of the Wisconsin Central R. R. Co. *v.* Forsythe (*supra*) was applied, as affecting the status of settlers, and as the motion raises a question as to the correctness of the application made in said decision, which affects many other tracts having a similar status, I have considered the grounds of error set forth in the motion. In effect the motion urges that the withdrawal made in 1856, of these lands, for indemnity purposes, continued in full force until the restoration ordered on November 2, 1891. With this position I am unable to agree, for, as the grant made by the act of May 5, 1864, was a present grant, acquiring precision by the definite location of the Wisconsin Central Railroad, the status of the lands, which were before reserved lands for indemnity purposes to satisfy the Omaha grant, was changed to granted lands, the title to which passed by the definite location of the Wisconsin Central Railroad, and upon the failure of the Wisconsin Central Railroad Company to construct its road opposite this land, it was necessary, either by judicial proceeding or an act of Congress, to forfeit said grant and restore title to the United States. To hold that, after the grant of 1864, these lands yet remained reserved under the act of 1856, would be to hold, in effect, that the indemnity reservation under the act of 1856, resting entirely upon executive action, could not be annulled by Congress, for its action in making other disposition of the land must be construed as nullifying such previous reservation. That such was the effect of the act of 1864, I have no doubt, as it would be inconsistent to hold that the same lands were granted to one company and yet remained reserved to satisfy the grant for another company.

It is further urged that, whether reserved under the act of 1856 or 1861, the reservation continued until the lands were restored on November 2, 1891.

This position is equally untenable, for, in view of the plain terms of the act of September 29, 1890, recognizing the rights of settlers on the lands forfeited by said act, while it might be possible to hold that they were not formally opened to entry until notice had been given by the Land Department, which I do not mean to hold in this case, yet there can be no doubt but that after the passage of said act all lands restored to the public domain thereby were at once subject to settlement.

For the reasons herein given the several motions are denied.

REPAYMENT—DESERT LAND ENTRY.

SIMEON D. WYATT.

A desert land entry made in good faith under the general act of 1877 by one who has theretofore had the benefit of the special act of 1875, is an entry "erroneously allowed," and repayment of the money paid thereon may be properly allowed.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1896.
(G. C. R.)

Simeon D. Wyatt has appealed from your office decision of January 19, 1895, rejecting his application for repayment of purchase money paid on desert land entry, No. 428, made January 16, 1890, (final certificate No. 164,) for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$; the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the S. $\frac{1}{2}$ of Sec. 20; and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 29, T. 29 N., R. 14 E., M. D. M., Susanville, California.

Said entry was canceled because the entryman had exhausted his rights by previously filing his declaration to make entry of the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the S. $\frac{1}{2}$, Sec. 29, T. 29 N., R. 14 E., under Lassen county act of March 3, 1875 (18 Stat., 99).

Your office declined to recommend said application for repayment, because there was evidence of *mala fides* on Wyatt's part, in that he either swore falsely or concealed the facts of his prior entry when he applied to make the entry in question, also when he submitted his final proof thereon.

Appellant insists that there is nothing in the record which justifies the finding that he concealed the facts of his former entry, or that he made any false statements in his final proof.

It appears that Wyatt was allowed to make the entry in question, which is under the act of March 3, 1877 (19 Stat. 377), after he had made a desert land entry for four hundred and eighty acres under the Lassen county act of March 3, 1875, *supra*. He undoubtedly made an erroneous statement when he applied to make his second entry, for he then swore that he had "made no other declaration for desert lands."

This statement, however, is in the printed form (4—274) for desert land applications, and may not have been an intentional deception.

In the appeal to this Department from the action of your office holding for cancellation his second desert entry, it was then insisted that a desert entry under the Lassen county act (*supra*) did not debar the entryman from making a second entry under the more general law of 1877; and in the motion for review of departmental decision, sustaining the action of your office, it was alleged that one and the same person had been allowed to make entries under the acts of 1875 and 1877.

In the decision on this motion (19 L. D., 247), it is said:

In a number of cases two such entries by the same person or by the same name, one under each act, were discovered; but final certificate having issued, and more than two years having elapsed, the entries went to patent under the confirmatory provisions of the act of March 3, 1891 (26 Stat., 1095).

Accompanying this motion are two affidavits, one made by W. P. Hall, the present receiver and from 1884 to 1888 the register of the office; one made by A. F. Dixon, also register on November 1, 1890.

Receiver Hall states in his affidavit that he is well acquainted with Wyatt, who made the desert entries in question; that on the day (November 1, 1890,) upon which he submitted his final proof under the Lassen county act for four hundred and eighty acres in sec. 29, he also made desert entry for the six hundred and forty acres under the act of 1877 (*supra*); that affiant then informed said Wyatt that

he had a legal right to make both entries, and that the usages of the Department sanctioned entries under both acts; that there was no attempt whatever on the part of Wyatt to conceal the fact that he was seeking to gain title to land under both of said acts; (that it was the) open, notorious and uniform practice of the land office at Susanville to allow entries and filings to be made by one and the same person under both of said acts during all the time that affiant was register as aforesaid, and that the propriety of said practice was never questioned by the General Land Office, so far as affiant has any knowledge, until said entry, No. 428, final certificate 164, of S. D. Wyatt was held for cancellation, etc.

Ex-register Dixon makes substantially the same statements in his affidavit.

While these two officers were in error as to their interpretation of the law, it may be stated that they are not in error as to the practice of their office in allowing an entry to one and the same person under both acts.

From these considerations it is clear that Wyatt could have no purpose in concealing the fact of his having made a desert entry under the act of 1875, when on July 16, 1890, he made desert entry for the land in question under the act of 1877; and his unfortunate statement in his application, wherein, in the printed part, he stated that he had made no other declaration for desert lands, deceived no one—on the contrary, the officers who allowed the entry were in full possession of all the facts, and assured him of his legal right to make the second entry.

To all intents and purposes the entry in question "was erroneously allowed" within the meaning of the act of June 16, 1880 (21 Stat., 287). And it may be fairly said that the erroneous entry was in no sense the fault of the entryman, but resulted from an erroneous interpretation of the desert land laws on the part of the local officers, without whose advice and instruction the entry would never have been made.

The application for repayment will therefore be allowed.

The decision appealed from is accordingly reversed.

OKLAHOMA LANDS—SECOND HOMESTEAD—SETTLEMENT RIGHT.

HEISKELL *v.* McDOWELL.

Presence within the territory, after the act authorizing the President to open the same to settlement, but prior to the proclamation issued thereunder, will not operate to disqualify the settler, if he was not then within said territory for the purpose of selecting lands, and by his presence therein secured no advantage over other settlers.

If one in good faith, claiming the right to make a second homestead entry, settles upon land subject to entry, and applies for the restoration of his homestead right, and permission to enter the land so settled upon, and is adjudged to be entitled to make such entry, such judgment validates his acts of settlement, and removes from them the presumption of invalidity.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 7, 1896. (C. J. W.)

It appears from the record that the plaintiff, Felix Heiskell, made homestead entry for the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ of section 21, T. 13 N., R. 7 W., on April 10, 1890, which was cancelled by relinquishment May 7, 1891. On December 7, 1892, the local officers denied the application of Heiskell, made April 25, 1892, for restoration of homestead right, and for re-instatement and permission to file his homestead entry for the land in dispute, the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and lots 1 and 2, Sec. 30, T. 18 N., R. 8 W., Kingfisher land district, Oklahoma.

The defendant, McDowell, on April 30, 1892, made application to enter said tract, which application was rejected on account of the prior one of Heiskell, and also upon the ground that McDowell was disqualified by reason of his being in the Cheyenne and Arapahoe country prior to the opening of the land to settlement. Each of the parties appealed from the decision of the local officers in rejecting his application. Your office,—passing upon the question presented by the appeal,—rejected the claim of Heiskell to make entry of the tract in question.

From this decision Heiskell appealed to the Department. The case was considered here on April 4, 1893, and it was remanded for further hearing, and specifically to determine, 1st. Is Heiskell disqualified from

making entry for the tract described in his second application? This may be found to depend upon whether the local officers rejected his second application for leave of absence, and if they did so, whether they acted properly in so doing. 2d. If it should be determined that he can be permitted to make a second homestead entry, was he or McDowell the prior settler on the land now claimed by both? 3d. Is McDowell, because of his entry in Kansas in 1885, disqualified from making another homestead entry? 4th. Did either Heiskell or McDowell enter the Cheyenne and Arapahoe country prior to the time they were justified in so doing, under the terms of the act, and the proclamation opening the same to settlement and entry?

The decision of your office being thus modified, a hearing was had before the local officers on November 16, 1893, both parties and their counsel being present, for the purpose of considering said specified questions. On March 16, 1894, the local officers made their finding and judgment on the questions presented. In reference to the first question, they say:—

It appears that on April 10, 1890, Heiskell made homestead entry for the E. $\frac{1}{4}$ NW. $\frac{1}{4}$ and lots 1 and 2, section 21, township 13, range 7, which was canceled by relinquishment May 7, 1891, and it is satisfactorily shown by the testimony in this case, that the contestant on September 15, 1890, applied for six months leave of absence from the tract of land last mentioned, which was granted until March 15, 1891. Afterwards in April, 1891, he applied for additional leave of absence for the term of six months, based on the sickness of his wife. It is this second alleged leave of absence which is alluded to in the decision *ex parte* Heiskell (*supra*). The testimony in this case sustains the case made by Heiskell, that he did in April, 1891, make such application for leave of absence to the local land office at Oklahoma City, and that this application was refused by the local officers, and from the showing made in this case, we find that it was improperly refused. Heiskell then alleges that owing to this refusal to grant him leave of absence from his homestead he was forced to abandon it, and did so May 7, 1891. His position on this point has not been successfully assailed though it was attempted to show that he had been holding his relinquishment for sale and had offered to sell it for a stipulated price. The fact remains, however, that he relinquished without consideration, and in our opinion his actions throughout show perfect good faith. It would seem that under the circumstances, he was properly entitled to restoration of his homestead right and privilege and upon that point it is so held.

On the question of settlement they held Heiskell to be the first settler. In reference to McDowell's entry of certain lands in Kansas in 1885, which he subsequently abandoned, they held that he was entitled to the benefits of the act of March 2, 1889, which restored his homestead right. In reference to the alleged disqualification of both parties by reason of their presence inside the Territory during the inhibited period, they hold that neither party was disqualified. The sequence of the finding of the local officers was a recommendation that Heiskell be allowed to make second homestead entry for the land in question, and that McDowell's application to enter be rejected. The defendant duly appealed from this decision of the local office, and on April 20, 1895, your office considered said appeal, and therein treated

each of the questions covered by their report and finding, except the one of priority of settlement, remarking as to this, that

as the final disposition of this case depends upon another question than priority of settlement, I will not consider the evidence on that question.

In reference to the question as to whether the local officers acted properly in rejecting Heiskell's application for leave of absence, and its effect on his qualification to make second entry, your office says:

I am clearly of the opinion that your finding that said second application for leave of absence was improperly refused, is correct, and that this leave of absence should have been granted.

In reference to the effect of McDowell's homestead entry in Kansas, made in 1885, and which appears to be still of record, your office held that inasmuch as McDowell had not perfected said entry, that the act of March 2, 1889 (23 Stat., 854), applied, and McDowell could make second entry. In reference to the alleged disqualification of the parties by reason of having entered the country to be opened during the inhibited period your office differed with the local officers, and found that both parties were disqualified. Your officer, therefore, concurred with the local officers on two of the questions covered by the report, reversed it as to one, and withheld judgment as to the other. From this decision both parties have appealed. Each alleges that it was error to hold that he was disqualified by reason of premature entry into the Cheyenne and Arapahoe country, and as this may be regarded as a ground common to both appeals, it will be considered first.

Both parties are shown to have been inside the Territory after the passage of the act authorizing the President to open it to settlement, but before the issuance of his proclamation for its opening. In both instances the parties went in on business unconnected with the selection of land, were not in the neighborhood of the land in dispute, and obtained no advantage over anyone in the matter of selecting lands, and at that time, so far as the evidence discloses, were not even contemplating entry when the land should be opened to settlement.

In the light of the later decisions, I cannot concur in the conclusion reached, that these parties were "sooners," and therefore disqualified as entrymen. As the facts do not present either one of them as an infractor of the spirit of the law, following the rule in the case of *Curnutt v. Jones* (21 L. D., 40), I must hold that neither of them is disqualified on the ground stated. It must then, in some way, be determined which one of these parties has a superior claim to this land. Heiskell insists that it was error to hold that McDowell was qualified to make a second entry under the provisions of the act of March 2, 1889, as was held both by the local officers and your office. This conclusion is reached by giving a literal construction to the second section of said act, which is as follows:

That any person who has not heretofore perfected title to a tract of land of which he has made entry under the homestead law, may make a homestead entry of not

exceeding one quarter section of public land, subject to such entry, such previous filing or entry to the contrary notwithstanding.

Inasmuch as the local officers and your office concluded, that under the facts, McDowell was entitled to make second entry, that conclusion will not be disturbed, but the rights of the parties submitted to other tests.

McDowell while he claims to be free from any disqualification to make a second entry, by mere operation of law, insists that Heiskell is to be regarded as a mere trespasser on the public domain, until he has of record an application for the restoration of his homestead rights. As under my view of this case it must turn upon the question of prior settlement, this insistence of the defendant will be considered, since, if Heiskell is to be regarded as disqualified to perform any act of settlement, until he filed his application on April 25, 1892, for restoration of homestead right and permission to file his entry for the land involved, then McDowell would necessarily be the prior settler. So far as this particular case is concerned, it would seem that the question was virtually decided in the decision ordering a hearing between these parties, of April 4, 1893, in which it was specifically directed that they should be heard as to which one performed the first acts of settlement on the land.

If one in good faith claims the right to make a second homestead entry, settles upon land subject to entry, and applies for restoration of homestead rights and for permission to enter the land settled upon, and is adjudged to be entitled to make a second entry, such judgment validates his acts of settlement and removes from them the presumption of invalidity. The parties will, therefore, be regarded as starting into the race for this land on the day of its opening to settlement, on terms of equality under the law. The question then is, which one settled on it first? Each has a residence and improvements on it of something like equal value. As to the exact time of the arrival of each party on the land there is considerable conflict in the testimony. On this subject the local officers say:

Upon the question of prior settlement upon the tract in dispute, as is usual in such cases, the testimony is conflicting, but upon the whole, after careful review of the claims of the parties and their witnesses, I am satisfied from the evidence adduced that Heiskell was the first in making claim to and appropriating the tract; he came upon the tract a few minutes past twelve o'clock, noon, of April 19, 1892, began to make improvements, and has measureably resided on the land since that time. Whereas on the contrary I find that McDowell first began to assert claim to the tract on April 20, the next day, and like Heiskell has since resided on the land, if not continuously, at least to the exclusion of a home elsewhere.

This finding seems to be justified by a preponderance of the testimony, which I think shows that Heiskell performed the first acts of settlement on the land. I, therefore, find that, under the facts disclosed by the record, he is entitled, under the law, to make a second homestead entry, and that being the first settler on the land in question, his

application to enter it should be allowed, and that McDowell's application should be rejected.

Your office decision is accordingly reversed.

RAILROAD RIGHT OF WAY—RESERVATION IN PATENT.

DUNLAP *v.* SHINGLE SPRINGS AND PLACERVILLE R. R. Co.

A railroad right of way under the act of March 3, 1875, is fully protected by the terms of the act as against subsequent adverse rights, and a reservation of such right of way, in final certificates and patents issued for lands traversed thereby, is therefore not necessary, and should not be inserted.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 7, 1896. (C. W. P.)

By your office letter of October 20, 1894, Elon Dunlap was allowed thirty days within which to show cause why the patent issuing on his cash entry, No. 4702, for the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 24, T. 10 N., R. 10 E., Sacramento land district, California, which was sold to him by the local officers of the district on April 28, 1894, under section 2455 of the Revised Statutes, should not contain a reservation of right of way for the Shingle Springs and Placerville Railroad.

Upon the showing made by said Dunlap, your office, on March 26, 1895, held that patent should issue to Dunlap, without reservation of right of way for said railroad, saying:

Since the date of office letter calling on Mr. Dunlap to show cause, the Honorable Secretary in the case of Mary G. Arnett decided that the language of section 4 of the act of 1875 "is not a direction to the Land Department to insert limitations and restrictions in the final certificate and patent, but a legislative declaration of the reservation of a right of way to such railroad companies as may have complied with the law." The effect of this decision in the Arnett case is to revoke the instructions of the circular as to making reservations in the certificate, and patent will therefore issue thereon without reservation.

On April 2, 1895, the company filed a motion for review of your office decision of March 26, 1895, and on July 3, 1895, your office revoked said decision and held that said entry was subject to the action required by the instructions at the bottom of page 6, circular of March 21, 1892, that is, that the notation, "subject to the right of way of the Shingle Springs and Placerville R. R. Co.," should be written across the face of the final certificate in red ink.

Dunlap appeals to the Department.

It is contended by Dunlap that your office decision of March 26, 1895, is correct, and that no reservation should be made in his final certificate and patent.

It appears that a map of the definite route of said company's road through the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, was approved by the

Department on April 27, 1888, under the act of March 3, 1875 (18 Stat., 482), and that the company, on December 28, 1888, filed a map, showing that the road had been constructed on the approved right of way.

The question is, should the right of way clause be inserted in the final certificate of entry and patent for the land over which a right of way has been acquired by a railroad company, under the act of March 3, 1875, *supra*.

In the case of *ex parte* Mary G. Arnett, 20 L. D., 131, it is said:

The injustice to the patentee of placing such a limitation in the conveyance, is apparent when it is remembered that the patent is the strongest and best evidence of title, and the patentee would be thereby concluded in an action at law instituted against him by the railroad company for the possession of such right of way. The right of way clause should not then be inserted in the applicant's final certificate, unless it is necessary to protect whatever rights the railway company may have in the land by virtue of its grant.

Under the act of March 3, 1875 (*supra*), such protection does not appear to be necessary. The act itself affords ample protection to the company, if it has any rights which the courts may hereafter determine have not been forfeited. The language of section four of said act is, "and thereafter all such lands over which such right of way shall pass, shall be disposed of, subject to such right of way." These lands are then disposed of, subject to such right of way, by virtue of the statute.

This is not a direction to the Land Department to insert limitations and restrictions in the final certificate and patent, but a legislative declaration of the reservation of a right of way to such railroad companies as may have complied with the law. The insertion of the right of way clause would answer no purpose except to embarrass the settler, and leaving it out does not affect the rights of any railroad company under said act.

In this regard, the case at bar may be distinguished from the recent case of the Pensacola and Louisville R. R. Co. (19 L. D., 386). In that case, the granting act did not impose a penalty of forfeiture on the company for failure to perform its conditions, nor did it direct that the lands over which the right of way was granted should be disposed of, subject to such right of way.

In the absence of such statutory protection, and it not appearing that the rights of the company had been forfeited by legislative enactment, or judicial determination, it became the duty of the Land Department to insert the right of way clause in all patents issued for lands over which such right of way had been granted.

In the case of Florida Central and Peninsular R. R. Co. *v.* Heirs of Lewis Bell, deceased (22 L. D., 451), it is said:

In the case of *ex parte* Mary G. Arnett (20 L. D., 131), it was held that a claim reserving the right of way should not be inserted in final certificate of entry and patent for land over which a right of way has been granted under the act of March 3, 1875, where it appears that there has been a breach of the conditions imposed by said act, but no re-assertion of ownership by the government. This was put on the express ground that the fourth section of said act provided, that "all such lands over which such right of way shall pass shall be disposed of subject to such right of way," that therefore the rights of the railroad company (if it had any) were protected by statute, and the case of the Pensacola and Louisville railroad company (*supra*) was in this regard distinguished.

In the case at bar there is no question of forfeiture for failure of the conditions subsequent, and the public land laws under which these patents will issue do not in terms protect the company's rights. I am, therefore, of opinion that if the plaintiff company has a grant of right of way across said reservation on the line of its constructed road, and is not estopped from asserting that right by its own acts, the limitation asked for should be incorporated in the patents.

The latter case is not to be understood as overruling or modifying the decision of the Department in the Mary G. Arnett case.

In the case at bar, the land being subject to the right of way by virtue of the act of March 3, 1875, comes within the reason of the decision in the Arnett case, to wit, that the act itself affords ample protection to the company for its rights.

The decision of your office of July 3, 1895, is, therefore, reversed.

MINING CLAIM—ADVERSE CLAIM—PROTEST—APPEAL.

PARSONS ET AL. v. ELLIS.

A protest against a mineral application, filed after the period of publication, will not be considered by the Department on appeal, unless it is shown that the protestant has an interest in the ground involved, and that the law has not been complied with by the applicant.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1896. (P. J. C.)

It is shown by the record in this case that Charles W. Ellis by W. S. Morse, his attorney in fact, on September 27, 1894, filed application for patent for Pine Mountain lode mining claim, survey 1146, in Prescott, Arizona, land district. The first publication of notice was on October 3, and the last December 5, 1894. The sixty days period within which protest and adverse claim should be filed expired December 3, 1894.

E. D. Parsons and Anna D. Faulkner, by J. C. Herndon, attorney in fact, filed on December 5, 1894, their protest and adverse against the entry of Pine Mountain. The local officers "rejected the same as an adverse, for the reason that it was not filed within the sixty days period of publication of notice, but filed and allowed the same as a protest and set for hearing on December 29, 1894."

On December 6, 1894, applicant made application to purchase and tendered payment for the land. On December 10 following, a certificate of the clerk of the district court, dated December 8, was filed, wherein it is stated that no suit was pending in said court affecting the title to the Pine Mountain, prior to December 4, 1894.

It is alleged in the protest that the protestants are the owners and in possession of the Morning Star lode; that the same was located in 1882, and the law and mining regulations have been complied with in all respects by themselves and their grantors; their mining improvements, consisting of shafts and tunnels are recited and valued at \$3,800; "that the said Ellis desiring to wrong, defraud and injure protestants, shifted the monuments of the Pine Mountain lode so as to cover six and one-tenth acres of the Morning Star lode and in so shifting said monuments, he caused to be embraced within the boundaries

of his pretended Pine Mountain location" some of the improvements belonging to protestants; that Ellis knew these improvements belonged to protestants; that these improvements are noted on the plat of the Pine Mountain, but are designated as belonging to unknown claimants; that Morse was the only assistant of the deputy surveyor in making the survey, and on information and belief charges that he is interested in the Pine Mountain lode; that he is the attorney in fact of Ellis.

A hearing was had on the protest, and as a result the local officers recommended that Ellis' application to purchase be rejected.

The applicants appealed, and your office by letter of May 17, 1895, reversed their action, whereupon the protestants prosecute this appeal, assigning numerous grounds of error. It is not deemed necessary to quote these for the reason that there is but one material question involved in this controversy, and upon that the case may be determined.

A motion to dismiss the appeal has been filed on the ground "that the protestants as such have no right of appeal, occupying the position of *amicus curiae*, merely, and not being parties in interest."

It will be observed that the allegations of the protest raise but a single issue, and that is the possessory right to the ground in controversy. This is a question, the determination of which Congress has lodged in the local courts. (Sec. 2325 and 2326 R. S.).

The Department will consider a protest against a mineral entry, after the period of publication has elapsed, where it is shown that the protestant has an interest in the ground in controversy, and that the law has not been complied with by the applicant. Both of these elements must be present. In the case at bar the protestants allege interest in the ground, but they do not charge a failure on the part of the applicant to comply with the requirements of the law in any particular. Hence it must be assumed that the proceedings on the part of the applicant were regular. The protestants were therefore charged with notice of the application for patent, and to protect their interests were required to do so in the manner provided by law. (See *Bright v. Elkhorn Mining Company*, 8 L. D., 122; *Hopeley et al. v. McNeil et al.*, 20 L. D., 87; *Gowdy et al. v. Kismet Gold Mining Co.*, 22 L. D., 624).

The appeal is therefore dismissed.

RAILROAD GRANT—ADJUSTMENT—TERMINAL LINE.

NORTHERN PACIFIC R. R. CO.

The joint resolution of May 31, 1870, designated the city of Portland as the point of connection between the branch line as originally provided for in the grant of July 2, 1864, and the extension to Puget Sound authorized by said joint resolution, and it therefore follows, that in the establishment of a terminal line between the lands granted by said joint resolution, and those of the prior grant forfeited by the act of September 29, 1890, said line should be drawn through the city of Portland.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 9, 1896. (F. W. C.)

With your office letter of March 26, 1896, was transmitted a petition filed on behalf of certain settlers praying for a change in the terminal established to the unconstructed portion of the Northern Pacific railroad *via* the valley of the Columbia River, to a point at or near Portland.

To a proper understanding of the question a brief recitation of the legislation and previous action taken by this Department in relation to the grant is necessary.

The act of July 2, 1864 (13 Stat., 365), incorporating the Northern Pacific R. R. Co. made a grant to aid in the construction of a continuous line of railroad—

Beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget Sound, with a *branch via the valley of the Columbia River, to a point at or near Portland*, in the State of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus.

By the joint resolution of April 10, 1869 (16 Stat., 57), said company was

authorized to extend its branch line from a point at or near Portland, Oregon, to some suitable point on Puget Sound, to be determined by said company, and also to connect the same with its main line west of the Cascade Mountains in the Territory of Washington.

By the joint resolution of May 31, 1870 (16 Stat., 378), said company was authorized—

To locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main *road* to some point on Puget Sound *via* the valley of the Columbia River, with the right to locate and construct its *branch* from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound.

In the case of *Spaulding v. Northern Pacific R. R. Co.* (21 L. D., 57), it was held that—

At Portland, Oregon, the Northern Pacific has two grants, the first for the line eastward, under the act of 1864, and the second northward, under the joint resolution of 1870, and, so far as the limits of the grant east of said city overlaps the subsequent grant, the latter must fail; and, as the road at such point eastward is unconstructed, and the grant therefor forfeited by the act of September 29, 1890, the lands so released from said grant, do not inure to the later grant, but are subject to disposal under the provisions of said forfeiture act. (Syllabus.)

After this decision it became necessary to establish a terminal separating the grants in the neighborhood of Portland, and the diagram submitted showed the location of the terminal to be at a point selected on the line of general route to the north of the Columbia River, which point your office denominated as Vancouver, Washington.

The petition urges that the point selected is about two miles east of the actual location of Vancouver, and in reporting on said petition your office letter states:

In submitting this matter, I have to say that the diagram prepared by this office nearly twenty-six years ago, to show the limits of the withdrawal which took effect upon the filing by the railroad company of the map of the general route of its road from Puget Sound, by way of the valley of the Columbia River, to the mouth of the Walla Walla River, was prepared from said map, and the line of the road on the diagram corresponds with that on the map of location as nearly as it is possible to make it, the roughness and crudity of said map being considered.

The claim that Vancouver is two miles west of the place fixed on the diagram, if true, is not material, the spot on the line of the road fixed as the most westerly point nearest to Portland being taken as the end of the location under the act of 1864, and the diagram showing Vancouver at that point it was so stated in the letters treating of the matter. It was the most westerly point on the line of the located road nearest Portland that was sought and fixed upon, and it matters not whether this point is at Vancouver or elsewhere. The line of the road where it touches Vancouver according to the copy of the township filed and marked exhibit B, is not such point. The location map of the company and the map of the State prepared by this office both show Vancouver east of its actual location, but as before stated, this is not material.

An examination of the map of location shows that line of the road as a continued line along the north bank of the Columbia, with a spur to Portland, from a point near Vancouver and east thereof, which as before stated is practically the same as fixed in the preparation of the diagram of the grant.

No reference is made to the spur to Portland either on the map itself or the letter transmitting it to this office, nor has mention of it been made until now, in any manner. It is not shown on the withdrawal diagram, and no attention was paid to it in the construction of said diagram. No withdrawal on account of it was ever made, although the first withdrawal on account of this portion of the road was of twenty miles only and did not cover all lands within twenty miles of the spur.

To sum up the facts in relation to this matter, the line of the road was laid down on the diagram of withdrawal as nearly as possible in conformity with that shown on the map of location, this diagram has governed the action of this office in the administration of the company's grant for nearly twenty-six years, and ever since the earliest action affecting said grant was taken; the point fixed for the western terminal of the forfeiture is the most westerly point on the located line of the road, nearest Portland, Oregon, for which any withdrawal was made, and said terminal as shown is as nearly correct as it is possible to get it.

From the previous recitation it is apparent that Congress first provided for a main line to Puget Sound with a branch *via* the valley of the Columbia River, to a point at or near Portland.

Under the resolution of 1869, said company was authorized to extend its branch line from a point at or near Portland to Puget Sound, but without a land grant.

The joint resolution of 1870, changed the branch to main line, the company being authorized "to locate . . . its main road to some point on Puget Sound *via* the valley of the Columbia River," etc.

This same resolution provides—

And that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon, shall be completed by January 1, 1872, and

forty miles of the remaining portion thereof each year thereafter until the whole shall be completed between said points.

In referring to this resolution, the supreme court in the case of *United States v. Northern Pacific R. R. Co.* (152 U. S., 294), said:

Undoubtedly, this resolution gave authority to locate and construct a main road *via* the Columbia River Valley to Puget Sound. A road so located and constructed would, or might, have passed the city of Portland. But if, as the company now insists, the act of 1864 gave ample authority to locate and construct a road extending from Lake Superior to Puget Sound, along the valley of the Columbia River, *and by the way of Portland or its vicinity*, the resolution of 1870 was entirely unnecessary in so far as it gave authority to the company to locate and construct its road through the Columbia River Valley to some point on Puget Sound. We cannot agree that this resolution is to be held, in this respect, as simply a recognition by Congress of an existing right, in the company, to locate and construct a road from Portland to Puget Sound, with the right to obtain lands, in aid thereof, as provided in the act of 1864. On the contrary, it should be regarded as giving a subsidy of lands in aid of the construction of a *new* road, not before contemplated, that would directly connect Portland and its vicinity with Puget Sound.

This would seem to make it clear that the point of connection between the branch line originally provided for, which was to end at a point "at or near Portland," and the extension to Puget Sound, which under the resolution of 1870 became a continuous line was, by the joint resolution of 1870, made at Portland, Oregon, instead of "at or near Portland." The map filed in 1870 shows a continuous line to the north of the Columbia River with a line dropped from a point nearly due north of Portland to Portland, a distance of about seven miles.

In the building of the road from the western terminus at Tacoma the company built directly to the city of Portland.

It will thus be seen that the resolution of 1870 designated the city of Portland, the company's map of location made connection with that city and in the building of the road southward from Tacoma, the company built direct to Portland, so that had the company proceeded with the construction under its charter it would necessarily have been obliged to build eastward from Portland.

In this connection I have to call attention to the fact that in considering the question of the conflict between the grant made by the act of 1864 for the Northern Pacific R. R. Company, and the Oregon and California R. R. Co., under the act of July 25, 1866 (14 Stat., 239), Portland was accepted as the western terminus of the branch line of the Northern Pacific railroad provided for under the act of 1864, at which point the terminal was drawn. Upon the basis of this terminal suit has been begun against the Oregon and California railroad company, in which judgment below has been given against the company.

For the reasons given I am of opinion that the terminal to the portion of the line *via* the valley of the Columbia River should be drawn through Portland, Oregon, thus forming a continuation of the terminal heretofore established at that point.

Under date of May 20, 1896, you transmitted the papers relative to

a demand made upon the Northern Pacific railroad company for the reconveyance of certain lands erroneously patented to the east of the terminal heretofore established by your office, from which it appears that the resident counsel for the company, Messrs. Britton and Gray, have refused to accede to the demand.

These papers are returned to the end that the demand may be amended to agree with the change in the terminal herein directed to be made.

TOWNSITE SETTLEMENT—CONFLICTING SETTLEMENT RIGHTS.

WEST RENO CITY ET AL. *v.* SNOWDEN.

The amount of land reserved by a townsite settlement may be properly limited to the legal sub-division on which actual settlement is made, where the townsite claim is for the purpose of securing an entry of lands additional to a prior townsite settlement.

As between parties claiming priority of settlement, preference must be given to the one who first performs some act on the land indicative of an intent to appropriate the same.

Secretary Smith to the Commissioner of the General Land Office, July 9, 1896. (C. J. W.)

The land in dispute is a part of the Cheyenne and Arapahoe country, which was opened to settlement April 19, 1892, at 12 o'clock M. A narrow strip of land known as lot 5, section 28, T. 13 N., R. 7 W., estimated to be one hundred and fifty-five feet in width lies between the line of old Oklahoma and the quarter-section in dispute. This strip had to be crossed by those who made the race on the day of opening. On April 19, 1892, Persie Snowden and Rose Goenawein, with a view to homestead entry, and several hundred people with a view to settlement for townsite purposes, at the signal given started into the race from the outer border of this strip and ran towards the quarter-section in dispute. On the same day at 2.45 P. M., Persie Snowden filed her application at the Oklahoma City land office, and made homestead entry No. 3489, for the NE. $\frac{1}{4}$ of Sec. 29, T. 13 N., R. 7 W. On April 20, 1892, Rose Goenawein visited the land office to file her homestead application for the same land, but on finding Miss Snowden's application of record she filed her affidavit of contest against said entry, alleging settlement on the land prior to Snowden or any other person. On May 14, 1892, John Fox, probate judge of Canadian county, Oklahoma Territory, applied to enter said quarter-section, together with lot 5, Sec. 28 (the narrow strip before described), for townsite purposes, which application was rejected for conflict with Snowden's entry. By letter "G" of March 15, 1893, your office directed that a hearing be had to determine the

priority between Persie Snowden and the townsite claimants. On May 15, 1893, such hearing was had, and as no hearing had been given as between Snowden and Goenawein, Rose Goenawein was made a party and allowed to intervene with her claim to prior settlement. On the close of the evidence introduced by the townsite claimants, Goenawein and Snowden joined in a demurrer to the sufficiency of the evidence so introduced, which was sustained by the local officers. From this decision the townsite claimants appealed to your office, and on January 2, 1894, your office reversed the local office, and remanded the case for further hearing.

Notice was duly given and on May 17, 1894, further hearing was had at which all the parties appeared, and submitted testimony. The hearing, after a number of continuances, was closed on September 20, 1894. On July 8, 1895, the local officers rendered their decision, in which they found that Rose Goenawein had sustained her claim of prior settlement, and recommended the cancellation of Snowden's entry and the dismissal of the townsite application. From this decision the townsite applicants and Snowden appealed, and on December 21, 1895, your office passed upon the case and again reversed the local office, rejecting the application of Goenawein, allowing that of the townsite claimants as to the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, cancelling the application of Snowden as to the W. $\frac{1}{2}$ and holding it intact as to the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$. From this decision the townsite claimants, and Goenawein and Snowden have all appealed. The appeal of the townsite claimants specifies three grounds of error:

1. That it was error to award the east half of the NE. $\frac{1}{4}$ to Persie Snowden, when she made her affidavit in support of her application before the land was opened to entry which invalidated her application and entry.
2. Error not to award the entire quarter-section to the West Reno City townsite as neither Snowden or Goenawein were entitled to any right thereto.
3. Error in not awarding the entire quarter-section to West Reno townsite, when it was all claimed by original settlement or staking of lots.

It will relieve the case of some confusion to consider and dispose of this appeal first.

The first ground, if supported by the proof, would be fatal to the entry. The rule is recognized, that an affidavit which is the basis of an application to enter, made before the land is subject to entry, is invalid. The facts as disclosed by the record render this rule inapplicable in this case. The affidavit in question appears to have been sworn to before William J. Grant, U. S. Commissioner, second district, Oklahoma, on the 18th day of April, 1892, but the name of Grant is stricken out, and qualification finally made before J. C. Delaney, receiver. There was no change of the date made on this paper, but the date of the other papers made before this officer as well as the parol testimony on that subject makes it clearly appear that this affidavit was in fact made and filed on the 19th day of April, 1892, the evening of the day of opening, thereby

depriving this objection of its force. The failure to change the date seems to have been a mere clerical error or oversight.

The remaining exceptions of the townsite claimants may be considered together. They assert an absence of right on the part of either Goenawein or Snowden to any part of the land in dispute, and the existence of a prior and superior right to the entire quarter-section upon the part of the townsite claimants. It is insisted that some of the townsite claimants reached some part of the quarter-section and planted stakes before either of the homestead claimants, and that the prior occupancy of any one of them inured to the benefit of all, as against the homestead claimants. By way of supporting this contention it is insisted that under sections 2387 and 2388 and 2389, Revised Statutes U. S., no stated number of inhabitants is necessary to enable them to make an entry for a townsite, when the number is less than one hundred, and that the Department is without jurisdiction or authority to limit the amount of land to be entered for such purpose to the legal subdivision upon which actual settlement is made. Under the facts of this case this reasoning is without force or applicability, this attempted entry in fact being an addition to a townsite already settled upon on an adjacent subdivision. The staking of lots for townsite purposes was confined on the day of opening to the west half of the NE. $\frac{1}{4}$, and it is not believed that your office exceeded its authority in recognizing the settlement rights of a homesteader upon the east half of said NE. $\frac{1}{4}$, especially when the evidence shows that the land awarded meets all the requirements of the townsite claimants for business purposes. Under the facts as disclosed by the record the townsite claimants seem to have been awarded all the rights they are entitled to.

The appeals of Goenawein and Snowden remain to be considered. Each of these parties insists that it was error to award any part of said NE. $\frac{1}{4}$ to the townsite claimants, and each lays claim to the quarter-section by reason of being the prior settler thereon, on the day of opening. While Goenawein undertakes to present fifty-three specified exceptions to your office decision, it is not believed that either her rights or a full consideration of the vital questions connected with the case, require any detailed statement of these exceptions, or their separate consideration. The errors alleged to have been committed refer to errors of law and of fact. The one class has led to a careful consideration of the record, and the other to the examination of such questions of law as seemed to be material.

On the line of facts, your office found, among other things, as follows:

Miss Goenawein has possession of from three to five acres of the east half of said land. She erected a dwelling house and made other valuable improvements thereon. There is testimony tending to show that she did not reside on the land but resided with her father on his homestead near Reno City, and in the town of El Reno. She and her father and mother and one or two of her sisters testified that she had resided on said land since April 30, 1892. The records of this office show that Rose Goenawein, in the case of *Goenawein v. McComb et al.* was an applicant for lot 15, block

94 (T. S. copybook 22, -371), El Reno. She was also an applicant in the case of Goenawein and Roff v. Haddon for lot 11, block 104 (T. S. copybook 22, -31), El Reno. In each of these cases she testified that she had resided on the lots and was an actual occupant of them from sometime in March, 1892, to May 23, 1892, the time of the entry of the townsite of El Reno. The testimony of Snowden and witnesses tends to show that Miss Goenawein was only at said house on said land, once or twice a week, and only remained thereon over night about twice per month. In *Langford v. Butler* (20 L. D., 76,—syllabus), it is stated that,—“residence cannot be maintained by occasional visits to the land, while the actual home is elsewhere.”

It further appears that the house she erected on the land was a frame building, weather-boarded, floor laid, but said house was not plastered nor sheeted inside, and was open from floor to roof. Those who kept company with Miss Goenawein generally found her at her father's house and on returning would leave her there. I am inclined to think that she did not maintain such a residence on said land as the law requires of a person entitled to a homestead, and I so find. I also find that Persie Snowden made a settlement on said land before Goenawein settled thereon.

This part of your finding is the subject of several of the exceptions filed. In so far as it purports to be the substance of facts shown by the testimony and record, it seems to be fairly supported. This additional state of facts is further gathered from the record: Goenawein made the race across the one hundred and fifty-five foot strip on horseback while Snowden made it on foot. Goenawein reached the line of the quarter-section first, throwing an iron stake upon the land with a flag attached as she entered upon it, and while her horse was in full career. Her horse carried her about four hundred feet further before she stopped and dismounted. Her father rode in the race with her and after she stopped and dismounted, she requested her father to bring her the stake from the place where she had thrown it, which he proceeded to do, and in a few moments afterwards she stuck it into the ground near where she dismounted. It was the opinion of many of the witnesses that many of those who ran afoot reached the limit of the one hundred and fifty-five foot strip about as soon as those on horseback or on wheels. There can be no doubt, however, from the evidence that Miss Goenawein rode a very fleet pony, and that she crossed this strip and threw her stake upon the ground in advance of Miss Snowden. Miss Snowden ran rapidly across the strip on to the land, stopping a few yards from the line, carrying a stake and hatchet, where she stuck the stake and at once commenced digging. It is apparent that she was thus engaged before Goenawein stuck her stake at the point where she dismounted. Leaving the question of whether or not Goenawein maintained her residence on the land after settlement as required by law in abeyance, for the present, the question as to which one of them performed the first acts of settlement on the land will be considered as a further test of their respective claims.

It seems to be insisted that the mere act of running to and upon the land is an act of settlement, and especially that the throwing of a stake upon the land, as in this instance, constitutes an act of settlement in the meaning of the law. It has been held in a number of

cases, that one who goes upon public land with the intention of making it his home, and does some act in execution of that intention, which is sufficient to give notice to the public generally of his intention to appropriate the land is a settler in the meaning of the law, if such initiative act is followed up and maintained. It may be said at once that the mere going upon the land, whatever may be the purpose, is not an act of settlement which charges others with notice of the intent or purpose and as such appropriates the land. This being true, the mere reaching the land first by Goenawein would not in itself confer any superior right upon her. It is insisted, however, that the throwing of her stake upon the land as her horse ran over it, was an act of settlement sufficient to segregate the land. A small stake with a flag or inscription upon it set in the soil, high enough above the surface to attract attention will be deemed an act of settlement, but it has in no instance been held that such a stake lying upon the ground would be notice to the public. In this case the stake thrown upon the ground was not permitted to remain there, whatever its position was, but at Miss Goenawein's request was removed by her father and carried to the point where she dismounted from her horse and there set up. The effect of the act of throwing the stake need not be further considered as a means of notice to the public, since it lacks the necessary element of permanency. This means of notice was at once abandoned, and the stake removed. The setting of the stake by Miss Goenawein at the point where she dismounted from her horse was the first act of settlement which could estop Snowden and others from settling upon the land. Snowden having performed a similar act of settlement upon the land earlier in point of time must be regarded as the prior settler, and Goenawein can take no benefit from this final setting up of her stake.

A different question might arise, if Snowden had observed the throwing of this stake, and thus had actual notice of Goenawein's intention to claim this particular tract; but she is not shown to have had any knowledge of what Goenawein was doing or intending, and the mere racing over the land was not significant, as it was but the border of a vast tract of the Cheyenne and Arapahoe country, that day opened to settlement; thus there was no presumption that those starting into the race there intended stopping on this tract.

The purpose of Miss Snowden's appeal is to insist upon her right to the whole of the NE. $\frac{1}{4}$, as the prior settler upon it. It is not necessary to consider her appeal further than to say that sufficient grounds have not been found to authorize the dispossession of the townsite claimants on the west half of the quarter-section. In the light of the whole record, the rights of the parties seem to have been fairly adjudged by your office, and your office decision is accordingly affirmed.

RAILROAD GRANT—PLAN OF ADJUSTMENT.

IOWA RAILROAD LAND CO.

The grant to the State of Iowa by the acts of May 15, 1856, and June 2, 1864, is a grant in place, the extent of which is determined by the location under the original grant, and the amount of lands earned thereunder ascertained by the line of road constructed west of Cedar Rapids, with the additional right under the act of 1864, to satisfy deficiencies within the grant in place by resorting to even numbered sections within the six mile limits, and both even and odd within the fifteen mile limits, and if there is still a deficiency to resort to the even and odd sections along the modified line within twenty miles thereof.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 9, 1896. (F. W. C.)

I have considered the matter of the adjustment of the grant made by the acts of May 15, 1856 (11 Stats., 9), and June 2, 1864 (13 Stats., 95), to the State of Iowa to aid in the construction of a railroad

from Lyons City to a point of intersection with the main line of the Iowa Central Air Line Railroad, near Maquoketa, thence on said main line, running as near as practicable to the forty-second parallel across the State, to the Missouri River.

By the act of 1856 a grant was made to the State of "every alternate section of land designated by odd numbers for six sections in width on each side" of the road, with provision for the selection of other lands from the odd numbered sections within fifteen miles of the line of the road, in lieu of those lost in place.

This grant was, by the State, conferred upon the Iowa Central Air Line Railroad Company, which company surveyed the line shown upon the map filed October 31, 1856, as the definite location of the road, which location was duly accepted, the limits of the grant adjusted thereto, and withdrawal made of the odd numbered sections within such limits. This company failed to construct any part of the road, and the State resumed the grant in 1860 and conferred the same upon the Cedar Rapids and Missouri River Railroad Company.

Prior to this time, however, a road had been built by the Chicago, Iowa and Nebraska Railroad Company (not a land grant road), from a point on the Mississippi River within about three miles from Lyons City to Cedar Rapids, and practically upon the location theretofore made between said points by the Iowa Central Air Line Company.

The Cedar Rapids Company was, therefore, on its own request, released from the building of a railroad east of Cedar Rapids. This company began the construction of the road at Cedar Rapids, upon the original location, and prior to the year 1864 had completed about one hundred miles, or, as appears from your letter, to Nevada.

By the fourth section of the act of June 2, 1864 (*supra*), it is provided:

That the Cedar Rapids and Missouri River Railroad Company, a corporation established under the laws of the State of Iowa, and to which the said state granted a

portion of the land mentioned in the title to this act, may modify or change the location of the uncompleted portion of its line, as shown by the map thereof now on file in the general land-office of the United States, so as to secure a better and more expeditious line to the Missouri River, and to a connection with the Iowa branch of the Union Pacific Railroad; and for the purpose of facilitating the more immediate construction of a line of railroads across the State of Iowa, to connect with the Iowa branch of the Union Pacific Railroad Company, aforesaid, the said Cedar Rapids and Missouri River Railroad Company is hereby authorized to connect its line by a branch with the line of the Mississippi and Missouri Railroad Company; and the said Cedar Rapids and Missouri River Railroad Company shall be entitled for such modified line to the same lands and to the same amount of lands per mile, and for such connecting branch the same amount of land per mile, as originally granted to aid in the construction of its main line, subject to the conditions and forfeitures mentioned in the original grant, and, for the said purpose, right of way through the public lands of the United States is hereby granted to said company. *And it is further provided*, That whenever said modified main line shall have been established or such connecting line located, the said Cedar Rapids and Missouri River Railroad Company shall file in the general land-office of the United States a map definitely showing such modified line and such connecting branch aforesaid; and the Secretary of the Interior shall reserve and cause to be certified and conveyed to said company, from time to time, as the work progresses on the main line, out of any public lands now belonging to the United States, not sold, reserved, or otherwise disposed of, or to which a pre-emption right or right of homestead settlement has not attached, and on which a bona fide settlement and improvement has not been made under color of title derived from the United States or from the State of Iowa, within fifteen miles of the original main line, an amount of land equal to that originally authorized to be granted to aid in the construction of the said road by the act to which this is an amendment. And if the amount of lands per mile granted, or intended to be granted, by the original act to aid in the construction of said railroad shall not be found within the limits of the fifteen miles therein prescribed, then such selections may be made along said modified line and connecting branch within twenty miles thereof: *Provided, however*, That such new located or modified line shall pass through or near Boonsboro', in Boon County, and intersect the Boyer River not further south than a point at or near Dennison, in Crawford County: *And provided, further*, That in case the main line shall be so changed or modified as not to reach the Missouri River at or near the forty-second parallel north latitude, it shall be the duty of said company, within a reasonable time after the completion of its road to the Missouri River, to construct a branch road to some point in Monona County, in or at Onawa City; and to aid in the construction of such branch the same amount of lands per mile are hereby granted as for the main line, and the same shall be reserved and certified in the same manner; said lands to be selected from any of the unappropriated lands as hereinbefore described within twenty miles of said main line and branch; and said company shall file with the Secretary of the Interior a map of the location of the said branch: *And provided, further*, That the lands hereby granted to aid in the construction of the connecting branch aforesaid shall not vest in said company nor be encumbered or disposed of except in the following manner: When the governor of the State of Iowa shall certify to the Secretary of the Interior that said company has completed in good running order a section of twenty consecutive miles of the main line of said road west of Nevada, then the secretary shall convey to said company one third, and no more, of the lands granted for said connecting branch. And when said company shall complete an additional section of twenty consecutive miles, and furnish the Secretary of the Interior with proof as aforesaid, then the said secretary may convey to the said company another third of the lands granted for said connecting branch; and when said company shall complete an additional section of twenty miles, making in all sixty miles west of Nevada, the

secretary, upon proof furnished as aforesaid, may convey to the said company the remainder of said lands to aid in the construction of said connecting branch: *Provided, however*, That no lands shall be conveyed to said company on account of said connecting branch road until the governor of the State of Iowa shall certify to the Secretary of the Interior that the same shall have been completed as a first-class railroad. And no land shall be conveyed to said company situate and lying within fifteen miles of the original line of the Mississippi and Missouri railroad, as laid down on a map on file in the general land-office: *Provided, further*, That it shall be the duty of the Secretary of the Interior, and he is hereby required, to reserve a quantity of land embraced in the grant described in this section, sufficient, in the opinion of the governor of Iowa, to secure the construction of a branch railroad from the town of Lyons, in the State of Iowa, so as to connect with the main line in or west of the town of Clinton in said state, until the governor of said state shall certify that said branch railroad is completed according to the requirements of the laws of said state: *Provided, further*, That nothing herein contained shall be so construed as to release said company from its obligation to complete the said main line within the time mentioned in the original grant: *Provided, further*, That nothing in this act shall be construed to interfere with, or in any manner, impair any rights acquired by any railroad company named in the act to which this is an amendment, or the rights of any corporation, person or persons, acquired through any such company; nor shall it be construed to impair any vested right of property, but such rights are hereby reserved and confirmed: *Provided, however*, That no lands shall be conveyed to any company or party whatsoever, under the provisions of this act and the act amended by this act, which have been settled upon and improved in good faith by a bona fide inhabitant, under color of title derived from the United States or from the State of Iowa adverse to the grant made by this act or the act to which this act is an amendment. But each of said companies may select an equal quantity of public lands as described in this act within the distance of twenty miles of the line of each of said roads in lieu of lands thus settled upon and improved by bona fide inhabitants in good faith under color of title as aforesaid.

It will be seen that this act authorized a change in the location of the *unconstructed* portion of its line and adjusted the grant for such modified line "to the same lands and to the same amount of lands per mile" as originally granted for the same road; it also provides for a connecting branch line with a new grant of "the same amount of land per mile, as originally granted, to aid in the construction of its main line."

After the passage of this act the road was constructed to the Missouri River, upon the modified location made thereunder, and as constructed is somewhat longer than the original location west of Cedar Rapids.

In the case of the Cedar Rapids and Missouri River Railroad Company *v.* Herring (110 U. S., 27), the court says:

We are of opinion that the purpose of this enactment was—

1. To relieve the company from the obligation to build that part of its line as found in the land office, between the Mississippi River and Cedar Rapids, because there already existed a road between those points built by another corporation.

2. To require the company to connect the city of Lyons with that corporation's road, so that it would be, as originally intended, the Mississippi terminus of the land-grant road across the State. This required the construction of about two and a half miles of road.

3. To authorize the company to change the location of its road yet to be constructed west of Cedar Rapids for its convenience.

4. If this change left the city of Onawa, in Monona County, off the line of the road, they were to build a branch to that place.

5. To construct a new line connecting its existing road with the road from Davenport on the Mississippi River, to Council Bluffs, on the Missouri River.

6. To adjust the amount of lands, to which the company would be entitled under this new order of things, and to enlarge the source from which selections might be made for the loss of that not found in place.

In this adjustment it becomes necessary in the first instance to determine the amount of lands earned by the construction of the road west of Cedar Rapids.

You present five plans of adjustment, and the results thereof are as follows:

Exhibit A is an adjustment upon the theory that the company takes under the original grant from Cedar Rapids, and that the only additional right given the company under the act of 1864 was to satisfy deficiencies within the grant in place, by resorting to the even numbered sections within the six mile limits and both even and odd within the fifteen mile limits, and if there was still a deficiency to resort to the even and odd sections along the modified line within twenty miles thereof. Under this settlement there have been excess approvals to the company of 57,570.24 acres.

Exhibit B is a statement upon the same theory for that part of the road between Cedar Rapids and Nevada, as exhibit A, but for that portion west of Nevada six sections per mile of constructed road have been allowed. Under this statement, there have been excess approvals of 5,814.20 acres.

Exhibit C is an adjustment upon the theory that the company is entitled to six full sections per mile of constructed road west of Cedar Rapids, and if that theory be correct, there would still be due the company 9,512.43 acres.

Exhibit D shows an adjustment upon the same theory for that part of the road between Cedar Rapids and Nevada as exhibit A, and for the balance, or the modified line under the act of 1864, 171.60 miles, for the same amount of lands per mile as was granted by the act of 1856. If this statement is correct, there has been approved to the company 14,943.32 acres of the land in excess of the quantity it is entitled to.

Exhibit E shows an adjustment upon the theory that the grant should be adjusted as a whole from Cedar Rapids to the eastern terminus, 271.6 miles, and the company is entitled to the same amount of land per mile therefor as was granted by the act of 1856. The amount of lands per mile granted by said act was 3,786.80 acres, and this multiplied by the number of miles of road constructed west of Cedar Rapids gives 1,028,494.88 as the number of acres to which the company is entitled.

You are of the opinion that the latter plan is the correct one, while the company claims six full sections per mile for the entire road constructed, being the plan described in exhibit "C", thus making an absolute grant of quantity for the entire line west of Cedar Rapids.

The act of 1856 did not grant any specific number of sections per mile, it was "every alternate section of land designated by odd-numbers for six sections in width on each side," being a grant "in place," and indemnity was not granted in quantity sufficient to make up any specified amount, but only as to such sections in place as had been disposed of prior to definite location.

This company had, at its own request, been released from building

the road east of Cedar Rapids, the same having been built by another company, and, as held in Cedar Rapids, etc., *Railroad v. Herring* (*supra*), this company earned no lands by such construction, as it was not the purpose of the act of 1864 to give lands on account of the whole line, when only a part had been constructed, but that the quantity of the grant is to be determined by the constructed line.

The effect of this decision was to establish a new terminus at Cedar Rapids for the measure of the grant.

Prior to the passage of the act of 1864, about one hundred miles of road had been constructed west of Cedar Rapids; any *further grant* made by said act must therefore have been made in contemplation of the continued construction to the western boundary of the State as originally intended.

By the act of 1864 the company was permitted to change the unconstructed portion of its line, and for such modified line, it was to be entitled "to the same lands and to the same amount of lands per mile." It was apparant, however, that the necessary quantity of lands in lieu of the odd sections disposed of within six miles could not be satisfied by *alternate* sections within the fifteen mile limits along the *original* line; hence, said act of 1864 provides that—

The Secretary of the Interior shall reserve and cause to be certified and conveyed to said company, from time to time, as the work progresses on the main line, out of the public lands now belonging to the United States . . . within fifteen miles of the original main line an amount of land equal to that originally authorized to be granted to aid in the construction of the said road by the act to which this is an amendment. And if the amount of land granted by the original act, to aid in the construction of said railroad, shall not be found within the limits of the fifteen miles therein prescribed, then such selections may be made along said modified line and connecting branch within twenty miles thereof.

I am unable to find anything in the act of 1864 to sustain the position that, by said act, the grant was changed from one "in place" under the act of 1856, to an absolute grant in quantity.

In the case of Cedar Rapids, &c., *Railroad v. Herring* (*supra*), the court says:

The words "the same lands," which plaintiff's counsel insist mean *all* the lands of the old grant, are intended, we think, to show that the lands are to be taken along the line of the old survey; that the odd sections on each side of that old line which became vested in the State when it was established should be a part of the new grant to this company, and that the deficiencies should in like manner be made up by sections within the fifteen mile limit of that line. This is confirmed by that part of the next sentence of this section, which directs the Secretary of the Interior, when the new line shall have been established, to reserve all the lands without regard to alternate sections within that limit, so far as may be necessary to satisfy these selections, for the loss of odd sections previously disposed of.

Under said decision, any lands along the "old survey," except those "in place" west of Cedar Rapids, must be taken as indemnity, and "for the loss of odd sections previously disposed of." Where was said loss to occur? Not along the new location, for there were no place

limits provided for along such line. It could only be along the original location, or, as it is called, the "old survey."

In the case of the Iowa Railroad Land Company (9 L. D., 370), it was said that—

The quantity of land to which the company is entitled under the grant of 1864 is to be determined by the length of the road actually constructed by it, and not by the length of the road as originally located under the act of 1856;

i. e., that the company was not to receive any lands on account of any portion of the road not constructed by it. In said case it was also held that lands lying within the indemnity limits of the old line *east* of Cedar Rapids may be selected in lieu of lands lost "in place" *west* of said city.

It is plain to my mind, therefore, that the original location is the measure of the grant for the main line of said road, and that the only purpose of the act of 1864, so far as said main line is concerned, was to authorize a change in the line, secure the building of a connection with Lyons City, and "to enlarge the source from which selections might be made for the loss of that not found in place," along the original line, i. e., to fully satisfy the amount granted or intended to be granted for the road west of Cedar Rapids by the act of 1856.

It would therefore seem that the plan set forth in exhibit "A" is in accord with my views on the subject, in so far as the extent of the grant is concerned.

Against the charges made on account of the grant in your adjustments, the company claims and insists that there should be deducted—

First, "lands erroneously or mistakenly certified, namely 109,756.85 acres, known as the Des Moines River lands."

If, in the adjustments heretofore submitted, this grant is charged with any lands erroneously certified within the limits of the Des Moines River grant, the same should be deducted, as such lands are not properly chargeable to this grant.

Second, "There should be deducted from the area of lands charged against the grant 6,358.71 acres of swamp lands in Carroll county."

In support thereof it is insisted that:

In 1853, Iowa, by an act of the General Assembly, granted to each county all such lands lying within its limits. Carroll county sold and conveyed, or agreed to convey to the American Emigrant Company all its swamp lands. In an action brought in the district court of that county in September, 1853, against the Iowa Railroad Land Company, assignee and successor in interest of the railroad companies, the county sought to recover the possession of and to quiet the title to several thousand acres of land which had been certified to the railroad company. In this action it was claimed that the certification of the lands to or for the railroad was a cloud upon the title of the county. The American Emigrant Company intervened as a party, claiming that all the right, title and interest of the county in and to the said lands had been conveyed to it. The court held that of the lands in controversy 6,358.71 acres were swamp lands in fact and passed to the State under the act of September 28, 1850; that the American Emigrant Company was the grantee of the State and of the county; that the certificates issued to the State for the benefit of the railroad

company were a cloud upon the Emigrant Company's title. December 16, 1878, a decree was entered "that the title to all of said lands and to each particular tract and parcel thereof be quieted and confirmed in the intervenor, the American Emigrant Company, and that all right and apparent title and interest of the defendant, the Iowa Railroad Land Company, in and to the same, or any tract or parcel thereof, be and the same is hereby extinguished, canceled and set aside, and the said defendant is hereby barred and estopped from having or asserting any title to or interest therein, to any part or parcel thereof."

A list of these lands has been filed by the company.

Perhaps the government is not bound by this decision. But it is best that you will investigate this matter, and if it is found that these lands are swamp and overflowed the deduction should be allowed.

Third: "There should also be deducted from the area of lands chargeable against the grant 2,569.75 acres, erroneously certified, as set forth in 'Exhibit B' herewith, they having been previously disposed of by the United States."

The certifications, on account of the grant, being outstanding, must remain a charge to the grant, but should the company reconvey these lands to the United States, and thus remove the cloud upon the previous titles given to other parties, the deduction should be allowed.

Fourth: "There should also be deducted from the area of lands chargeable against the grant the 76,916.75 acres sold by the Iowa Central Air Line Railroad Company out of the grant of 1856, prior to resumption by the State of Iowa, and to the enactment of the grant of June 7, 1864."

These lands were certified on account of the grant made by the act of 1856, and this claim for deduction seems to rest upon the ground that the company receiving the lands did not earn the same, and that the present company never received any benefit from such certification, and therefore should not be charged with the same.

Having held that the purpose of the act of 1864 was merely to enlarge the source from which the amount of lands granted by the act of 1856 might be satisfied, it follows that indemnity can not be allowed for lands certified under the act of 1856 and prior to the passage of the act of 1864, and this claim for deduction must be denied.

This disposes of the claims for deduction made on behalf of the company, and it but remains to consider the lists, submitted by you, of lands held to have been heretofore erroneously certified on account of the grant.

These lists are described in your letter as follows:

List A 1 embraces lands covered by entries which were either made prior to and were extant upon the records at the time the company's right attached, or were authorized or confirmed by this office or Department.

List B 1 embraces lands which have been approved to the State as swamp.

List C 1 embraces lands within the six mile limits, which were covered by unexpired pre-emption filings at the date of the definite location of the road.

List D 1 embraces lands lying east of the terminal at Cedar Rapids.

In the answer made on behalf of the company, to the rule issued by you to show cause why the lands embraced in these lists should not be reconveyed to the United States as contemplated by the act of March 3, 1887 (24 Stats., 556), many general questions as to the rights of the United States under said act are discussed, but these questions are fully answered in the case of Winona and St. Peter Railroad Company (9 L. D., 649), and the position there taken is adhered to.

As to the lands in list "A 1" the company disclaims any interest in a large part thereof.

Those are, perhaps, the same lands for which a deduction is claimed by the company, and, as it lays no claim thereto, it should convey the lands to the United States and thus remove the cloud from the title of others, and in this way facilitate the adjustment of its grant.

Should such conveyances be made, the rule, to this extent, might be dissolved, otherwise demand should be made for reconveyance as in other cases heretofore directed.

In this connection I might add, as stated in the matter of the adjustment of the grant for the St. Louis, Iron Mountain and Southern Railroad Company (13 L. D., 559),

that any tracts covered by entries upon which patents have also issued, should be eliminated from the demand. In such cases, i. e., where two patents are outstanding, the parties should be left to their remedies before the courts.

As to the lands in list "B 1," they have all been twice approved to the State; first, as "swamp lands," and, later, on account of the railroad grant.

For the reason above given, I am of the opinion that, as the government can have no interest in the lands, and is under no obligation to an individual, that as to those the rule should be dissolved.

As to the lands embraced in list "C 1," viz: those covered by pre-emption filings, I have to direct that the list be amended so as to include all lands shown to have been covered by uncanceled pre-emption filings at the date of definite location, which I note is erroneously given in your office letter as October "13," 1856, instead of October 31, 1856.

See recent decision of this Department in the case of Fish v. Northern Pacific R. R. Co., on review, (23 L. D.,).

As to the lands in list "D 1," claimed to have been erroneously certified, for the reason that they lie east of the terminal at Cedar Rapids, I do not think that such fact is sufficient upon which to base a suit for the recovery of the land.

In the case of the Iowa Railroad Land Company (9 L. D., 370), it was held that lands might be selected within the indemnity limits east of Cedar Rapids, in lieu of lands lost in place west of that city.

I am of opinion that lands might be taken anywhere "along the line of old survey" to satisfy the grant, which, as before stated, is to be measured by the odd sections in place west of Cedar Rapids and within the limits of the original location.

While these lands may have been improperly certified as granted lands, yet, as they are subject to the grant as indemnity under the act of 1864, if found to be needed on the adjustment of the grant, no good purpose could be served by a suit, which must result in a judgment for the company, (*Kansas City, Lawrence and Southern Kansas Railroad Company v. The Attorney General*, 118 U. S., 682), but they should be charged to the company as so much indemnity for other losses.

It appears from this list that a large number of the tracts had been filed for and entered prior to the certifications on account of the railroad grant, and the same should be examined, with a view of determining the effect of such filings and entries upon the certifications made, and such tracts as have a status similar to those heretofore referred to, and for the reconveyance of which demand has been directed, should be included in such demand.

In this connection I note that the company alleges that it has sold many, if not all, of the lands shown to have been erroneously certified.

Under the act of March 2, 1896 (Public No. 35), these sales, if shown to have been bona fide, are confirmed, and the action against the company would necessarily be for the value of the land.

In resubmitting the case you will consider the showing in this particular in recommending further action.

This disposes of all questions necessary to a complete adjustment of this grant, and the papers are herewith returned.

HOMESTEAD CONTEST—SETTLEMENT RIGHTS—SECOND HOMESTEAD ENTRY.

NORTH PERRY TOWNSITE ET AL. *v.* MALONE.

In the case of an attack upon a homestead entry, based on alleged priority of settlement, it is incumbent upon the contestant to show that his acts of settlement were followed by the establishment of residence on the land to the exclusion of a home elsewhere.

When it appears that an entry fails because of the entryman's negligence in the matter of ascertaining prior adverse rights, he will not be allowed to make a second entry, if at the date of his application for such privilege there is a qualified adverse claimant for the land applied for.

The right to make a second entry will not be accorded to one who relinquishes his prior entry on account of a money consideration or its equivalent.

The sale by a settler of part of the land settled upon disqualifies him as an applicant for the right of entry under the homestead law.

A settlement right will not be held to relate back to the alleged initial act, if such act is not followed by substantial and bona fide acts of settlement and improvement.

A settlement made ostensibly for the purpose of securing a homestead, but in fact with a view to speculation in town lots, is lacking in good faith, and should not be accepted as the basis of a homestead entry.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 9, 1896. (G. C. R.)

This case involves the SW. $\frac{1}{4}$ of Sec. 14, T. 21 N., R. 1 W., Perry, Oklahoma, upon which John J. Malone made homestead entry at 3:59 o'clock P. M., September 16, 1893.

It appears that a hearing was ordered by your office letter "G" of March 12, 1894, upon contests filed against the entry by the townsite settlers of North Perry, by D. C. French, William R. West, William Mackel, and H. C. Schilling, alleging prior settlement, etc.

Upon that hearing your office affirmed the action of the register and receiver, dismissing all the contests and holding Malone's entry intact.

From that judgment the townsite settlers, West, Mackel and Schilling have, respectively, appealed. French appears to have made default at the hearing.

The land is in that part of Oklahoma known as the Cherokee Outlet, and was opened to settlement and entry at noon on September 16, 1893.

The land in controversy lies adjacent to and immediately north of the east half of the original townsite of Perry, which covers three hundred and twenty acres of land, being the NE. $\frac{1}{4}$ of Sec. 22 and the NW. $\frac{1}{4}$ of Sec. 23, of said township. This townsite was surveyed prior to the opening into blocks, lots, streets, etc.

The Atchison, Topeka and Santa Fe Railroad passes through the central part of the town of Perry, and it was over this road that the major part of the settlers reached the town on the day of opening, coming from the south boundary of the strip. The first train that arrived from the south was crowded with intending settlers, most of whom were seeking town lots. It was upon this train that Malone, West, Mackel, and many of the townsite contestants and settlers came.

Frank Corrigan, a witness for townsite claimants and clerk to the provisional board for North Perry, testified that he came in on the first train, which arrived in Perry about 12:35 P. M.; that he was among the very first to get off the train, having stood on the steps of the coach; that on leaving the train he went by the land office, where he stopped two or three seconds, and then went directly north to Sec. 15, just one and a half blocks from the land in controversy, reaching that place in three minutes from leaving train; that he staid in that locality all the afternoon; that on getting off the train it appeared to him that all the town lots were taken, not less than two or three thousand persons being scattered over the townsite; that a large number of people reached the land in controversy about the same time he arrived on Sec. 15; that he could see nearly all over the land from his position; that many people from the train "passed right on like a wave up the hill;" that he saw people east of the railroad (on land) immediately after he stopped; that four or five hundred people settled on the land in controversy that afternoon; when night came many of them went to the

creek on the land to get out of the heat and dust and to get water, but did not abandon their lots, returning to them; that the settlers on the lots on the land in controversy, and also on lots in Sec. 15, held a public meeting on the evening of the 16th of September (day of opening), looking to organization of the town of North Perry; that the meeting was adjourned until Monday evening following, when officers were elected; that the firm of Jacobs and Lindsey, surveyors and civil engineers, were employed to survey the land in lots; that the land was laid out into lots and blocks, the work commencing September 21, 1893, and ending October 7, thereafter; that one hundred and ninety-six certificates for lots were issued by the provisional board of trustees, and the same were paid for; thirty-four certificates were issued and partly paid for, and the remainder in possession of board; that the sum of eight hundred dollars (\$800) had been paid for lots; and out of this sum two hundred and fifty dollars (\$250) had been paid for their survey; that at date of hearing there were one hundred and ninety people living on the land; that the estimate was carefully made by going over the land lot by lot; that the improvements on the land were also carefully estimated by witness and one Bonty, and amounted to \$18,000, including some live stock.

Lindsey also testified that he assisted in the survey; that while this work was being done "a great many stakes were changed so as to be on blocks and not on the streets."

Nettie Weld also testified that she came in on first train, went at once to the land, with her mother; that she staked a lot and slept there that night; that there were two hundred people on the land that evening; that her mother has a house on the land; and has lived there since they first settled.

Isam Woolgridge testifies that he came in on first train about 12:35 P. M.; that he went at once to the land, he then saw people on west side of railroad, digging holes and driving stakes; that there were from three to five hundred people on the land that afternoon; that he still resides on the land; has a house, well, storm cellar, etc.

The above is substantially the testimony in behalf of the townsite claimants.

William Mackel, who claims the right of entry by reason of his alleged prior settlement, testified that he, too, came in on first train, which stopped "directly south of the boundary line in question; that he went at once to the land; that he "did not know of any one else there;" that he ran to the land and staked a homestead, placing his stake "probably twenty-five yards north of south line," and same distance from west line; three-quarters of land level; that there was no townsite settlement on land when he got there; did not then see Malone, Schilling, French or West; no one claimed the land as a townsite; that after he reached the land, "saw some parties staking for

lots, expecting it to be a townsite;" this was fifteen or twenty minutes after he reached the land; staid on land that night, and next day went to Orlando after team; returned on the 17th; went back again to Osage country, where he was sick three weeks, returned to land October 25; that the land was then fenced up with lots, so he could not find a place to put a house without having a quarrel; went back to Osage country, remained there on account of his son's sickness until December 15, 1893, when he returned to land; then built a house, fourteen by sixteen feet, and has lived there since; impossible to cultivate the land, since same was taken for town lots; many people could not get town lots and came at once to the land; before train stopped there were two or three hundred people on townsite of Perry, and on night of 16th (day of opening) there were town lot claimants on land; there were no people settled on the land "in my view until I got there."

The evidence shows that Mackel kept up his farm in the Osage country, where his son staid; he only moved part of his household goods. He could not say how much he staid on the land, and it is very questionable that his real home was at any time on the land. He fails entirely, except by mere negative testimony (as "there was no one in my view"), to show that he was in fact the first settler. His grounds of error relate, principally, to the findings in Malone's behalf and in failing to grant a new hearing upon his showing as to Malone's conduct. In view of what follows, it is unnecessary to discuss these grounds. Suffice it to say, that Mackel has failed to show that he was the prior bona fide settler on the land; even if he had established his averments in this respect, he failed to show that he made the land his real home. His contest is therefore dismissed.

Henry C. Schilling. It is unnecessary to set forth the voluminous testimony respecting Schilling's alleged prior settlement on the land. His peculiar methods of reaching the land in advance of the first train, by the aid of his old friend Summerville, superintendent of bridge construction, were of questionable regularity. He swears that he came in on a hand car, and reached the land before it was possible for those on the train to get there; that he saw no other person when he got there.

His own witness (S. B. Strahn) admitted that Schilling endeavored to get him (Strahn) to furnish Schilling with \$100 on consideration that a man would be furnished to hold a claim for witness until the latter could reach the land.

But, independently of these circumstances showing questionable conduct, Schilling is not a qualified entryman, and therefore his alleged prior settlement, even if established at the hearing, could avail him nothing.

It was shown that on September 22, 1891, Schilling made homestead entry for the NW. $\frac{1}{4}$ of Sec. 15, Tp. 14 N., R. 4 E., Guthrie land district;

that contests were filed against said entry, as follows: October 6, 1891, by one Berner; by one Dauron, October 22, 1891; and by one Adams, April —, 1892, all alleging prior settlement, and that Schilling did not go upon or settle on the land prior to his making entry.

Schilling relinquished said entry January 16, 1892, prior to the date fixed for the hearing. Sundry affidavits were introduced, stating that Dauron, one of the contestants, settled on the land on the afternoon of the day the land was opened to settlement and entry (April 22, 1891), and that in the judgment of affiants, Schilling's right there was inferior to that of contestant, and that he could not have successfully defended against said contest.

Schilling testified that he relinquished to avoid litigation and settle a contest; that he found out others had settled before he made entry. Being asked on cross examination what he received for the relinquishment, he answered: "I forget just now what it was in amount;" that he received thirty or forty dollars.

It does not appear that he has ever made application to make a second entry. When he made entry of this land, he, as an intelligent man, knew that another might have settled upon it; that among the many who made the race hundreds would in all probability fail to find unoccupied land; but he appears to have taken the risk, and made the entry without first going to and examining the land.

The general law prohibits one and the same person from making two homestead entries. While, under certain circumstances, a second homestead entry will be allowed upon proper showing, yet when it appears, as in this case, that the entry failed because of the entryman's laches or neglect in visiting the land, where he might have learned of a prior settler's rights thereto, he will not be allowed to make a second entry, when at date of his application therefor there is an adverse claimant for the desired tract qualified to make entry.

Again, Schilling received a consideration for his relinquishment—as to how much, his memory was strangely at fault; he thinks it was thirty or forty dollars. His evidence on this point is not satisfactory. If the sale of his relinquishment was induced solely by a money consideration, or its equivalent, either promised or received, it is plain he should not be allowed to make a second entry. His failure of memory as to what he did receive, the correct answer to which would have been the principal test, is hardly in accordance with the ability he exhibited in delineating many minute circumstances necessary to his cause, and it is doubtful on this account that he would be allowed the right of making a second entry, even in the absence of an adverse claim.

It is clear that Schilling is not a qualified entryman, and, therefore, his settlement, even if prior to all others (which is not admitted), can not avail him. His contest is therefore dismissed.

William R. West. West testified that he also came in on the first

train; and went at once to the land; that he did not see any one "on that part of the land;" that his family has been on land since September 18, 1893, and lived in a tent; admits he saw a young man (Gage) on the land just after he stuck his flag; admits having sold lots to the amount of ten dollars to one Dr. Pierce, and that his wife sold lots to a Bohemian.

There is no evidence showing that West reached the land in advance of others. Besides, he appears to have disqualified himself even if he were the first settler, by selling a portion of the lands. His contest is dismissed.

John J. Malone. As before seen, your office affirmed the action of the register and receiver in allowing Malone's entry to remain intact. All appellants allege error in this holding.

Malone testifies that he came in on the tender of the first train; that he jumped off the train before it hardly came to a stop; that he then went east, probably one thousand feet; then went over the railroad track and on to the land; carried with him a stake, two feet long, with his name written thereon; stuck his stake and pushed it down, and "skipped for land office on the dead run;" that that was all of the settlement he then performed. The stake had no flag, only his name written on it; that when he reached the land he saw two persons, French and one Walker; that as soon as he came to the land office "a man handed me my filing papers out of a window and a set of blanks; I got in line and I handed my papers to a man who came up there to make them out for me;" that he staid in line until he handed his papers to the register; that he had an interest in two tents which were put up in the town of Perry, but did not think it necessary to put up one on land until he built a house; that he started to build a house on land the last of February or first of March, 1894, "could not say positive;" house built by March 5, since which time has lived there; stay down town nights when can't get home; was in the saloon business in Perry; performed no acts of settlement from time he stuck his stake till he commenced his house.

It appears from papers in the case that John J. Malone, the entryman, died in the Insane Asylum, at Jacksonville, Illinois, January 27, 1895; that his father, John Malone, has qualified as his administrator, and seeks to be subrogated to all the rights of the deceased with respect to the land.

Certain phases of the testimony, disclosing glaring discrepancies in the testimony of the entryman, will not now be discussed.

A note on the homestead application, made by J. E. Malone, the register (a brother of the entryman), shows that the entry was made at 3:59 o'clock P. M., on the day of the opening (September 16).

Admitting that Malone stuck the stake, as represented, the act was not followed within a reasonable time by either improvements or residence. He waited nearly six months before he did anything whatever.

If he depended upon his settlement rights to secure title to the land, the initial act (sticking of the stake) should have been followed within a reasonable time by more conspicuous evidences of good faith. If he depended upon his entry, it should have been admitted to record before others had, in good faith, settled on the land. Before his entry was made many people were on the land claiming and staking the same for townsite purposes. It results that he was limited in his rights to his initial act, which failing to be followed within a reasonable time by more substantial and bona fide acts of settlement and improvements, his rights, if any, became subordinate to the townsite settlers.

The people who came into Perry on the day of the opening knew there would be a great rush for town lots; they had reasons to suspect that the lots then surveyed would be inadequate to the demands of the public, and that it would be necessary to obtain them from the lands immediately adjoining the townsite; such had been the history of Guthrie, the neighboring town, from which many of the settlers came; such was also the history of many other Oklahoma towns; and such is the history of Perry.

It is difficult to believe that the anxiety of the homestead claimants to secure the land in controversy was induced by a desire to use the land solely for agricultural purposes; it is more reasonable to conclude from all the circumstances that the primary purpose of the haste was to secure the land in anticipation of the inevitable and immediate demands of the same for town lots. As a matter of fact, all, or nearly all, the town lots of Perry were taken in a few minutes after the arrival of the first train; besides, many had preceded the train from nearer points on swift horses, and were on the lots when the train arrived. The result was that the supply of lots was vastly less than the demand, and the people in large numbers rushed to the adjoining tracts and began staking and claiming lots.

This state of facts was anticipated by every intelligent person; and if the land in controversy was sought for the purpose of preparing for this demand, and settlements were made thereon ostensibly for homestead purposes, but really for speculation in town lots, then the element of good faith would be lacking; in such case the entry of one, even if preceded by a prior settlement, could not be allowed to stand. *Guthrie v. Paine*, 13 L. D., 562.

It appears that the townsite of Perry has been extended, and that the land in controversy is now included in its corporate limits.

For reasons above given, Malone's entry will be canceled, and the corporate authorities of the town of Perry will be advised that upon a proper showing and application, the land may be entered for the several use and benefit of the inhabitants thereof.

The decision appealed from is accordingly reversed, in so far as the same holds the entry of Malone intact.

WAGON ROAD GRANT—DIAGRAM OF LIMITS.

HARDMAN *v.* THE DALLES MILITARY WAGON ROAD CO.

A diagram showing the limits of a wagon road grant, that has stood unquestioned for a long term of years, and under which rights have vested, will not be disturbed.

Secretary Smith to the Commissioner of the General Land Office, July 9, 1896. (C. W. P.)

The grantees of Joseph H. Hardman have appealed from your office decision of December 18, 1894, holding the homestead entry (No. 3516, LaGrande) of said Hardman of the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 5, the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 7, and the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 8, T. 14 S., R. 34 E., Burns land district, Oregon, for cancellation, for conflict with the grant to the Dalles Military Wagon Road Company.

In their appeal to the Department said grantees of Hardman allege that this land is within the limits of the grant to said company; that it appears from an inspection of the official map, or diagram, filed in the local office, township 14 south, range 34 east, lies next and directly south of township 13 south, range 34 east, and it appears from the official map published by the Department of the Interior, showing the location of the various townships in the State, as surveyed in the field, that said township 14 S., range 34 E., as surveyed and approved by the Department, does not extend as far east as the township next north, by more than one-half mile, that is to say, that the difference in the range of these townships is one-half mile; township 14 S., range 34 E., being one-half mile west of the extended east line of township 13 S., range 34 E.

It appears from your office letter of June 5, 1896, that "an examination of the records of your office shows that there is such a 'jog' between the said townships 13 and 14, which is not accounted for on the official diagram of said company's grant, for the reason that the said diagram was made long before these particular townships were surveyed;" and that "a re-adjustment of the limits of the grant to conform with this 'jog' would probably throw both of the said tracts outside the primary limits of the grant," but that "following the rule that has always obtained in this (your) office, this re-adjustment has never been made, so that according to the official diagram the said tracts are within the primary limits of the grant."

In the case of McLean *v.* Union Pacific R. R. Co. (22 L. D., 227), it was held upon the authority of the case of C. W. Aldrich (13 L. D., 572), that a diagram showing the limits of the railroad, prepared concurrently with the filing of the map of definite location, and upon which the withdrawal is ordered, will not be disturbed after such withdrawal has stood unquestioned for a long term of years and rights have vested thereunder.

This ruling will be adhered to, and your office decision is affirmed.

MINING CLAIM—PLACER LOCATION—APPLICATION—JUDICIAL AWARD.

AURORA LODGE v. BULGER HILL AND NUGGET GULCH PLACER.

The discovery and location of a placer mining claim establishes in the owner the right to the possession of the superficial area within its boundaries for all purposes connected with and incident to the use and operation of the same as a placer mining claim; such location, however, does not operate to give title or right of possession to veins or lodes within its limits, or preclude the right of discovery and location thereof by others.

A placer applicant will not be allowed to amend his application so as to embrace therein veins or lodes discovered by others after the location of the placer claim, but prior to the application therefor, and not included in said application as originally submitted.

A judicial award of the right of possession to an adverse placer claimant as against a lode applicant does not preclude departmental inquiry on the allegation of the lode claimant that said placer claim, as subsequently applied for, embraces known lodes or veins, where it appears that such question was not in issue before the court, nor determined by its judgment; but if such allegation of the lode claimant is sustained, on such inquiry, he will be limited to the land necessary to the occupation, use, operation and enjoyment of the lode thus shown to exist within said placer claim.

Secretary Smith to the Commissioner of the General Land Office, July 13, 1896.
(A. B. P.)

This is an appeal by William M. Bennett, who in his own right, and as representative of the estate of one M. H. Gibbon, deceased, claims to be the owner of the Aurora lode mining claim, from two decisions of your office, under dates, respectively, of January 28, 1896, and April 1, 1896, the first dismissing his protest against the application of the Silver Bow Basin Mining Company for patent to the Bulger Hill and Nugget Gulch placer claims based upon mineral entry No. 34 and the papers filed in support thereof, in the Harris mining district, Sitka, Alaska, and the second, denying his motion for review of said first decision.

The facts shown by the record are substantially as follows:

The Bulger Hill and Nugget Gulch placer claims were located March 19, and April 6, 1881, by the original owners thereof.

The Aurora lode claim was located April 9, 1881, by the present claimant Bennett and two others then interested with him in the claim.

The Silver Bow Basin Mining Company is now the owner of the Bulger Hill and Nugget Gulch placer claims, and the said Bennett and the estate of said Gibbon, who was also one of the original locators, are the owners of whatever rights exist under the location of the Aurora lode claim and the proceedings subsequently had thereunder.

By act of Congress approved May 17, 1884, the laws of the United States relating to mining claims were extended throughout the District of Alaska. (23 Stat., 24.)

A conflict, to the extent of 6.52 acres of surface ground, between the Placer and Lode claims furnishes the source of the present controversy.

In November, 1887, Bennett, for himself and his co-claimant, filed in the local office an application for patent for the said Aurora lode claim, which had been designated and was known on the files and records of the office as lot No. 41; and on January 25, 1888, one George Harkrader, then owner of the said placer claims, though he was not one of the original locators thereof, filed an adverse claim under section 2326 of the Revised Statutes. It does not affirmatively appear that this adverse claim was filed within the time allowed by law, but as no question has been raised in the record relative thereto it will be presumed to have been properly filed.

Upon his said adverse claim suit was instituted by Harkrader, in the United States district court for the district of Alaska, within the time allowed by the statute for such action to be taken by an adverse claimant. This suit came on for trial at the November term, 1888, of the said court, and resulted in verdict and judgment in favor of the plaintiff for the possession of the "placer mining claims" described in the complaint filed.

A writ of error was obtained to the judgment from the supreme court by Bennett, and by decision of that court, rendered May 27, 1895, the judgment of the court below was affirmed (158 U. S., 441).

In the meantime, to wit, on March 14, 1891, the Silver Bow Basin Mining Company, as successor to the rights of Harkrader, filed in the local office a certified copy of the judgment roll of the lower court, accompanied by an application for patent for the 6.52 acres, in conflict as aforesaid, as a placer mining claim, and was allowed to make mineral entry No. 34 covering the same. Why the application and entry were restricted to the 6.52 acres, and were not made for the whole area of the placer claims, does not appear. The said application and entry papers were forwarded to your office, but in view of the pendency of said suit in the supreme court on writ of error, as stated, further action in the premises was for the time suspended.

After the said decision of the supreme court had been rendered, to wit, on August 16, 1895, the Aurora lode claimant filed in your office his protest against the issuance of patent to the placer claim upon said mineral entry No. 34.

This protest, referring to the surface conflict as hereinbefore set forth, between the lode and placer claims, as originally located, alleges in substance, that there exists within the limits of said surface conflict a lode or vein, known as the Aurora lode claim, which was discovered by protestant and said M. H. Gibbon, and was, by them, on the 9th day of April, 1881, duly located and properly surveyed, marked and designated on the ground, by monuments, stakes and otherwise, in all respects in accordance with the local laws, customs, and regulations of the Harris mining district, and that notice of said location was duly filed and recorded in the proper records; that ever since its location,

the protestant had been in the actual, open and notorious possession of said lode claim, and had, in the year 1893, erected thereon a Huntington mill and other valuable improvements, and had extracted from the mine large quantities of valuable ores and milled the same on the premises; that he had continuously worked and operated the said mine since the time of the location thereof, had expended in developing and improving the same more than \$50,000.00, had driven during the time over three hundred feet of tunnels, had operated the mine at large profit, and had realized in the operation thereof more than \$75,000; that said Aurora lode claim was known by name and general reputation throughout the Harris mining district; and in the vicinity of its location, and especially to the original locators and to the present owners of the said placer claims, was known to contain rock in place and well defined veins or lodes of gold-bearing quartz; that said improvements were erected and are situated within the limits of the said overlap or surface conflict; that at the date of the placer locations the locators thereof knew, and at the date of the said application for patent the present owner thereof knew, of the existence of said Aurora lode mining claim, and none of them ever at any time asserted any claim to the lodes, veins or ledges, by reason of the placer locations and the proceedings thereunder, or otherwise, but always recognized the protestant's right thereto.

The protest is accompanied by the separate affidavits of said Bennett and six other persons, which fully sustain the allegations thereof. Two of these affiants were original locators of the placer claims, and they aver, among other things, that at the time of said locations the ground was covered with snow, the surface being wholly invisible; that three days after said locations were completed Bennett and others were seen by affiants upon the ground locating the Aurora lode claim; that after the snow disappeared affiants themselves discovered that there was in fact quartz and rock in place within the line of the Aurora lode claim as located; that said Bennett and others went immediately into possession of the Aurora lode claim and had been continuously in possession, improving and operating the same, ever since; and that the original locators of the placer claims never asserted any claim or right thereto in any respect whatever. One of said two affiants further states that he was a witness in the said suit in the district court and that at the trial thereof it was not claimed by the plaintiff, Harkrader, that he had any right or claim whatever to the quartz or rock in place within the limits of said Aurora lode claim.

Three of said affiants, after severally averring upon their personal knowledge the existence of rock in place, ledges and lodes of mineral bearing ore within the Aurora lode claim, further say, in substance, that they were of the trial jurors in the said suit in the district court and that during the trial of said suit no evidence was submitted to the jury tending to raise a question as to whether the Aurora lode claim con-

tained rock in place and valuable lodes, and that no such question was passed upon by the jury; there was no contention before the jury as to the right of the Aurora lode claimant to the rock in place, ledges and veins within the lines of said claim as originally located, it being conceded by all parties and known as a fact to the jurors that the defendant, Bennett, was the owner of and was operating, with large improvements thereon, his said Aurora lode mining claim, and that the only question argued before and submitted to the jury for their determination was as to the validity of the Bulger Hill and Nugget Gulch placer claims, and this was the only question passed upon by the jury.

In view of these things Bennett asked for a hearing in the case, in order that he might have opportunity to establish by proper evidence, in the regular way, the facts set forth in his protest, and especially the material fact of the *known existence* of the Aurora lode mining claim within the limits of the placer locations, at the time of the said application for patent by the placer claimant, March 14, 1891.

On consideration of the record thus presented, your office, on January 28, 1896, held, in effect, that the judgment of the United States district court is conclusive of the questions raised by said protest, and that by virtue of that judgment and its affirmance by the supreme court, as stated, the placer claimant is entitled to patent for the ground in controversy, and it was thereupon ordered that the said protest be dismissed.

On February 18, 1896, counsel for Bennett filed a motion for review of said decision, assigning various errors, which it is not deemed necessary here to specifically set forth.

Upon consideration of the motion for review, your office on April 1, 1896, denied the same, holding in substance and effect:

(1) That the original placer claimants, by virtue of their prior location were entitled, not only to the possession of their entire claim as located, but also to all the veins and lodes included within the boundaries thereof; and that their right to such veins or lodes within said boundaries could not be affected by the location of a lode claim within said boundaries, made subsequently to the placer location;

(2) That the present placer claimant therefore should be allowed to file an amended application for patent, embracing the lode claim in controversy; or if it should be charged by said claimant that no such vein or lode exists within the boundaries of the placer claim, a hearing should then be ordered to determine that question; and

(3) That at all events the rights of the lode claimant in this case were settled by the judgment of the court adversely to him, and there was, therefore, no error in the decision complained of, dismissing his protest.

It is not deemed necessary to set forth in detail the numerous specifications of error contained in the appeal by Bennett which brings the case here. Suffice it to say that they deny in toto the correctness of the several rulings of your office stated in substance as aforesaid.

These rulings will be considered in the order in which they have been already stated; and

(1) As to the effect of the placer locations:

In your said decision of April 1, 1896, you hold in substance that such a location gives to the locators or claimants under it a right to all veins or lodes included within its boundaries, though not claimed as such, or even discovered at the time; and that such right in the placer claimant can not be affected by any subsequent discovery or location by another, of a lode claim within the boundaries of the placer claim. In other words, a placer claim, once lawfully located distinctively as such, gives to the owner thereof the right to appropriate to his own use and benefit any lodes or veins of mineral bearing ores, which may thereafter be discovered and located by another within the limits of his claim; and all he will have to do in order to procure title to such subsequently discovered lodes or veins, in the discovery and location of which he took no part, would be to include them in his application for patent when filed, and pay the additional price per acre therefor as required by law. This I understand to be the logical effect of your said decision.

It does not appear to me that such is the law. No case has been cited in which the precise question has been decided, nor am I aware of any.

Under the mining laws of the United States property rights in veins or lodes containing mineral bearing ores are acquired in the first instance by discovery and location. It has frequently been held by the courts that a mining claim once perfected under the law by discovery and location, becomes property in the highest sense of that term (*Sullivan v. Iron Silver Mining Company*, 143 U. S., 431-434; *Belk v. Meagher*, 104 U. S., 279-283).

That there can be no valid location of a mining claim without discovery to support it will hardly be questioned. And a location on account of the discovery of a vein or lode can only be made by the discoverer, or one claiming under him. If the title to the discovery falls, so must the location which rests upon it. But if the discoverer has himself perfected a valid location on account of his discovery, no one else can have the benefit of that location, unless he should abandon his prior right (*Gwillim v. Donnellan*, 115 U. S., 45-50).

It is also to be remembered that the two classes of mineral deposits, namely, vein or lode deposits, and placer deposits, may exist in the same superficial area, and that they may be discovered, located and claimed by the same, or different persons, and patented accordingly. This is not only in accord with the plain import of the statute (Section 2333 R. S.), but is also well settled by both judicial and departmental decisions (*Reynolds v. Iron Silver Mining Company*, 116 U. S., 687-697; *South Star Lode*, 20 L. D., 204). The said two classes of mineral deposits are entirely separate and distinct from, and exist wholly independ-

ently of each other. The mining statutes appear to be founded upon the well-known and universally recognized difference in their character. The vein or lode of mineral bearing quartz is more valuable than the surface and placer deposits, and Congress has accordingly fixed the price per acre, as represented by the superficial area, of the former at \$5.00 per acre, and of the latter but \$2.50 per acre. This was stated in substance by the Supreme Court in the case of *Reynolds v. Iron Silver Mining Company*, just cited, wherein the court also said it had been shown by experience that both these classes of mineral deposits might be found in the same superficial area, and that section 2333 of the Revised Statutes makes provision for such a case. That section is as follows:

Where the same person, association, or corporation is in possession of a placer-claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer-claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer-claim, or any placer claim not embracing any vein or lode-claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer-claim, an application for a patent for such placer-claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer-claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer-claim is not known, a patent for the placer-claim shall convey all valuable mineral and other deposits within the boundaries thereof.

This section, as was stated by the supreme court in the case of *Noyes v. Mantle*, 127 U. S., 348-352, and in other cases both prior and subsequent thereto, makes provision for three classes, as follows:

1. When one applies for a placer patent, who is at the time in the possession of a vein or lode included within the placer boundaries, he must state the fact, and then, upon payment of \$5.00 per acre for such vein or lode claim and twenty-five feet of surface on each side thereof, and \$2.50 per acre for the placer claim, a patent will issue to him covering both the placer claim and the lode.

2. Where a vein or lode is known to exist at the time within the boundaries of the placer claim, an application for patent for the latter which does not include an application for the vein or lode will be construed as a conclusive declaration that the placer claimant has no right of possession to the vein or lode.

3. Where the existence of a vein or lode in a placer claim is not known at the time of the application for patent, title will be conveyed by such patent to all veins or lodes within its boundaries.

The present case, if the allegations of the protest filed by Bennett are true, would seem to come within the second of the three classes named, if within any of them. Certainly, it does not belong to either

of the other two. The original locators of the placer claims, assuming the allegations in the protest to be true, were not at the date of the placer locations in the possession of the vein or lode, and did not by their said locations lay any claim thereto. Their's were distinctively placer locations. They could not have had any just claim to the lode because, as we have seen, they were not the discoverers thereof, and could not therefore lawfully locate it, or assert any property rights in it. The lode claim was discovered by others; was located by others; and upon its location, as property under the law, belonged to others. Nor was the present placer claimant in possession thereof at the date of his application for patent, at which time and long prior thereto, the existence of the vein or lode within the limits of the placer locations, was a well known fact.

But whether this case comes wholly within the said second class or not, as to which more will be said when we come to consider the next question raised by the appeal, it cannot longer be doubted that the question as to whether lodes or veins of mineral bearing quartz pass under a patent covering a placer claim, is to be determined by the fact of the known or unknown existence of such veins or lodes *at the date of the application for patent* by the placer claimant, and not at the date of the location of his claim. If at that date the veins or lodes were known to exist and were not included in the application for patent, no title to them can pass by the patent; if not known to exist at that date, the placer patent will carry the title to them (South Star Lode, *supra*, and cases cited).

This being the settled law, both by departmental construction and judicial decision, as is also, as we have seen, that a mining claim once discovered and duly located becomes the property of the discoverer or locator; and in further view of the fact, as well as the settled law, that both placer and lode claims may and do exist within the same superficial area, and may be located by and patented to different owners, it would be strange indeed if a placer location can, as such, operate either to withdraw from subsequent discovery and location any lodes or veins within its boundaries by any one other than the placer claimant, or to appropriate the benefit of such discovery and location if made by another to the use and benefit of the placer claimant. This would give to the placer location an effect, in my judgment, not contemplated by the mining laws. Such a location, in and of itself, does not establish any right in the claimant under it to the superficial area within its boundaries except as a placer claim or mine. Of its own force, it cannot operate to give title to or property rights in any veins or lodes within its boundaries. True, a placer mining claim becomes property *as such* by discovery and location the same as a vein or lode claim, but it cannot and does not of itself in any sense give title to or property rights in veins or lodes; nor can it, in my judgment, operate to preclude a subsequent lawful discovery and location of veins or lodes within its boundaries.

If the contrary were the law, the more valuable of the two classes of mineral deposits, entirely separate and distinct from each other, but frequently existing in the same superficial area, as we have seen, might be absolutely withdrawn from exploration and purchase, by a location covering a claim to the less valuable; or, in cases like the present one, the effect would be to give to the locators of claims of the latter class all rights attaching by the discovery and location of claims of the former class, which are held to be property rights in the highest sense of that term. I cannot believe such is the law, and my conclusions, therefore, upon this branch of the case, are:

That while the discovery and location of a placer mining claim establishes in the owner the right to the possession of the superficial area within its boundaries for all purposes connected with and incident to the use and operation of the same as a placer mining claim, such location does not operate to give title or right of possession to veins or lodes within its limits, or preclude the right of discovery and location thereof by others.

2. As to the right of the placer claimant to amend its application for patent, so as to include an application for a lode.

The decision complained of in this respect necessarily implies the fact of the known existence of the lode claim at the date of the placer claimant's application for patent. This application, though it mentions the adverse lode claim of Bennett, does not include an application for said lode, but is distinctively a placer application, and that only. If section 2333 of the Revised Statutes is at all applicable to the case, then such an application for patent is thereby expressly declared to be a conclusive declaration that the placer claimant has no right to the possession of the lode, and in view thereof such claimant could not now be allowed to amend its application so as to include the lode, even if it had asked to do so, which does not appear from the record before me to have been done at the date of the decision complained of.

In your said office decision you make an exception of this case from the operation of said section 2333, based upon the idea that the placer claimant, by adversing the lode claim in the courts, thereby claimed possession of all veins or lodes within the placer limits during the pendency of such adverse proceedings. I do not think that such a claim of possession, even if made as stated, could in any event override the positive provision of the statute that the application itself shall conclusively determine the right of possession of the lode against the applicant if the lode is not applied for. But I do not understand that by the said adverse proceedings the owner of the placer claim asserted any right whatever to the possession of the vein or lode. On the contrary, the complaint filed in the court distinctly sets forth a claim to the premises in question as a placer mine, and makes no claim to any vein or lode that may exist therein. Instead, therefore, of any claim to the possession of the vein or lode being shown by the adverse proceedings, it

clearly appears therefrom that the then placer claimant *disclaimed* any such right of possession, by basing his said adverse proceedings wholly and solely upon a placer location or claim.

It is contended, however, that said section 2333 can have no application to the present controversy, because at the date of the placer application for patent the lode claim had been duly located, was the private property of the locators, and therefore could not have been lawfully included in the application for patent. That such were the facts is distinctly averred in the said protest by Bennett, the lode claimant.

In the case of *Noyes v. Mantle*, *supra*, the supreme court, in construing said section 2333, said:

This section can have no application to lodes or veins within the boundaries of a placer claim, which have been previously located under the laws of the United States, and are in possession of the locators or their assigns; for, as already said, such locations, when perfected under the law are the property of the locators, or parties to whom the locators have conveyed their interests. . . . The section can apply only to lodes or veins not taken up and located so as to become the property of others. If any are not thus owned, and are known to exist, the applicant for a patent must include them in his application, or he will be deemed to have declared that he had no right to them.

The same doctrine was again enounced and followed in the subsequent case of *Sullivan v. Iron Silver Mining Company*, 143 U. S., 431.

I conclude, therefore, that whether this case be considered as coming within the purview of said section 2333 or not, a question which it is not necessary here to determine, in neither event can the present placer claimant be allowed to amend his application for patent so as to include an application for the said vein or lode and thereupon secure patent therefor. If the statute applies, the placer claimant's rights in this respect are conclusively determined by its application for patent as filed. If the statute does not apply, as under the decision of the supreme court and the facts alleged in said protest it would seem that it may not, such right of amendment is nevertheless equally precluded, because to allow it would enable the placer claimant to appropriate to himself that which under the law, assuming the allegations of said protest to be true, is clearly the property of others.

3. As to the effect of the judgment of the court.

In your said office decision of April 1, 1896, you state, in effect, that the judgment of the court in this case determined but one question, and that, the right of possession; that the question as to whether there was a known lode within the limits of the placer claims, was not before the court and was not decided by it. This I believe to be the correct view of the scope and effect of the adverse proceedings in the court. The question there determined was simply the right of possession of the placer claims, distinctly as such; nothing more. No claim to the lode was asserted by the adverse claimant, although it appears from the said protest that its existence and its ownership by Bennett, etc.,

were at the time, well known and generally recognized facts. The complaint filed by the adverse claimant whereon the proceedings in the court were founded, which is not restricted to the premises in controversy here but appears to cover the whole area of the placer locations, avers the right of possession in the plaintiff of the premises described, as *placer claims*. The issue tried by the court, therefore, must necessarily have been simply whether the plaintiff was entitled to the possession of the premises *as placer claims*. It could have no wider scope under the pleadings.

By the judgment of the court there was awarded to the plaintiff "the possession of the above described placer mining claims." No question as to the ownership or right of possession of the lode was passed upon. No such issue was raised by the pleadings and therefore could not have been decided by the court.

In view of these things it is difficult to conceive upon what principle your office holding, to the effect that the lode claimant's right to the possession of the lode was decided adversely to him by the court, is based. I do not understand such to be the effect of the court's judgment. The court simply gave to the plaintiff what he claimed, namely, the possession of the ground within the limits of his placer claims as described; and, as stated in your said office decision of April 1, 1896, did not determine any question as to the known existence of a vein or lode within said placer limits. Neither in my opinion did the court undertake by its judgment to determine any question as to the ownership or right of possession of such vein or lode, nor could it have done so under the pleadings. Moreover, if the court did not determine the question of the known existence of such vein or lode, how could it have determined any question as to the right of possession or ownership thereof. And further, it is to be remembered that the application for patent by the placer claimant was not filed until March 14, 1891, more than two years after the date of the judgment of the district court; and that the date of the filing of that application is the time relative to which the fact of the known existence of a vein or lode within the placer limits is to be determined.

It thus clearly appears that neither the question as to the known existence of a vein or lode within the limits of the placer claims at the date of the placer application for patent, nor the question as to the right of possession and ownership of such vein or lode, if so known to exist, was before the court in the adverse proceedings, and neither was passed upon by the court. These important questions, both material to the present controversy, are therefore entirely open for departmental adjudication.

As already stated in another part of this opinion, the question as to the right of the placer claimant to the vein or lode, if in fact known to exist within the placer limits at the date of its application for patent must be conclusively determined against it by the fact that its appli-

cation for patent does not include an application for the vein or lode. But the question as to the known existence of such vein or lode within the placer limits, as alleged, still remains undetermined, and in view thereof I am of the opinion that the protest filed by Bennett should have been entertained by your office.

By said protest the known existence of a valuable vein or lode of mineral bearing quartz or rock in place within the placer limits, at the date of the application for patent by the placer claimant, is not only averred under oath, and the averment supported by numerous corroborating affidavits, but it is alleged in the same manner, that such vein or lode was discovered and duly located as a mining claim under the local rules and customs then in existence in Alaska, as far back as 1881, nearly ten years prior to the placer application for patent, and that the locators and present claimants thereunder have expended a vast amount of money in improving and operating the same, and have been continuously in its possession, improving and operating it as a mining claim ever since the date of said location, and were in such possession at the date of the filing of the placer application for patent. If these things be true as alleged, there can be no doubt, in my judgment, that the protestant, claiming in his own right and for another as stated, is the lawful owner of said vein or lode and should be protected in his rights thereto.

The only question which presents any serious difficulty to my mind relates to the extent of surface area the lode claimant will be entitled to in the event he sustains, by proof in the regular way, the allegations of his protest. His claim as originally located appears to be something over five hundred feet in width at the points of conflict with the placer locations. The extensive and valuable improvements erected upon the claim are alleged to be upon that part within the overlap. The surface ground being, however, only an incident to the lode and not a part of it, I am of the opinion that, under the judgment of the court, the placer claimant is entitled to the surface area within the overlap, except so much thereof as is necessary to the occupation, use, operation, and enjoyment of the lode claim by its owners. This may be more or less according to the extent and location of the present improvements, if any, and other conditions peculiar to this particular claim. I know of no established precedent controlling in such a case as this, but in view of the superior right of the placer claimant to the surface area as established by prior location and by the judgment of the court in the adverse proceedings, I do not think that the superior right of the lode claimant to the possession of his lode, if its discovery, location and known existence be true as alleged, should be allowed to carry with it more surface ground within the overlap than is necessary for the occupation, use, operation and full enjoyment thereof. Having been defeated in the adverse proceedings in the court, it would appear to be but just and right that the lode claimant should be thus restricted as touching the

surface area of his claim, and, indeed, such seems to be necessary in order to give effect to the court's judgment.

In view of the foregoing your said office decisions of January 28, and April 1, 1896, are reversed, and you are directed to order a hearing upon the protest filed by Bennett, for the purpose of determining:

1. Whether or not, at the date of the application for patent by the placer claimant, there was known to exist within the boundaries covered thereby, a vein or lode claim as alleged; and,

2. What extent of surface area on each side of said vein or lode within such boundaries will be necessary for the occupation, use, operation, and full enjoyment thereof by the owners, in the event its known existence shall be established as alleged.

Upon the report of such hearing you will proceed to adjudicate the case upon the principles herein enunciated.

FLORIDA CENTRAL AND PENINSULAR R. R. CO. *v.* BELL ET AL.

Motion for review of departmental decision of April 7, 1896, 22 L. D., 451, denied by Secretary Smith, July 13, 1896.

PRACTICE—APPEAL—MOTION TO DISMISS.

KEYES *v.* MACHOMICH.

Failure to appeal in time can not be excused on the ground that in the notice of the decision the period accorded for appeal was erroneously stated as thirty instead of sixty days, where the appellant has had the benefit of the full period, and the adverse party takes no advantage through said error.

Secretary Smith to the Commissioner of the General Land Office, July 13, 1896. (R. F. H.)

Elijah B. Keyes appeals from your office decision of April 30, 1895, dismissing his contest against homestead entry No. 3234 of Davenport T. Machomich, made December 7, 1893, for the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 31, T. 22 N., R. 16 E., Susanville land district, California.

Notice of said decision was served upon the attorney for Keyes May 7, 1895, but said written notice contained the statement that Keyes had *thirty* days in which to appeal from said decision.

Keyes filed his appeal from said decision in the local office July 10, 1895, and on the same day served notice of said appeal on the attorney for Machomich.

Motion to dismiss said appeal on the ground that the same was not

taken within the sixty days allowed by Rule 86 of Practice was filed by attorney for Machomich.

In opposition to the motion it is urged that the notice served was defective, in that it allowed but thirty instead of sixty days for appeal, and that had the register and receiver at the expiration of the thirty days reported that no appeal had been taken, it would have been the duty of the Commissioner to order a new notice, and that the time of appeal being governed by rule and not by statute, the presumption that all persons know the law does not apply. The answer to these arguments are, that the appellant has been in no manner injured or misled by the notice complained of; that he has had the benefit of the full sixty days allowed by the rule; that he saw and read the decision of the Commissioner from which he sought to appeal; that said decision did not limit the time of appeal as fixed by the rule of practice; and, lastly, that the entryman is not seeking any advantage by reason of the thirty days notice.

It is an elementary maxim of practice, that "the practice of the court is the law of the court," and this maxim goes hand in hand with the maxim, *ignorantia juris non excusat*, and the Rules of Practice must be observed, and such a deviation from them will entail consequences detrimental to the suitor. It is true that in cases of this nature, the government is always a necessary party, and by virtue of supervisory powers, may waive a defective appeal, and assume jurisdiction, whenever the interests of the government, or strong equities, demand the suspension of the rule, that gross injustice be not done, yet, such is not this case. In the case of *Julien v. Hunter* (18 L. D., 151), which involved a motion to dismiss an appeal on the ground that it was not taken in time, it was said in passing upon the question as to whether acceptance of notice of the appeal was a waiver of laches on the part of the appellant—

In the case at bar, however, there was no consent to delay, but simply an acceptance of service of notice after the time therefor had expired. It would therefore come within the rule already quoted, from *Sheldon v. Warren*, and in said case on review (9 L. D., 668), it was held that the rules of practice limiting the time within which appeals may be taken, will, in all contest cases, be strictly enforced, in the absence of valid excuse, or circumstances calling for the exercise of supervisory authority.

In the case before me, the excuse might be held sufficient, in the absence of any adverse claim, but from the examination of the record which I have made in determining the motion to dismiss, I am convinced that no injustice has been done by the decision already rendered in the case. There is no call, therefore, for the exercise of my supervisory authority.

In *Raven v. Gillespie* (6 L. D., 240), it was said: "On motion of the appellee, an appeal, not filed in time, must be dismissed."

In accordance with the foregoing rule, I am of opinion that the motion to dismiss the appeal in this case must prevail, and said appeal is accordingly dismissed.

RAILROAD LANDS—SECTION 4, ACT OF MARCH 3, 1887.

CARLTON SEAVER ET AL.

The right of a purchaser from a railroad company to perfect title under section 4, act of March 3, 1887, may be exercised without regard to whether his purchase was made before or after the passage of said act, if it was made in good faith, and before the land was held to be excepted from the grant.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 13, 1896. (C. J. G.)

This case involves the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 29, T. 1 N., R. 8 W., S. B. M., Los Angeles land district, California.

The said tract was patented to the Southern Pacific Railroad Company April 4, 1879, which patent was declared void by the U. S. Supreme Court in December 1892. After the land had been formally restored to the public domain in accordance with the decree of the U. S. circuit court filed April 27, 1893, Carlton Seaver and Stoddard Jess submitted proof under section 4 of the act of March 3, 1887 (24 Stat., 556), in support of their alleged right to said land. The said proof was rejected by the local office, it appearing that claimants had purchased the land from the company under deed dated May 19, 1887.

On appeal your office, under date of February 14, 1896, affirmed the action of the local office, holding that the right of purchasers to perfect title under section 4 of the act of March 3, 1887, is intended for those who purchase in good faith prior to the passage of said act.

The claimants have appealed from your office decision to this Department, assigning the following errors:

1. In holding that the remedy granted by the fourth section of the act of March 3, 1887, applies only to purchases from the railroad before the date of said act.
2. In not holding that said section applies to all purchases from a railroad, at any time before the decision of the supreme court, under or in accordance with which an adjustment provided by the first section of said act, shall be made.
3. In not holding that said section applies to all purchases from a railroad, before actual adjustment and finding of an erroneous certification or patent issued to a railroad, upon the grants therein mentioned or referred to.

On November 17, 1887 (6 L. D., 272) Attorney General Garland gave an opinion on certain questions proposed to him relative to the third, fourth and fifth sections of the act of March 3, 1887. Speaking of the section now under consideration he says:

The fourth section is a part of a general scheme for the disposition of lands which have been erroneously certified or patented to the railroads, which certification or patenting has been set aside and the title restored to the United States. . . . By the expressed words of the section with reference to the time when the patent shall issue: "The person or persons so purchasing in good faith . . . shall be entitled to the land so purchased . . . after the grants respectively shall have been adjusted." As the adjustment then must be completed first the patents under the fourth section are only intended to be issued after it shall have been

legally determined, in the mode prescribed in the second section, that the certification or patent to the railroad had been erroneously issued.

The second section of the act reads as follows: "That if it shall appear, upon the completion of such adjustments respectfully (*sic*), or sooner, that lands have been, from any cause, heretofore erroneously certified or patented etc."

It would appear from the language of the act and its interpretation by the Attorney General that said act was intended to include all lands erroneously certified or patented by the company prior to the date of adjustment, whether such lands were purchased before or after the passage of the act of March 3, 1887.

The Attorney General in the opinion cited continues as follows:

The whole scope of the law from the second to the sixth section, inclusive, is remedial. Its intent is to relieve from loss settlers and *bona fide* purchasers, who through the erroneous or wrongful disposition of the lands in the grants, by the officers of the government, or by the railroads, have lost their right or acquired equities, which in justice should be recognized. . . . The whole remedial part of the law was passed with a recognition of the fact that the railroad companies had sold lands to which they had no just claims.

The cases of *Sethman v. Clise* (17 L. D., 307) and *Holton et al v. Rutledge* (20 L. D., 22) were as to whether the right of a qualified transferee to purchase under section 5, act of March 3, 1887, was affected by the fact that his purchase was made after the passage of said act. In the former case it was said—

In my opinion it was the intention of Congress that the adjustment of these grants should be begun at once and completed as soon as possible, yet experience has shown that making these adjustments was not the work of a day and Congress must be held to have known that much time was necessarily employed before the end should be reached.

The act directed the manner of making adjustments, and it was the evident intention of Congress, as expressed in the 5th section of the act, that when in the adjustment of these grants it was ascertained that land had been bought from the railroad companies for which they could convey no good title, such buyers or their transferees, if *bona fide*, should be allowed to purchase the tracts claimed by them. And it can make no difference, I think, whether a transferee, otherwise entitled to purchase, bought the land before or after the day of approval of the act, if it was originally purchased in good faith from any said company.

The case of *Andrus et al v. Balch* (22 L. D., 238), cited the above decision, concluding as follows:

The argument here used applies with equal force where the original purchase was made after the passage of the act, as when the transfer from the original purchaser was made after the passage of the act and I am of the opinion that it can make no difference whether the purchase from the company was made before or after the passage of the act of March 3, 1887, if made in good faith, believing the title to be good and before the land purchased was held to be excepted from the grant.

It thus appears that the several sections of the act of March 3, 1887, are but different parts of the same scheme, namely, to secure from the

railroads a relinquishment or reconveyance to the United States of lands theretofore erroneously certified or patented, and

to relieve from loss settlers and *bona fide* purchasers, who, through the erroneous or wrongful disposition of the lands in the grants, by the officers of the government, or by the railroads, have lost their right or acquired equities, which in justice should be recognized.

It has been shown that relief similar to that applied for in the case at bar has been granted under the fifth section of the act of March 3, 1887 to transferees; there seems to be no good reason why the same relief should not be granted to an original purchaser under the fourth section thereof.

It is in evidence that the money for the purchase of the land in question was paid by the claimants to the company some time in the month of March, 1887. It also appears that there are no adverse claimants.

Your office decision is accordingly reversed, the claimants' proof will be accepted, and your office will accordingly demand payment from the railroad company for the land in question, as provided in section four of the act under consideration.

COAL LAND—PREFERENCE RIGHT OF ENTRY.

WALKER v. TAYLOR.

The preference right of entry conferred by section 2348 R. S., is dependent upon the opening and improving of a coal mine on public land that is in the actual possession of the applicant.

Secretary Smith to the Commissioner of the General Land Office, July 13, 1896. (E. B., Jr.)

Harry L. Taylor appeals from the decision of your office of July 11, 1895, holding his coal declaratory statement No. 601, filed July 6, 1893, for the NW. $\frac{1}{4}$ of Sec. 24, T. 21 N., R. 116 W., Evanston, Wyoming, land district, for cancellation and rejecting his application filed July 28, 1894, to purchase the land under his said declaratory statement.

Taylor's filing was made under section 2348 of the Revised Statutes to secure a preference right of entry to the land above indicated, and alleged, among other things, continued possession, commencing May 29, 1893, and that he had "located and opened a valuable mine of coal thereon." On March 12, 1894, Sharp Walker filed his coal declaratory statement for the same land, alleging possession since March 4, 1894, thus making a claim thereto adverse to that of Taylor. One J. S. Beckwith also subsequently made a coal filing for the same land. When Taylor offered final proof and applied to purchase the land, July 28, 1894, the local office suspended action upon his application until due notice should have been given to the adverse claimants of record as provided by paragraph 30 of Rules and Regulations under the coal land law, approved July 31, 1882.

Beckwith acknowledged service of notice on him in August following (the precise day of the month written in the acceptance is illegible). The record does not show when Walker received notice, but the same, apparently, brought out his protest, filed August 24, 1894, charging that Taylor never made any discovery of coal on the land, nor did any work upon the same in the way of taking out coal therefrom, and that since his filing the tract had remained vacant and unoccupied except as to his (Walker's) own possession. As the result of a hearing at which Taylor and Walker only appeared, the local office rejected the application of the former to purchase, on November 26, 1894, on the grounds, among others, that he had not been in possession of the land since March 4, 1894, and had not worked and made such improvements thereon and shown such good faith, generally, in the premises, as would entitle him to enter the land in the face of the protest of an adverse claimant in possession. Upon appeal by Taylor your office affirmed the decision of the local office, and held his filing for cancellation.

Only two of the nine assignments of error made in Taylor's appeal demand consideration here. These are that your office erred (1) in finding that the evidence did not show good faith in him in the matter of improvements, and (2) in holding his declaratory statement for cancellation. The first of these raises an issue of fact, the second, of law. It is unnecessary to set out or discuss at any length the testimony upon the question of fact. The decisions of the local office and of your office are in entire harmony upon that question and are adverse to appellant. The testimony has been carefully examined here and not only fails to show that any improvements in the way of opening a mine of coal on the land or of making it more valuable for coal mining purposes were ever made by appellant, but it is also shown both by the testimony of one Lessenger, Taylor's agent, and by numerous witnesses in behalf of protestant, that Taylor was not in actual possession of the land when he filed his application to purchase. The testimony further fails to show that Taylor ever made any discovery of coal on the land, and, as between him and Walker, shows that the latter was in possession when the former filed his application to purchase.

Section 2348 R. S. makes the opening and improving of a coal mine upon the public lands a condition precedent to the preference right of entry therein authorized. It also requires that an applicant to purchase thereunder must be in actual possession of the land (James D. Negus *et al.*, 11 L. D., 32). Section 2351 R. S. provides that "priority of possession and improvement followed by proper filing and continued good faith shall determine the preference right to purchase" in case of conflicting claims.

There were no improvements made upon this land by Taylor prior to filing. It is not shown that the Ogden Coke and Coal Co., whose assignee Taylor claims to be, had any right to the land in controversy, nor made any improvements thereon, nor that Taylor purchased any-

thing of any nature from said company. The only evidence in support of such claim is the statement of Taylor's agent Lessenger. Upon the facts found by your office and shown by the testimony, the holding of Taylor's filing for cancellation was abundantly justified.

Relative to Taylor's contention in appeal and argument that he should have been allowed to make private entry of the land under section 2347 R. S., notwithstanding his said filing, it may be proper—as it certainly is sufficient—to say in passing, (1) that he elected to proceed otherwise, as already indicated, (2) that he filed no application to make private entry thereof, and (3) that no such entry could have been legally allowed until the adverse filings of Walker and Beckwith were disposed of.

The rejection of the application to purchase and the proposed cancellation of Taylor's filing are accordingly affirmed.

MINING CLAIM—FINAL CERTIFICATE—TITLE.

J. C. BAKER FRACTION PLACER.

The final certificate of a mineral entry will not be allowed to embrace the name of one who fails to show that he owned an interest in the claim at the date of application, or that subsequently, and prior to entry, he acquired such interest from a legal applicant.

Secretary Smith to the Commissioner of the General Land Office, July 13, 1896. (E. B., Jr.)

Eli C. Wood, Adam Aulbach and Lawrence O'Neil, who made Cœur d'Alene, Idaho, mineral entry No. 168, March 28, 1895, for the J. C. Baker Fraction placer claim, appeal from your office decision of October 5, 1895, requiring proof that Aulbach and O'Neil owned, each, an interest in the claim at date of application, or subsequently and prior to entry acquired such from a legal applicant, and proof of O'Neil's citizenship, and holding that in default of the proof required the names of Aulbach and O'Neil must be stricken from the final certificate of entry. The contention of the appeal, briefly stated, is that the abstract of title and a certain judgment on file furnish the required proof.

The abstract of title does not show that at date of filing application, December 29, 1894, or of entry, either of the parties in question had any interest in said claim. Aulbach's claim of title through one Mary C. Nason, as widow of C. C. Nason, can not be recognized, for the reason that it is not shown that Mary C. Nason, as alleged widow, or otherwise, had any interest in the claim. It is not shown that Mary C. Nason, who made certain conveyances of record to Aulbach, was the widow of C. C. Nason. Your office properly held that an agreement to convey, under certain conditions, by J. C. Baker, the locator of the claim, which agreement is set up as a connecting link to show

an interest in C. C. Nason, did not convey any interest. Two deeds, one dated October 14, 1893, and recorded the same day, from "Mary C. Nason, widow of C. C. Nason, deceased," and one dated and recorded December 26, 1894, from Mary C. Nason, both to said Aulbach, constitute the only evidence afforded by the said abstract of any conveyance of an interest in said claim to Aulbach prior to date of entry. It is unnecessary, in view of the prohibition in paragraph 93 of current Regulations under the mining laws, to consider the record of certain conveyances from parties not applicants for patent, made subsequent to the application.

The "certain judgment" hereinbefore referred to is apparently a judgment such as is indicated in section 2326 of the Revised Statutes, rendered June 26, 1890, in a suit by certain claimants of said claim against the claimants of the Idaho Bar placer claim, by the district court in and for Shoshone county, Idaho. This judgment was in favor of the then J. C. Baker Fraction claimants, among whom were said O'Neil and "Mary C. Nason administratrix of Christopher Nason deceased." This judgment is of no avail so far as either Aulbach or O'Neil is concerned, before the land department, in view of the showing made by the abstract of title. Said abstract does not show, as already indicated in part, that any one authorized in the premises conveyed any interest of C. C. Nason or Christopher Nason in said lode claim to said Aulbach. Without setting forth the minutia of computation it is found that said abstract shows that by deed dated June 23, and recorded June 25, 1894, said O'Neil conveyed an undivided one eighth interest in the claim in question to Eli C. and James R. Wood, which was one seventy-second greater interest than he is shown to have at any time acquired. Said judgment does not show the amount of his interest. It is unnecessary in view of the foregoing to consider the question of O'Neil's qualification as to citizenship. Your office decision in accordance herewith is affirmed.

MINING CLAIM—REINSTATEMENT—RELOCATION.

MCGOWAN ET AL. v. ALPS CONSOLIDATED MINING CO.

A mineral entry canceled without notice to the entryman must be reinstated irrespective of any intervening adverse claim.

The cancellation of a mineral entry does not in itself render the ground covered thereby subject to relocation.

Secretary Smith to the Commissioner of the General Land Office, July 13, 1896. (P. J. C.)

The record in this case shows that The Alps Consolidated Mining Company, by G. L. Havens, Superintendent, on October 2, 1881, made application for patent for the Alps No. 2 lode mining claim, survey No.

1953, Leadville, Colorado, land district. On December 19, 1882, the Alps Company abandoned that portion of its claim that conflicted with the Great Eastern lode, and on the same day made entry, No. 1497, of the Alps No. 2, less this conflict.

In so far as material to the question involved here the next step was by your office letter of April 8, 1885, addressed to the surveyor general of Colorado, which required a new survey of the Alps No. 2, showing the exclusion of the Great Eastern. He was required to notify the parties in interest. Thus the matter rested October 9, 1894, when your office called for a report from the surveyor general as to what action had been taken under your former letter. On November 9th, following, he reported that on October 13, 1894, he "wrote J. W. Smith, Leadville, registered, \$25 deposit required, and sent a copy of former General Land Office letter;" that the registry receipt was returned, but no further action had been taken.

On March 19, 1895, your office addressed the register and receiver, calling attention to the correspondence with the surveyor general, and held the entry for cancellation.

On June 15, 1895, the register reported that notice had been mailed to the Alps Consolidated Mining Company at Leadville by registered letter and the same was returned uncalled for. Thereupon, by letter of June 24, 1895, your office canceled the entry.

On July 6, 1895, there was filed in the local office the affidavit of one B. F. Stickley, by which it is shown that he is the agent of the Alps Company, and has been such agent for ten years; that the company has no office in Leadville; "that affiant this day for the first time learned of the requirements of Hon. Commissioner's letter of April 8, 1885;" that the company never had notice of such requirement; that the company "stands ready, willing and able to comply with all the requirements of the General Land Office;" that the premises are valuable and large sums of money have been spent in the development of the same. The company ask that the order of cancellation be revoked and that it be allowed to meet all the requirements of your office.

Omitting further details, it is sufficient to say that McGowan *et al.* on June 26, 1895, located the ground under the name of the Clark lode, and they appeared by counsel and objected to the reinstatement of the Alps entry. Your office, however, by letter of October 16, 1895, held that the cancellation was erroneous, and the same was recalled and revoked, whereupon McGowan *et al.* prosecute this appeal, assigning numerous grounds of error.

The most material contention of counsel is that it was error to reinstate this entry in the presence of an alleged adverse right in the land, acquired as it was by a relocation of the identical ground, after the cancellation of the entry by your office.

There is nothing in the record that would justify the surveyor general in sending notice of your office order of 1885 to J. W. Smith. This is

the only mention of this name in the record. Neither was there anything to warrant the local officers in mailing the notice to the Alps Company addressed at Leadville. On the contrary, the certificate of incorporation filed in their office shows that the office of the company is in New York City. It follows that the cancellation was without notice to the claimant, and therefore erroneous. The attention of your office being called to this, it could do nothing less than reinstate the entry.

The fact that the entry was canceled would not of itself render the ground subject to relocation. The original location of the lode was not affected by the cancellation, even though it had been regular, and the owner could still hold it under its possessory right so long as there was a compliance with the requirements of the law. (*Branagan et al. v. Dulaney*, 2 L. D., 744).

An affidavit by McGowan has been filed in which he states that the annual assessment work for the years 1894 and 1895 was not performed on the Alps No. 2. This affidavit can not be considered, for the reason that the Alps Company has had no notice of it.

There is in the files an amended survey of the Alps No. 2, forwarded December 7, 1895.

Your office judgment is affirmed, and the papers transmitted by your office letter "N" of November 1, 1895, are herewith returned for appropriate action.

RAILROAD GRANT—SECTION 1, ACT OF APRIL 21, 1876.

NORTHERN PACIFIC R. R. CO. *v.* TREADWELL.

The confirmation of entries under section 1, act of April 21, 1876, is solely for the benefit of the individual claimant, conditioned upon his compliance with law, and was not intended to confirm the entry absolutely, as against the right of the company, so as to except the land from the grant, in favor of any other settler.

Secretary Smith to the Commissioner of the General Land Office, July 13, 1896. (F. W. C.)

With your office letter of November 4, 1895, are submitted the papers in the case of Northern Pacific R. R. Co. *v.* Treadwell, involving the SW. $\frac{1}{4}$ of Sec. 5, T. 23 N., R. 19 E., Waterville land district, Washington.

This land is within the limits of the withdrawal upon the map of general route of the branch line of said road, filed August 15, 1873. It fell without the limits of the withdrawal adjusted to the map of amended general route of the branch line filed June 11, 1879, and was restored to entry during that year. It again fell within the primary limits of the grant as adjusted to the map of definite location filed December 8, 1884.

The order of withdrawal on account of the map of definite location was not received at the local office until January 7, 1888.

Subsequently to the filing of the map of definite location and prior to the receipt of the notice thereof at the local office, to wit, on March 25, 1885, John Tymon was permitted to make homestead entry of this land, which entry was contested by Treadwell for abandonment and ordered canceled June 22, 1889. Thereafter Treadwell applied to file pre-emption declaratory statement for the land upon which the present controversy arose.

The testimony shows that Treadwell began working upon the tract in question September, 1887. He moved his family on the place the following spring and they have since resided thereon and made improvements valued at about \$200.

Your office decision rejected the application holding that as there was no authority for the filing of the map of amended general route, the withdrawal of 1873 continued and was a bar to the allowance of Treadwell's application.

The appeal urges that as Tymon's entry was made before the receipt of notice of the withdrawal at the local office upon the map of definite location, that the same served to defeat the grant.

For the disposition of this case it is unnecessary to consider the effect of the withdrawal of 1873 upon the map of general route. The record discloses no claim to the land at the date of the filing of the map of definite location December 8, 1884, and the land therefore passed under the grant. While it is true Tymon made entry before the receipt of the notice of withdrawal at the local office and might have been confirmed under the act of April 21, 1876 (19 Stat., 35), that is disregarding the withdrawal of 1873, yet as held in the decision of this Department in the case of Northern Pacific R. R. Co. (20 L. D., 191), the confirmation of entries under section one, act of April 21, 1876, is solely for the benefit of the individual claimant, conditioned upon his compliance with law, and was not intended to confirm the entry absolutely as against the right of the company so as to except the land from the grant, in favor of any other settler.

Whatever Tymon's rights under the act of 1876 might have been had he complied with the law, yet with the abandonment of his entry said act can have no application, and as Treadwell settled upon the land subsequently to the filing of the map of definite location, your office decision rejecting his application for conflict with the grant is hereby affirmed.

COAL LAND—SCHOOL GRANT—DISCOVERY.

STATE OF MONTANA *v.* BULEY.

Land known to contain coal prior to the admission of the State to the Union is excepted from the operation of the school grant.

It is not necessary to show that coal has been developed on all parts of a forty acre tract; if coal has been discovered thereon the applicant is entitled to the whole of such legal sub-division.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 13, 1896. (P. J. C.)

The record in this case shows that Charles E. Buley filed coal declaratory statement on December 15, 1891, for the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 36, T. 19 N., R. 6 E., Helena, Montana, land district; that on January 30, 1893, he presented his "affidavit at purchase," and this is endorsed "held thirty days to give notice to adverse claimants." The land being a school section the State of Montana was notified, and the Attorney General under date of February 18, 1893, replied:

The State elects to institute no contest in this case, upon the ground that your Department, and as well the General Land Office at Washington has decided that such lands do not pass to the State under general grant of Congress, from the fact that they are mineral lands.

Entry was made March 28, 1893.

On April 20, 1893, the Attorney General of Montana, in a letter to your office stated that he was in receipt of information "that there was not over three or four acres of coal land in said entire tract."

By letter of June 8, following, your office directed the local to allow the State sixty days within which to show cause why the entry should not proceed to patent.

On August 30, 1893, the Attorney General filed in the local office the affidavits of George M. Watson, Charles Ashworth, Frank Lewis and Edgar E. Jones, and on September 4, that of Jerauld T. Armington. Each of these affiants admits that there is coal on the land in controversy; that it has been developed and mined, and coal hauled away from the mine for use; that there was a tunnel more than one hundred feet in length showing a vein of coal; that prior to Buley's entry this tunnel had been started by witness Armington, who admits that he at one time contemplated taking it as coal land. All the affiants claim, however, that only about six acres of the forty is coal, and claim that the balance of it is more valuable for agricultural purposes. The affiant Watson says, "Mr. Buley stated to me that Clingan was in with him." Jones says that he had purchased the interest of Buley "about two months ago;"

there was some (coal) shipped late in the spring. We are selling all the time to local ranchers. It is worth three dollars a ton, that is what we charge for it We have sold I believe about six or eight tons since I bought in as far as I know Clingan has always owned one-half of it. I could not say whether Clingan owned one-half of it when Buley filed on it.

Without any formal charges being made, and upon these affidavits, your office by letter of October 6, 1893, ordered a hearing "to determine the character of the land" and "also whether the entry was made by said Buley for his own use and benefit."

The testimony was taken before the clerk of the district court, and upon examination the local officers found that the land was more

valuable for coal mining purposes than for agriculture, and recommended that the coal entry remain intact.

Your office by letter of August 9, 1895, reversed the local office, and held the entry for cancellation on the ground—

that the State has shown that the existence of coal within the limits of the land embraced in contestee's coal entry, in sufficient quantity to add to its value, and to justify the necessary expenditure for extracting it therefrom, was not known prior to November 8, 1889, and that therefore said tract of land passed to the State of Montana under its school land grant.

The entryman prosecutes this appeal, assigning errors both of law and fact.

The propriety of ordering a hearing in the case, under the circumstances and on the showing made, is very questionable, to say the least. The State had an opportunity to contest the entry in the first place and declined to do so on the ground that the land was mineral. Subsequently, on an informal suggestion that there were not more than three or four acres of land that was valuable for coal, affidavits were allowed to be filed by which it was shown that coal did exist on the land. There is not a statement in the affidavits, which, if admitted to be true, would entitle the State to the land under the circumstances. The hint as to the interest of Olingan in the entry is unworthy of consideration for the purpose of ordering a hearing in view of the entryman's proof.

The decision of your office, affirming that of the local, that there is no evidence in the record showing that Buley made this entry in the interest of others, is concurred in.

The only issue remaining to be determined is whether coal was shown to exist on the land prior to November 8, 1889, the date of the admission of Montana as a State. The testimony on this point as set forth in your office decision is quoted with approval:

As to the facts known November 8, 1889, relative to the existence of coal on this tract; and its value for coal mining purposes the evidence submitted at the hearing is very meager and somewhat conflicting, and is substantially as follows:

Frank Lewis, a witness for the State, testified that the tunnel was first opened by Mr. Armington in 1886 or 1887, who extended the same sixty or seventy feet; Mr. Carpenter filed on it and worked on it in 1887, and that the tunnel was in about seventy feet when Buley commenced work.

Mr. Armington, also a witness for the State, testified that he located this land three or four years ago; thought he was going to get good coal; expended six or eight hundred dollars, run in ten or twelve feet, then Mr. Carpenter took out a claim for him and run the tunnel sixty-seven or seventy feet, and received no return for his expenditure.

Mr. McQueen, another witness for the State, testified that when he was in the tunnel in 1889 or 1890, coal was visible.

Mr. Ashworth, a witness for contestee, testified that he did the first work in the tunnel; did it for Armington in 1889; worked two days and found coal; it was next opened in April, 1890, by Wall and Guesford who run the tunnel sixty feet for Armington.

Mr. Mortson, a witness for the coal claimant, testified that he located three coal claims in 1878, one of which embraces the land involved in this case; discovered

coal on it at that time; found a coal vein four feet five inches thick; the coal discovered in 1878, was too near the outcrop to tell whether it was *good* coal, but it was coal.

In addition to this it may be said that the Buley tunnel has been run two hundred feet with a cross-cut of twenty-one feet, and that there is four and one-half feet of clean coal in the breast of the tunnel, which is about one hundred and sixty feet under cover. Also, that one witness says that as early as 1874, while surveying a military road through this land, he reported to "the engineering department of the government" the existence of coal in that region, and that it was well-known at that time. In 1878 coal was opened and mined in this section, and the testimony shows that there are coal mines in the vicinity and adjoining the land in dispute. While this latter fact would not of itself establish the existence of coal on this identical tract, yet it is mentioned to show that in this particular region there is a coal measure, and that it was known prior to November 8, 1889.

It is true, as shown by the testimony, that coal has not been developed on all parts of the forty acre tract. But this is not required. The statute provides that parties "have the right to enter by legal subdivisions any quantity of vacant coal lands," not exceeding one hundred and sixty acres, (Sec. 2347 R. S.) For the purposes of this act the smallest legal subdivision is forty acres, and if coal has been discovered as in this case, the party is entitled to the whole of such legal subdivision.

Your office judgment is therefore reversed, and the coal entry will pass to patent, if otherwise satisfactory.

TIMBER CULTURE CONTEST—APPLICATION TO ENTER.

SHEA *v.* WILLIAMS.

An application to enter filed with a timber culture contest is a part of and dependent upon the result of the contest, whether it be the first or second contest; and, where for any cause the second contest fails, or never attaches by reason of the cancellation of the entry under the first contest, the application filed with the second contest does not serve to reserve the land after the disposal of said contest, but falls with it, and confers no right upon the applicant.

The cases of *Kiser v. Keech*, 7 L. D., 25, and *Heilman v. Syverson*, 15 L. D., 184, overruled.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 13, 1896. (F. W. C.)

I have considered the appeal by Williams in the matter of the contest of John Shea *v.* James B. Williams, involving the latter's homestead entry No. 15,228, made September 23, 1889, for the NW. $\frac{1}{4}$, Sec. 20, T. 18 N., R. 27 W., North Platte land district, Nebraska, from your office decision of May 28, 1892, holding said entry for cancellation

because it was adjudged that Shea had a superior right of entry in said tract.

The facts in the case, briefly stated, are as follows:

On March 24, 1886, one Peter Gavin made timber culture entry of this land against which one Lew Williams filed a contest on January 11, 1888, resulting in a decision of the local officers, dated May 7, 1888, recommending the cancellation of said entry, from which no appeal was taken.

Whilst said case was awaiting action in your office, to wit, on October 4, 1888, John Shea, the present contestant, filed a second contest against said entry by Gavin, which he amended on March 2, 1889, by alleging that the contest by Williams was speculative, "and that said contestant had filed contests against other claims and has no intention of entering said tract."

Shea's contest was accompanied by his application to enter the land in question under the timber culture laws. On the same day Shea filed a second contest in the case of Penner *v.* Baldwin, accompanying the same with a timber culture application to enter the land therein involved, and had, prior to this time, filed a second contest in the case of Shrader *v.* Dillie, accompanying the same also with his application to enter the land involved under the timber culture laws.

By your office letter of August 13, 1889, the entry by Gavin was canceled on Williams' contest, of which Williams was duly advised, and within the thirty days of preference right awarded successful contestants, to wit, on September 23, 1889, his brother, James Williams, filed his, Lew Williams', waiver of any preference right and same day he (James Williams) was permitted to make homestead entry of the land in question.

On November 6, 1889, Shea contested said entry claiming a preference right under his second contest, of which he had never been advised by the local officers upon the cancellation of Gavin's entry.

Upon the testimony adduced the local officers found that there was no fraud in the matter of Lew Williams' contest against Gavin's entry, and dismissed Shea's contest.

Upon appeal, your office decision of May 28, 1892, reversed the decision of the local officers upon the authority of the holding in the cases of Kiser *v.* Keech (7 L. D., 25), Carson *v.* Finity (10 L. D., 532), in which cases it was held:

The pendency of an application to enter filed by a second contestant with his affidavit of contest against a timber culture entry operates to reserve the land subject only to the rights of the first contestant.

The sole question for consideration therefore is: Did the application by Shea, filed with his second contest, serve to reserve the land after the entry had been canceled on Williams' contest and he had waived his preferred right of entry?

It is plain that your decision was warranted under the holding made

in the case of *Kiser v. Keech* (*supra*), but without attempting to question the merits of Kiser's claim in that case, yet the principle therein announced, to my mind, is in conflict with the fundamental principles governing the granting of a preferred right of entry and the disposition of applications filed for land already appropriated by entries of record.

It is a fundamental principle that rights secured by an application filed with a timber culture contest, depend upon the establishment of the charge, and if the contest fails the application falls with it. It is also well established that the second contestant does not secure any preference right by reason of his contest, where the entry under attack is canceled in the prior contest of another. *Armenag Simonian* (13 L. D., 696). It is plain then that Shea did not secure a preferred right by reason of his contest.

In the case of *Kiser v. Keech* (*supra*), it is adjudged that Kiser's contest was properly dismissed because the entry had been canceled upon a prior contest, but as Kiser had filed an application to enter the land along with his contest, it was held that "such application operated, upon the ascertainment of the default, to reserve the land, subject only to rights of the first contestant," thus, it was held that the application was separate and apart from the contest, and the pendency of the same was held to operate as a reservation of the land.

If this be the correct view of the law, then, as shown in the present case, Shea was in a position to claim three tracts, upon a certain contingency, without expending a cent or taking a step towards clearing the record of defaulted entries; further, before disposing of any of these tracts, where the first contestant from any cause failed to make entry, notice had to be given Shea of his preferred right, and he would thereby be entitled to a second preferred period and might make entry, if he desired, or dispose of his preference to others.

It has been repeatedly held that an application tendered for lands already appropriated by an entry of record, secures to the party no rights, and if rejected and appealed from, such appeal will not cause any rights to attach under said application, even if the prior entry be canceled during the pendency of such appeal. *Maggie Laird*, 13 L. D., 502.

It is clear, then, that there is a conflict in principle in the several rulings with that announced in the case of *Kiser v. Keech* (*supra*).

In *Carson v. Finity* (*supra*), although *Kiser v. Keech* is referred to as authority, the facts show the case presented to have been different.

In that case the prior contestant withdrew before the cancellation of the entry, hence the second contest attached.

So in *Hudson v. Francis* (15 L. D., 173), the prior contest was dismissed and the second contest attached before the entryman relinquished.

In the case of *Heilman v. Syverson* (15 L. D., 184), however, the case,

as presented by the record, was similar to the case of *Kiser v. Keech* (*supra*), and Heilman was awarded the land, by reason of his application filed with a second contest, over Syverson who secured the cancellation of the record entry but did not assert his preference right within thirty days from notice.

These are the only cases I have been able to find reported, involving directly the principle here at issue.

It is plain to my mind that the holding in the two cases referred to, is in conflict with the principles hereinbefore announced in the matter of awarding preferred rights under contests; the disposition of applications tendered for lands covered by existing entries, and that the conflict arises from considering applications filed with a contest as separate from the contest.

After careful consideration therefore, I am of the opinion that an application filed with a contest is a part of and dependent upon the result of the contest, whether it be the first or second contest, and that where, for any cause, the second contest fails or never attaches by reason of the cancellation of the entry under the first contest, the application filed with such contest does not serve to reserve the land after the disposal of the contest, but falls with it, and confers no right upon the applicant.

I must, therefore, decline to follow the decisions in the case of *Kiser v. Keech*, *supra*, and *Heilman v. Syverson*, *supra*, and so far as they conflict herewith the same are hereby overruled.

Had Williams failed in his contest, Shea would then have been entitled to proceed with his. Having been successful, the record was cleared upon Williams' contest, and if *he* failed to make entry, it became, as any other public land, subject to entry by the first qualified applicant. In this case the brother of the first contestant made entry of the land on the waiver of the preferred right. Had Shea shown that the contest was brought for a speculative purpose in the interest of the present entryman, he might have secured the cancellation of the present entry, and in that event, he would have been entitled to make entry, but not by reason of the application filed with his second contest against Gavin's entry. The record shows that he failed to sustain the charge of speculative contest as against Lew Williams, and I therefore reverse your office decision and direct that Shea's contest be dismissed and that Williams' entry be allowed to stand subject to compliance with law.

WILLIS v. MERRITT.

Motion for rehearing in the cause above entitled denied by Secretary Smith, July 13, 1896. See departmental decisions of February 4, 1896, 22 L. D., 79, and May 14, 1896, 22 L. D., 571.

SOLDIERS' ADDITIONAL HOMESTEAD—DUPLICATE CERTIFICATE.

HENRY N. COPP.

In view of the provisions of the act of August 18, 1894, validating outstanding soldiers' additional certificates in the hands of bona fide purchasers, a duplicate certificate may issue to such a purchaser, in the name of the soldier, on due showing of the loss of the original, and the further fact that it has not been located.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 13, 1896. (W. M. W.)

Henry N. Copp has appealed from your office decisions of July 10, and August 1, 1895, denying his application for the issuance of a duplicate certificate of right to make soldiers' additional homestead entry in the name of one Samuel Mitchell.

The record facts necessary to be considered in determining the questions presented show, that on January 8, 1893, your office issued, under section 2306 of the Revised Statutes, a soldiers' additional homestead certificate for 5.89 acres of land in favor of Samuel Mitchell, late private of Company B, 57th Regiment of United States Colored Troops. Said certificate was sent to H. J. Ennis of this city as the attorney for said Mitchell.

On December 8, 1886, said Copp addressed a letter to your office, stating that there had been lost or stolen from the mails a soldiers' additional homestead certificate for 5.89 acres, in the name of Samuel Mitchell, and requested that proper notings be made on the records of your office. Mr. Copp also stated in said letter that he desired

information as to the proper course to pursue to secure the additional homestead right thus lost to said Mitchell. If an indemnity bond will be accepted and a new certificate issued, I will gladly furnish the bond. I will furnish evidence of loss, such as affidavits of myself, the sender (and the person) to whom it was sent, but by whom it has never been received.

By letter of December 15, 1886, your office informed Mr. Copp—

That this office does not recognize the right of a soldier to sell or transfer his right to make an additional homestead entry, and the fact that said certificate of right is outstanding is no bar to the right of the soldier to make personal entry in his own name at any time prior to the satisfaction of his right by the location of said certificate of right, and I can see no way by which it would be safe and proper for me to issue a second certificate of right in this case.

On June 23, 1895, Mr. Copp made application to your office

for the issue of a duplicate of the additional homestead certificate in the name of Samuel Mitchell, late private Company B, 57th Regt. U. S. Colored Troops, and the certificate thereof to be in my name as the *bona fide* owner of the same, under the act of Congress approved August 18, 1894.

Mr. Copp filed with his application his sworn statement as follows:

Some time in the fall of the year 1886 I purchased of and received from Simeon H. Merrill, then chief of the money order office of the Washington, D. C., city post

office a certificate of right to an additional homestead entry under section 2306 of the U. S. Revised Statutes in the name of Samuel Mitchell, formerly private Co. B, 57th Regiment, United States Colored Troops, for five and 89/100 acres of public land. I paid said Simeon H. Merrill about eighty-five (\$85) dollars for said certificate and two powers of attorney executed by said Samuel Mitchell, one power of attorney to locate the said certificate on public land and the other power of attorney to sell, transfer, and convey any land so located or entered, the said powers of attorney being irrevocable by said Samuel Mitchell.

That on or about the 23d day of October in the year 1886 I enclosed said certificate and the said two powers of attorney in a letter addressed to the cashier of the First National Bank of Olympia, Washington, with instructions to deliver the said papers to John F. Govey on receiving from said Govey one hundred and ten (\$110) dollars, which sum less costs was to be sent to me by exchange on New York City. I placed the said letter in the Washington city post office and I was never able to trace the said letter and I supposed and do believe it was destroyed, lost in, or abstracted from, the United States mails, all without my knowledge, assent or connivance.

Further, I never received from said John F. Govey or the said cashier of the First National Bank, any pay for said certificate in whole or in part, or any promise to pay from either or both of them or any one else, in view of the loss or destruction of said certificate. Inasmuch as it was the common and universal custom of the commercial world to evidence the sale, transfer, assignment and conveyance of the right of the soldier under said section of the United States Revised Statutes and his certificate by means of the powers of attorney and not otherwise, and as the said cashier and the said John F. Govey claimed and affirmed that neither of them had received said papers, I never demanded payment therefor.

Further, I depose and say that I do not know the address of the said soldier Samuel Mitchell and I have not communicated with him or any one in his behalf on the subject of the said certificate or of an application for the issue of a duplicate certificate in the place thereof.

Further, I depose and say that I am the *bona fide* purchaser for value and the owner of said right and certificate, being the said additional homestead certificate in the name of Samuel Mitchell, late private Co. B, 57th Regiment U. S. C. T., as aforesaid, issued by the Commissioner of the General Land Office January 8, 1883; that I received in good faith as purchaser from said Simeon H. Merrill the said certificate and the said two powers of attorney, as was the custom of transfer of title by delivery of the papers and the possession thereof. Since the date of said letter I have never seen, heard from or been able to trace said additional homestead certificate in the name of Samuel Mitchell aforesaid.

And also the sworn statement of John F. Govey, as follows:

STATE OF WASHINGTON, *Thurston County*, ss:

John F. Govey, being duly sworn, deposes and states as follows: During the year 1886 it was part of my business to locate scrip on public land: As nearly as I can remember during the latter part of said year, I requested Henry N. Copp of Washington, D. C., to send by express C. O. D., to the city of Olympia, Washington, what is known as a fractional soldiers' additional homestead certificate of about five acres in area, which, if satisfactory in all respects, I would purchase.

In December of said year I received a communication from said Henry N. Copp to the effect that in October, the second month before, he had forwarded by mail to the cashier of the First National Bank, in said City of Olympia (of which bank I am now and have been vice president for the past four years and more, from the fall of 1887 to the fall of 1890, I was president of said bank and from July, 1882, to July, 1886, I was register of the U. S. Land office at Olympia, Wash.), a soldiers' additional homestead certificate for five (5) and 89/100 acres in the name of Samuel Mitchell, formerly private Co. B, 57th Regiment U. S. C. T. As I had never seen

nor received said certificate, I declined to pay for the same and I have never paid for it in whole or in part or promised to pay for it in whole or in part. I do not know what became of said certificate beyond the statement made by said Henry N. Copp.

(Signed)

JOHN F. GOWEY.

On July 10, 1895, your office denied Mr. Copp's application.

On July 11, 1895, he filed a motion for review of your office decision, which motion was overruled by your office letter of August 1, 1895.

In his appeal Mr. Copp specifies several grounds of alleged errors in the decisions appealed from, the sixth and ninth of which are as follows:—

6. In not holding that the evidence submitted together with the fact that no effort has been made to locate said certificate since it left the possession of said Copp, nearly nine years ago, raises a reasonable presumption of its loss or destruction and entitles him, as its owner, under the act of Aug. 18, 1894, to a duplicate certificate thereof, in his name, under said act.

9. In holding that 'Merrill's connection with Mitchell' must be shown, in the face of the fact that it is already shown that Merrill had possession of the certificate issued to Mitchell under claim of ownership, and sold the same to appellant.

It appears that the records of your office show:

That said Mitchell became entitled to enter the additional land under Section 2306 U. S. R. S., and does not appear therefrom that he has exercised that right.

The act of August 18, 1894 (28 Stat., 397), provides:—

That all soldiers' additional homestead certificates heretofore issued under the rules and regulations of the General Land Office under section twenty-three hundred and six of the Revised Statutes of the United States, or in pursuance of the decisions or instructions of the Secretary of the Interior, of date March tenth, eighteen hundred and seventy-seven, or any subsequent decisions or instructions of the Secretary of the Interior or the Commissioner of the General Land Office, shall be, and are hereby, declared to be valid, notwithstanding any attempted sale or transfer thereof; and where such certificates have been or may hereafter be sold or transferred, such sale or transfer shall not be regarded as invalidating the right, but the same shall be good and valid in the hands of *bona fide* purchasers for value; and all entries heretofore or hereafter made with such certificates by such purchasers shall be approved, and patent shall issue in the name of the assignees.

The material part of the decision appealed from necessary to consider in determining the case is as follows:—

It is found, however, that the evidence of assignment usually present in cases of the kind, consisting of the production of the certificate and the powers of attorney necessary for the use thereof by the holder in the name of the soldier, which have been held by the Department to amount to an assignment of the right, is not present in this case.

The certificate is said to be lost, as also the powers of attorney. The only evidence that the certificate and powers of attorney were transferred by Mitchell for the purpose of assignment are the affidavits above mentioned.

I think that Mitchell must be regarded as a claimant of record to the right of additional entry. To comply with Mr. Copp's request would be equivalent to a decision by this office against Mitchell's right to avail himself of the additional homestead privilege to which the record shows that he was found to be entitled, on the ground that he transferred the same and that Copp is the present owner thereof.

I am not satisfied that this can be properly done in an *ex parte* proceeding, and on

evidence of the character submitted. It does not appear that Mitchell has had notice of this proceeding, nor does it appear what, if any, effort has been made to ascertain his whereabouts, and to afford him an opportunity to be heard as to whether he ever parted with his right by assignment as alleged.

It is true that there are precedents for issuing new or duplicate certificates of additional right on application of the beneficiary, but I know of no case in which this has been done at the instance of a party claiming under the act of August 18, 1894, to the exclusion of the original beneficiary, without notice to the latter. Such reissue does not appear to be provided for in said act, or the instructions in circular of October 16, 1894, issued thereunder.

The evidence submitted by Mr. Copp, in connection with the records of your office, establishes the following facts:

1. That on January 8, 1883, your office issued, in the name of Samuel Mitchell, a soldiers' additional homestead certificate for 5.89 acres of land under the law and instructions of the Department, and on the same day mailed it to Mitchell's attorney, Ennis, in this city.

2. That said certificate has never been located by Mitchell or any one else.

3. That in the fall of 1886 Henry N. Copp purchased said certificate of Samuel H. Merrill and paid him a valuable consideration therefor.

4. That at the time of said purchase said certificate was delivered to said Copp, together with two powers of attorney executed by said Mitchell, one power of attorney to locate the certificate on public land, and the other power of attorney to sell, transfer and convey the land so located or entered under said certificate; both of these powers of attorney made irrevocable by said Samuel Mitchell.

5. That in October, 1886, Henry N. Copp enclosed said certificate and powers of attorney in a letter addressed to John F. Gowey, Olympia, Washington, who never received them.

6. That said certificate has been lost in the mails, or otherwise, and cannot be found.

The questions to be determined are: First is Henry N. Copp entitled to have a duplicate certificate issued to him, and if so, then should it issue in his name or the name of the soldier Mitchell? The language used in the act of August 18, 1894, is very broad: "All soldiers' additional homestead certificates" issued prior to the passage of the act under the law and regulations, are made and "declared to be valid" notwithstanding any attempted sale, or transfer thereof; "and where such certificates have been or may hereafter be sold, or transferred, such sale or transfer shall not be regarded as invalidating the right but the same shall be good and valid in the hands of *bona fide* purchasers for value."

This language clearly covers a case of "sale" and purchase as well as one of "transfer." Mr. Copp is shown to be a *bona fide* purchaser for value and comes within the provisions of the act of August 18, 1894.

In the case of John M. Rankin (on re-review, 21 L. D., 404), it was held that said act validated all outstanding soldiers' additional certificates in the hands of *bona fide* holders. An outstanding certificate is

one that has been issued and has not been located, canceled or surrendered. Mr. Copp purchased this certificate and lost it; the mere loss of the certificate itself can not be treated as the loss or destruction of his rights thereunder. Since Congress has enacted a law validating and making good the certificates outstanding, it follows that Mr. Copp is entitled to have a duplicate certificate issued, and delivered to him, reciting that it is issued in lieu of the original which has been lost. Of course, it will issue in the name of Samuel Mitchell and for only 5.89 acres of land.

The lost powers of attorney have nothing to do with the case. The Department was in no sense connected with them in their inception and can make no order respecting them; they originated between the soldier, Mitchell, and his attorney or attorneys, and all matters relating to them must be settled outside of the Department.

The decision appealed from is reversed, and you are directed to issue a duplicate soldiers' certificate and deliver to Mr. Copp in conformity with the views herein expressed.

COAL LAND ENTRY—ASSOCIATION—IMPROVEMENTS.

MCWILLIAMS ET AL. v. GREEN RIVER COAL ASSOCIATION.

A coal land entry made by an association under the proviso to section 2348 R. S. may embrace by legal sub-divisions six hundred and forty acres including the legal sub-divisions on which the mining improvements are actually situated, whether the land covered by said improvements is coal or agricultural land.

Under an entry of such character the land must appear to be mineral in character as a present fact, and from actual production of coal, but the development of coal on each forty acre sub-division is not requisite.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 13, 1896. (W. M. W.)

I have considered the case of James McWilliams *et al.* v. The Green River Coal Association, on the appeal of the latter from your office decision of April 11, 1895, rejecting said association's coal declaratory statement and final proof thereon to the W. $\frac{1}{2}$ of Sec. 26, T. 22 N., R. 7 E., Seattle, Washington, land district.

The record shows that the approved plat of said township was filed in said local land office on the 5th of May, 1893.

On the same day The Green River Coal Association, by its attorney in fact, filed a coal declaratory statement for section 26 of said township, claiming it under the provisions of Section 2348 of the Revised Statutes.

On the same day, D. W. Wolters made homestead entry for the SW. $\frac{1}{4}$ of said section 26.

On May 18, 1893, Peter Brown made homestead entry for the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section 26.

On October 16, 1893, James M. McWilliams made homestead entry for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section 26.

On July 23, 1894, the coal applicant offered final proof, which the local officers declined to accept. Notice of a hearing was issued, citing the above named parties to appear and submit evidence as to the character of the land. At the time set for trial all the parties appeared and introduced their testimony.

On December 22, 1894, the register and receiver found that "the coal claimants have failed to show by their testimony that there are veins of coal upon this land that have been developed and worked, and that are actually producing coal." They recommended that the homestead entries of McWilliams, Brown and Wolters be sustained, the application of the Green River Coal Association to purchase said land be denied, and said association's final proof rejected.

The coal claimants appealed.

On April 11, 1895, your office concurred with the findings of the register and receiver as to the facts and rejected the coal declaratory statement and final proof of the coal applicants as to the W. $\frac{1}{2}$ of the section claimed.

The coal claimants appeal.

From an examination of the evidence and record in the case, it is apparent that it was tried before the local officers and passed on by your office on the part of the coal applicants upon the theory that all that was necessary for them to show, in order to enter the entire section, was that there was an association of four persons, that coal existed on the section, and that they had opened a coal mine on said section and had expended \$5,000, or more, in developing and improving the mine; on the part of the agricultural claimants it was tried upon the theory that, in order to be subject to entry under the coal land laws it was necessary to show the development of coal on each forty acre tract of said section. These theories were both erroneous, as will appear from an examination of the law.

• Sections 2347 and 2348 of the Revised Statutes are as follows:

SEC. 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal-lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

SEC. 2348. Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the

same, shall be entitled to a preference-right of entry, under the preceding section, of the mines so opened and improved: *Provided*, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

Section 2347 gives to properly qualified persons or associations the right to enter "by legal subdivisions" in the one case one hundred and sixty acres, and the other three hundred and twenty acres of "vacant coal lands," upon the payment of the statutory price of the land.

Section 2348 gives to duly-qualified persons, who have opened and improved, or shall hereafter open and improve, any coal mines on the public lands, and shall be in the actual possession of the same, a preference right of entry under section 2347.

In *Scott v. Sheldon* (15 L. D., 361), it was held that a coal land entry attacked by a subsequent homestead claimant may be canceled as to the legal subdivisions in conflict that are not valuable for coal. In the same case, on review, 15 L. D., 588, it was held that: "Coal land entries are made of 'legal subdivisions,' and if it is shown that any such subdivision, so entered, is not in fact coal land, the entry should be canceled as to such tract."

In that case Sheldon had entered lot 2, the NE. $\frac{1}{4}$ of the NW. $\frac{1}{2}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 23, T. 35, R. 6. Scott contested the entry as to lot 2, and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section, on the ground that said land was not coal land.

Whatever legal rights this association may have to enter six hundred and forty acres of land must be found in section 2347 and the proviso to section 2348 of the Revised Statutes. These sections must be construed together. Under section 2347 the right to enter coal lands "by legal subdivisions" is given. The *entry* when made must be made under this section; must be made in accordance with its provisions; the *right* to make entry of coal lands is given by this section; the right to enter lands under it is expressly limited to "coal lands." The proviso to section 2348 provides that: "Such association may enter not exceeding six hundred and forty acres, including such mining improvements."

It seems clear that this proviso means that where an association has expended \$5,000 or more in working and improving a coal mine or mines, then, in consideration of such expenditure, the association may enter by legal subdivisions not to exceed six hundred and forty acres of land, including the legal subdivisions of the land on which the mining improvements are actually situated, irrespective of whether the land covered by the improvements is coal land or agricultural land.

The use of the words "including such mining improvements" bears out this construction of the proviso, for one of the prerequisites to making a coal entry is that the land to be entered must contain coal, but in improving and developing a coal mine it is not always proper, profitable, wise or necessary, to place the improvements on land that

necessarily contains coal; indeed, cases might arise where it would be impracticable to place the improvements necessary to operate a coal mine or mines, on land that contains coal. The character of the land on which the improvements may be made for the purposes of working, developing and operating a mine or mines, is wholly immaterial.

As all entries under the coal land law are required to be made by legal subdivisions, it seems reasonable and proper that the land covered by the improvements should be limited to the subdivisions on which the improvements are actually situated.

With respect to the character of the land, outside of the improvements, the conclusion herein reached is in harmony with *Rucker et al. v. Knisley* (14 L. D., 113), and authorities cited, and is supported by *Hamilton v. Anderson* (19 L. D., 168). In the latter case it is said:

The rule of the Department undoubtedly is that the land must appear to be mineral in character, "as a present fact," and from actual production of mineral. *Rucker et al. v. Knisley* and cases cited (14 L. D., 113), but it does not follow, and has never been held by the Department that there must be an actual development of coal on each forty acre subdivision of the one hundred and sixty acres for which entry is allowed under the mining laws.

The evidence having been taken upon erroneous views of the law, and being indefinite in character, it is not sufficiently clear to warrant the Department in deciding the case on its merits.

The decision appealed from is vacated, the papers in the case are herewith returned, with the direction that your office order a hearing, at which all parties will be permitted to introduce such evidence as they may have, and upon the evidence so taken, the case will be rejudicated in conformity with the views herein expressed as to the law of the case, under the Rules of Practice.

PRIVATE CLAIM—SPECIAL ACT—RELINQUISHMENT.

JOHN HOUSTON M. CLINCH.

A patent having issued to the beneficiary in accordance with the terms of the special act of July 2, 1836, on application and payment for the land embraced therein, a conclusive presumption arises, as against a contrary claim on the part of the heir of said beneficiary, that all the requirements of said special act were complied with by said beneficiary, including the relinquishment of the lands specified in said act, a condition on which said act was dependent for its operative force.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 13, 1896. (J. L.)

This case involves section 38, T. 6 S., R. 26 E., containing 11,412 acres, section 37, T. 7 S., R. 26 E., containing 1007 acres, section 47, T. 6 S., R. 27 E., containing 4,106.80 acres, and section 44, T. 7 S., R. 27 E., containing 1454 acres; aggregating according to the official

maps on file in your office; 17,979.80 acres of land, in Gainesville land district, Florida: And also section 39, T. 6 S., R. 26 E., containing 860 acres, and section 38, T. 7 S., R. 26 E., containing 140 acres, aggregating 1000 acres of land in the same land district.

John Houston M. Clinch, claiming as heir and executor of Duncan L. Clinch deceased, who is alleged to have been assignee of George J. F. Clarke deceased, applied to your office for the issue of patents for the tracts of land aforesaid, under and by virtue of a Spanish grant to said Clarke dated and executed on April 6, 1816, and a Spanish concession dated October 7, 1816.

On February 3, 1887 your office rejected said application; and said John Houston M. Clinch appealed to this Department.

The material facts of the case disclosed by the record are as follows:

On April 6, 1816, the Spanish governor of East Florida granted to George J. F. Clarke five miles square (equal to sixteen thousand acres) of land, on the west side of St. John's River above Black Creek, at a place entirely vacant known by the name of White Spring. On January 11, 1819 said governor authorized

Dou Andres Burgevin, a competent surveyor, to survey the lands granted Clarke in property on the 6th of April 1816, on the west side of St. John's River, and at a place called White Spring, (so) that in the best form and exactness said lands shall have the equivalent to the square of five miles as mentioned in said grant; bounding on the north by Buckley creek on the south by the public road to Picolata where it meets the river, on the east by said river, and on the west by vacant pine land.

On January 25, 1819, said governor issued another order permitting the surveyor to contract the depth back from the river to about one and a half miles; and to survey to Clarke the balance of the 16000 acres "in the hummocks called Lang's and Cone's, situated on the south of Mizzell's lake, which are vacant."

Whereupon Burgevin made three surveys. The first, which was certified on February 24, 1819, included eight thousand acres of land

west of the river St. John, the admeasurement beginning at the mouth of Buckley Creek below White Spring, and following upwards the margin of said river to the point where the public road from Picolata to Alachua crosses the said river.

The second survey, which was certified on March 10, 1819, embraced five thousand acres in the place called Lang's hummock situated south of Mizzell's lagoon, west of the river St. John.

The third survey, which was certified on March 12, 1819, embraced three thousand acres of land in the place called Cone's hummock situated south of Mizzell's lagoon, west of the river St. John.

On May 23, 1832, the superior court of the eastern district of Florida, confirmed to said George J. F. Clarke said 16,000 acres according to said three surveys. On appeal, the supreme court of the United States (Marshall Ch. J. delivering the opinion of the court), on March 12, 1834,

affirmed so much the decree of the superior court as held that Clarke's claim of 16,000 acres was valid, and as confirmed the same

to the extent and agreeably to the boundaries as in the grant for the said lands, and in the plat of the survey thereof made by Don Andrew Burgevin of eight thousand acres, and dated the 24th day of February, 1819, filed in this cause;

and reversed so much of said decree

as confirms to the claimant the lands contained in two other surveys thereof, made by the said Don Andrew Burgevin, filed also in this cause, one for five thousand acres on the 10th of March, 1819, and the other for three thousand acres on the 12th of the same month.

And thereupon the supreme court remanded the cause to the said superior court.

With directions to conform to this decree; and to take such further proceedings in the premises that the remaining eight thousand acres which have been improperly surveyed without authority, be surveyed on any lands *now vacant* within the limits of the grant made to the petitioner on the 6th of April, 1816, and that the title of the petitioner to the land so surveyed be confirmed. (For this decree see 8 Peters 469).

The mandate of the supreme court was filed in the court below on August 16, 1834.

On May 22, 1835, the Commissioner sent to the surveyor general in Florida printed copies of supreme court decisions confirming eleven Spanish grants, and instructed him to survey them "*with the least practicable delay*", and to notify all parties interested. On June 25, 1835, the Commissioner instructed the surveyor general to give notice of his surveys by publication in the newspapers; and called his attention specially to the case of George J. F. Clarke, and to the necessity of action therein by the superior court of Florida. On August 8, 1835 the superior court appointed John Lee Williams to survey the additional eight thousand acres as required by the supreme court, and make return to court. On October 29, 1835, Williams returned a plat and report of his survey, describing the lines as follows:

Beginning (on St. John's River) at Narrow Bay, at a cypress marked with a cross, and running thence north 72, west 557 chains to a large pine on the south side of Buckley creek, marked also with a cross; thence north 12 east down the creek to a pine on the south bank marked with a cross 175 chains; thence south 68 east 510 chains to a water ash marked with a cross on the margin of the St. John's River; thence up the margin of the river 157 chains to the place of beginning: Containing (exclusive of a tract of one thousand acres marked "C" on said plat) eight thousand acres.

The plat, (which included the 8000 surveyed by Burgevin and the 8000 acres adjoining surveyed by Williams), showed the whole 16,000 acres conveyed by the grant of April 6, 1816, to be an irregular triangle, bounded on the west by Buckley creek, on the north and east by the St. John's river, and on the south by the straight line above described, extending from a cypress tree on the bank of the river to a pine tree on the bank of Buckley creek, north 72 west, 557 chains, "exclusive of the tract of one thousand acres marked C."

On November 2, 1835, the superior court of Florida examined Williams' return and plat aforesaid, and approved the same; and

Ordered that the said tract of eight thousand acres so returned be and the same is hereby confirmed to the said George J. F. Clarke as part and parcel of the sixteen thousand acres originally granted to him at that place.

From this decision the United States did not appeal. Whereupon it became and was in 1835 the duty of the U. S. Land Department to issue to George J. F. Clarke a patent for all the lands (except 1,000 acres) included within the three boundaries aforesaid, to wit: Buckley's creek, St. John's river, and the straight line aforesaid. And such is yet the duty of this Department, unless that duty has been modified by subsequent events. The grant aforesaid is called in the record, sometimes the "Bayard tract", and sometimes the "Mill grant." It will hereinafter for brevity be referred to, as Clarke's "mill grant."

The present applicant, John Houston M. Clinch, in a letter dated April 2, 1883, addressed to your office, claimed,

(1) That in the year 1834 his father Duncan L. Clinch bought said "mill grant" at a sale of Clarke's property made by the U. S. Marshal under a levy for debt, and received from the marshal a deed therefor; which deed has not been produced; and

(2) That afterwards his father took from Clarke a deed for the same property. A copy of said deed, dated December 16 1834, is filed in this record.

Therefore, Duncan L. Clinch, when he acquired an interest in said property under the deed aforesaid, knew that the survey of 3000 acres in "Cone's hummock" had been annulled by the supreme court of the United States. It must also be conclusively presumed that Duncan L. Clinch after November 2, 1835, knew that Williams' survey of the additional 8000 acres had been made, and had been confirmed by the superior court in Florida.

At the next session of Congress, which began in December, 1835, Duncan L. Clinch procured the passage of an act entitled "An act for the relief of Duncan L. Clinch."

It was approved July 2, 1836 (6 Statutes 676). Said act

authorized Duncan L. Clinch and John H. McIntosh assignees of George J. F. Clarke to enter at the minimum price for which the public lands are sold, (to wit, one dollar and twenty five cents per acre), a tract of land in East Florida, containing three thousand acres in Cone's or Moody hummock, south of Mizzell's lagoon, in lieu of the same quantity of land (to wit: 3000 acres), confirmed to them in another place, upon their filing in the office of the register of public lands for the district of East Florida, a relinquishment of all their right, title, claim and demand in and to the land last mentioned;

meaning plainly: Three thousand acres of the land confirmed to them (i. e. to their alleged assignor George J. F. Clarke); and in lieu of which the privilege of buying 3,000 acres at Cone's hummock, was granted them by Congress. By the terms of the act Clinch and McIntosh were free to accept the offer of Congress or decline it as they might see fit.

But they could accept it only by the performance of a condition precedent, to wit: "Upon their filing in the office of the register of public lands for the district of East Florida, a relinquishment of all their right, title, claim and demand in and to" three thousand acres out of the 16,000 acres of land confirmed to George J. F. Clarke under and by virtue of the decree of the supreme court of March 12, 1834. There is nothing in the record before me tending to show that McIntosh had any legal estate or interest in the premises. It seems that Clinch married one of McIntosh's daughters, and that McIntosh was the grandfather of Clinch's son, the present applicant. (See the affidavit of John Houston M. Clinch filed in this Department on September 27, 1887).

Duncan L. Clinch well knew that his estate and interest in the premises, was exclusive of McIntosh; and that he was obliged as a condition precedent to the assertion of any right under the act of July 2, 1836 aforesaid, to file his relinquishment of "the same quantity of land," out of the "mill grant", or "Bayard tract." On November 3, 1838, he, (ignoring McIntosh), filed in his own name in the Land Office at St. Augustine an application in the following words:

I, Duncan L. Clinch of Camden county, Georgia, do hereby apply to purchase the following parcels of public land granted to me by special act of Congress approved the 2d day of July A. D. 1836, amounting to three thousand acres to be taken up in Cone's or Moody's hummock south of Mizzell's lagoon west of the river St. John, by pre-emption, in lieu of three thousand acres on the St. John's river and situated on the west side of St. John's river, commonly known as the "Bayard tract;" a relinquishment of the same having been filed in the Land Office at St. Augustine district of East Florida.

(Then followed descriptions of ten subdivisions).

And the register certified the application.

On the same day, to wit: November 3, 1838, Duncan L. Clinch paid to the receiver \$3760.42, and took from him a receipt in the following words:

Receiver's Office, St. Augustine Nov. 3d, 1838.

Received from Duncan L. Clinch of Camden county, Georgia, the sum of three thousand and seven hundred and sixty dollars and forty two cents being in full for the following parcels or lots of land granted to him as a pre-emption to wit:

(Here follows list of subdivisions).

Being three thousand and eight acres and thirty four hundredths situated in Cone's or Moody's hummock Alachua county, at the rate of one dollar and twenty five cents per acre.

And on March 10, 1845, a patent was issued to Duncan L. Clinch for said 3008.34 acres of land, applied for and paid for as aforesaid.

It now appears that the signature of Duncan L. Clinch is not written on the face of the application. It also appears that the "relinquishment" required by the act of July 2, 1836, and referred to in said application as "having been filed in the land office at St. Augustine district of East Florida," has been lost or mislaid, destroyed or purloined, and

cannot be found. Whereupon John Houston M. Clinch, the applicant here; claims that he is entitled to a patent for the whole of the 16,000 acres of land embraced in the Spanish "mill grant" of April 6, 1816, in addition to the 3008.34 acres of land patented to his father Duncan L. Clinch under the act of July 2, 1836. In his letter of December 13, 1882 to the Commissioner of the General Land Office, he claims not only said tract of 16,000 acres, but also another tract of 1000 acres lying within the boundaries of the larger grant, but not being part thereof,—not having been included in the confirmatory decree of the court—He reiterated said claim in another letter to the Commissioner dated April 2, 1883. In his affidavit filed in this Department on September 27, 1887, he makes oath:

That affiant was executor of the will of his father General Duncan L. Clinch, and administrator of his grandfather General John H. McIntosh, and inherited from his father with the other heirs, the Clarke "mill grant", and the 3000 acres entered by his father under the act of Congress of July 2, 1836; and that he never heard that a relinquishment had been effected by them or either of them, of 3000 acres from the mill grant.

The third assignment of error filed with his appeal to this Department, is as follows:

III. The Commissioner erred in assuming that the private pre-emption act of July 1836 (6 Statutes 676), required Duncan L. Clinch and John H. McIntosh to file with the register a relinquishment of 3000 acres of the Clarke "Mill grant" as resurveyed by Burr; and erred in assuming that they made such relinquishment.

On page 17 of the printed brief of his attorneys, the present applicant again insists:

First, that the alleged application by Clinch (Duncan L.) of November 3, 1838, was wrong in reciting that a relinquishment had been made of 3000 acres on the Saint John in the Bayard tract; and wrong in reciting that the relinquishment had been filed in the Saint Augustine land office.

Second, that (Duncan L.) Clinch's letter of July 24, 1843, was wrong in saying that he had complied with all the requirements of the act of 1836.

Third, that Commissioner Sparks was wrong in relying upon the deceptive recitals in the paper of November 3, 1838, and in the letter of July 24, 1843:

Fourth, that Commissioner Blake, on whom the construction and enforcement of the act of July 2, 1836, was devolved, required and construed the act of July 2, 1836, to require, a relinquishment to the United States of the tract at Cone's hummock:

That is to say, that Clinch and McIntosh should relinquish to the United States the very land which the act authorized them to purchase from the United States, in lieu of the same quantity of land to be relinquished from the mill grant!

This Department will not entertain a proposition so absurd. It will not permit Houston Clinch to allege that his ancestor under and through whom he claims, fraudulently procured a patent for 3008.34 acres of land by means of "deceptive recitals." He will not be suffered to allege that his ancestor did not in good faith "comply with all the requirements of the act of 1836;" nor to deny that the "relinquish-

ment was duly filed in the office of the register of public lands for the district of East Florida." The meaning of the act of July 2, 1836, is too plain for serious discussion. This Department conclusively presumes that Duncan L. Clinch and John H. McIntosh did file a good and sufficient deed relinquishing to the United States 3008.34 acres of land out of the eight thousand acres which were located and surveyed by Williams, and confirmed by the superior court of East Florida in the year 1835. The land so relinquished became on March 10, 1845, the date of the patent to Clinch, a part of the public domain.

There is no room for dispute as to the boundaries of the "mill grant." Buckley's (sometimes called Governor's) creek is one; St. John's river is another; the third and last boundary is the straight line hereinbefore described. In the year 1849 Deputy Surveyor David H. Burr, under contract with the Commissioner of the General office for public purposes, located and resurveyed said straight line. Both Williams (in 1835) and Burr (in 1849) started on St. John's river, at Narrow Bay, at a cypress tree marked with a cross, and ran the line N. 72 W. to Buckley's creek. The public surveys were adjusted to and closed upon said line; and the plats made in accordance therewith were approved by the surveyor general. Since 1849, the location on the ground of the straight line confirmed by the superior court in Florida, has been a matter of public record in your office. All of the land included between Buckley creek and St. John's river north of that line, (exclusive of the thousand acre tract delineated on Williams' plat and also on the official map), was, by the judicial decree of November 2, 1835, confirmed to George J. F. Clarke as and for sixteen thousand acres in satisfaction of the Spanish grant of April 6, 1816. The alleged discrepancies since discovered as to lines and acres, are immaterial.

There is in this record sufficient evidence to show that Duncan L. Clinch in his life time acquired by sale and transfer from George J. F. Clarke, the 16,000 acres of land contained in the "mill grant;" and that said Clinch relinquished to the United States 3008.34 acres of land part of said 16,000 acres. Your office will therefore cause to be surveyed and cut off from said "mill grant" three thousand and eight acres and thirty four hundredths of an acre (exclusive of any part of the one thousand acre tract aforesaid); by locating and marking a line north of and parallel to the straight line aforesaid which appears upon the official maps as the southern boundary of said "mill grant"; and will cause the public surveys to be adjusted to and closed upon the new line so located and marked. Your office will then issue in the name of Duncan L. Clinch a patent for all the lands included within Buckley creek, St. John's river, and the new line aforesaid as boundaries, as and for 12,991.66 acres of land; describing the same also as usual according to the official maps. (See U. S. Revised Statutes, section 2448, and the case of Joseph Ellis, 21 L. D., 377).

It appears by the public records (See American State Papers Volume

5, page 376, No. 33 in Report No. 1, and p. 380), that in pursuance of a Spanish order of survey dated October 7, 1816, (and of a concession in 1817 and a royal title in the month of August 1818), one thousand acres of land on the west side of St. John's river opposite Picolata, were surveyed for and to George J. F. Clarke by A. Burgevin; and that said land and survey were confirmed to said Clarke by C. Downing, register, and W. H. Allen, receiver, under authority of an act of Congress of May 23, 1828 (4 Statutes 248). Clarke's claim and title to said thousand acres were again confirmed by the act of May 26, 1830 (4 Statutes 405). There is not sufficient evidence in this record to show that Clarke in his life time aliened or transferred his estate in said lands; and there appears no reason why patent therefor should not be issued. Your office will therefore issue a patent for said thousand acres of land in the name of George J. F. Clarke. The survey delineated on the plat of Williams made in 1835, does not exactly correspond with the survey made by Burr in 1849, and delineated on the official maps of T. 6 S., R. 26 E., approved July 7, 1849, and of T. 7 S., R. 26 E., approved June 19, 1851. The record shows that all parties claiming interests are content with the delineations on the official maps, and your office will follow them in issuing said patent.

Your office decision of February 3, 1887, is hereby modified in accordance with the foregoing opinions and directions.

REPAYMENT—ENTRY ERRONEOUSLY ALLOWED.

W. E. McCORD.

In case of an entry that is "erroneously allowed" for land not subject thereto, and canceled for that reason repayment may be granted without inquiry as to the truth or falsity of the final proof.

Secretary Smith to the Commissioner of the General Land Office, July 13, 1896.
(J. L. McC.)

On May 2, 1893, May Campbell made timber-land entry for the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 8, T. 49 N., R. 6 W., Ashland land district, Wisconsin.

On January 25, 1894, your office directed the local officers to notify Miss Campbell that said entry was on that date held for cancellation, for the reason that it was "offered" land, and not subject to entry under the timber-land act. Such notification was transmitted to claimant's address at Iron River (given in the entry papers as her residence), but it was returned unclaimed. Your office, therefore, on June 8, 1894, canceled the entry on the records of your office.

On September 1, 1894, W. E. McCord, claiming to be owner of the land described through purchase from Miss Campbell, applied in due form for repayment of the purchase money, fees, and commissions. This

application your office, by letter of October 10, 1894, submitted to the Department, which returned the same approved, on November 13, 1894.

In order to obtain repayment it was necessary according to the regulations of your office, to submit "properly authenticated abstracts of title, or the original deeds or instruments of assignment" (General Circular of October 30, 1895, page 98). Upon examination of the deed and abstract of title it became apparent that such deed had been made and executed by Miss Campbell prior to her making final proof and receiving final certificate. Your office, therefore, by letter of June 26, 1895, re-submitted the case to the Department, with the suggestion that, as said final proof was false, the allowance of the application for repayment be canceled.

The Department therefore, on August 12, 1895, canceled the approval of said McCord's application for repayment.

On August 20, 1895, your office notified the local officers that McCord's said application was denied, for the reason above suggested, to wit, that Miss Campbell's final proof, upon which her entry was based, was false.

From this action McCord, the transferee, has appealed.

Section 2362 R. S. authorizes repayment upon satisfactory proof "that any tract of land has been erroneously sold by the United States, so that from any cause the sale cannot be confirmed," and Sec. 2 of the act of June 16, 1880, provides that the Secretary of the Interior shall cause repayment to be made, "when from any cause the entry has been erroneously allowed and cannot be confirmed."

In the case at bar the entry of the land in question under the timber land law was "erroneously allowed and cannot be confirmed;" it is therefore embraced within the class for which repayment has been provided and directed.

It is true that the Department has repeatedly held that "repayment will not be allowed where an entry is canceled on account of its fraudulent character" (Lydia Kelly, 8 L. D., 322, and many other cases). But in the case at bar the entry was not canceled "on account of its fraudulent character." It was canceled for a reason for which the law authorizes and directs repayment. In view of this fact it is not material whether Miss Campbell's affidavit is true or false, and that question will not be inquired into.

In my opinion repayment should be allowed. The decision of your office is therefore reversed.

DESERT LAND CONTEST—RECLAIMED TRACT.

NILSON v. ANDERSON.

The mere fact that a tract of arid land is traversed by an irrigating canal is not sufficient in itself to constitute reclamation thereof, nor take it out of the class of lands subject to desert entry.

Secretary Smith to the Commissioner of the General Land Office, July 13, 1896. (E. B., Jr.)

The case of Louis Nilson, contestant, against Gustave H. Anderson, on appeal from your office decision of August 8, 1895, holding that the S. $\frac{1}{2}$ of Sec. 9, T. 36 N., R. 9 E., N. M. P. M., Del Norte, Colorado, land district, for which tract the latter made desert land entry No. 10 June 11, 1891, was desert land at the date of said entry, that the entry should remain intact, and that Nilson's contest be dismissed, has been duly considered.

Nilson having initiated contest against said entry, September 11, 1894, alleging that the tract was not desert land at the date of the entry, having been reclaimed by sub-irrigation from the Empire Canal, at and prior to that date, a hearing between the parties was duly had November 17th to 20th, 1894, which resulted in a decision by the local office, February 15, 1895, in favor of contestant. The history of the case, not already indicated herein, is so fully set out in your office decision, as are also the facts and the law applicable thereto, as to make recital thereof here, at length, unnecessary. The allegation of the contest affidavit, as above stated, presents the only issue in the case.

I find the facts to be substantially as set out in the decision now appealed from. The only water shown to have been brought on the land is that carried by the Empire Canal, which crosses the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said section from northwest to southeast so as to leave about thirty-five acres of the tract on the westerly side of the canal. From the line of the canal the land slopes to the eastward, and along its eastern border there is some sub-irrigation from the canal. The testimony is decidedly conflicting as to whether such sub-irrigation is sufficient for trees, and to supply moisture enough for grass so as to produce an average crop of hay upon the land sub-irrigated, and as to the area of land sub-irrigated. The most reliable of the testimony, that of witnesses whose ranches or farms border on the land, and who have experimented in the premises, is that, except upon the immediate margin of the canal, trees cannot be grown by sub-irrigation, and that hay, or any other agricultural crop, cannot be successfully grown upon the tract in question by that means.

The region, and the tract in question, are naturally arid, desert lands upon which neither trees nor crops of any kind can be successfully grown without irrigation. No system of laterals or ditches from the said canal, or any other source of water supply, was in operation, or had been projected, so far as appears, upon this land, when Anderson made his entry. The Department agrees with the conclusion reached by your office that under all these circumstances the mere fact that an irrigating canal crossed one corner of this tract of three hundred and twenty acres of otherwise desert land, did not, of itself, constitute a reclamation of the tract and take it out of the class of desert lands.

This case is readily distinguishable from that of *Dickinson v. Auerbach* (18 L. D., 16), cited by appellant. In the latter case water had been experimentally, at least, by a system of laterals and ditches, conducted over each forty acre subdivision of the land, and the irrigation of the land at any time was subject to the will of the entryman. The Department held that it was proven in that case that the entryman, "had actual control of a sufficient water supply," and, therefore, the reclamation of the tract had been potentially effected. In the present case nothing of the kind had ever been done upon the land by any one when Anderson made his entry, and the land was as substantially desert land as if the Empire Canal had not touched its borders.

Your office decision is affirmed; Anderson's entry will remain intact, and Nilson's contest be dismissed.

EVIDENCE—PRACTICE—NOTICE OF CONTEST—FRAUDULENT ENTRY.

MCGRADE *v.* MURRAY.

Rule 35 of Practice does not require a commission to issue to the officer who may be designated to take evidence thereunder.

In the notice of contest issued by the local office the charges as laid in the information need not be set out in the language of the informant; it is sufficient if the grounds and purpose of the contest are stated briefly.

An entry made in the interest of another is fraudulent and must be canceled.

Secretary Smith to the Commissioner of the General Land Office, July
(W. A. L.) 13, 1896. (J. L.)

This case involves the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 5, and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 8, T. 28 N., R. 21 W., Missoula land district, Montana, containing eighty acres.

On April 29, 1891, Edward Murray made homestead entry No. 16 of said tracts. In his homestead affidavit dated April 20, 1891, and filed under section 2294 of the Revised Statutes, among other things he solemnly swore:

That he was then residing on said land, and had made a bona fide improvement and settlement thereon; that said settlement was commenced on February 24, 1891; that his improvements consisted of a log house fourteen by sixteen feet in size, containing one door and a window, two acres cleared up, and that the value of the same is \$250; and that owing to the great distance he was unable to appear at the district land office to make this affidavit.

On October 27, 1892, Thomas J. McGrade filed his affidavit of contest against said entry, alleging:

1. That said Edward Murray has wholly abandoned said tract;
2. That he has changed his residence therefrom for more than six months since making said entry;
3. That said tract is not settled upon and cultivated by said party as required by law; and

4. That the said entry was not made in good faith, but fraudulently, and for the purposes of speculation.

This affidavit of contest was corroborated by Frank Hatton and H. G. Swaney.

On the same day the local officers ordered a hearing, and prepared a notice thereof, on the usual printed form, which was signed by the register, and delivered to the contestant for service, in the following words:

(4-345.)

NOTICE.

U. S. LAND OFFICE,
Missoula, Mont., October 27, 1892.

Complaint having been entered at this office by Thomas J. McGrade against Edward Murray for abandoning his homestead entry No. 16, dated April 29, 1891, upon the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 5 & NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ section eight, township 28 north of range 21 west in Missoula county, Montana with a view to the cancellation of said entry, the said parties are hereby summoned to appear at the U. S. Land office Missoula Montana on the 8th day of December, 1892, at 10 o'clock A. M., to respond and furnish testimony concerning said alleged abandonment, the testimony to be used at said hearing will be taken before Andrew W. Swaney a U. S. Commissioner, at Kalispell Montana on December 2, 1892 at 10 o'clock A. M.

ROBERT FISHER, *Register.*

Said notice was duly served on the entryman on November 1, 1892.

On December 2, 1892, the commissioner by consent of both parties adjourned the taking of the testimony until Monday December 5; on which day the entryman by his counsel filed with the commissioner a protest in the following words:

THOS. J. MCGRADE CONTESTANT, }
v.
EDWARD MURRAY CONTESTEE. }

Before U. S. L. O., Missoula, Mont. Involving Hd. E. of the NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ Sec. 8 and SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 5 T. 28 N. R. 21 W.

Now comes the contestee and objects to the taking of any testimony in this contest and moves to dismiss the same upon the ground and for the reason that the court commissioner before whom such testimony is to be taken as well as the said Land Office has no jurisdiction of the matter—in that—

First the commissioner has received no commission for taking the same, and no affidavit of contest upon which to base the same has been filed with U. S. Land Office or received by said commission, A. W. Swaney, as required by the statute and rules of practice.

Second any pretended affidavit of contest that may have been filed with the register and receiver of said Land Office specifies only conclusions of law, and contains no specific charges of abandonment, or any other charge.

EDWARD MURRAY.

The examination of witnesses on both sides, was continued from day to day until December 10, 1892, when it was closed. The commissioner mailed the testimony on December 13, and it was received at the local office on December 15, 1892. (It appears by a receipt filed with the papers that the contestant did not pay all the expenses of taking the testimony; and that Murray did not pay his part thereof, to wit: the sum

of \$33.92, until December 12, 1892. This may account for the retention of the papers by the commissioner). Neither party appeared at the local office on December 8, 1892, the day which was fixed for the hearing; and on December 12th the district officers "dismissed the case without prejudice to the contestant's commencing the case *de novo*."

On appeal by the contestant your office by letter "H" of March 3, 1893, reversed said decision, and instructed the local office to reinstate the case, and consider it on its merits: of which the parties were duly notified.

Consequently on April 4, 1894 the local officers rendered their decision, recommending that the contest be dismissed, and that Murray's entry be held intact.

The contestant appealed; and on September 29, 1894, your office reversed the decision of the local officers, and held Murray's entry for cancellation.

Murray has appealed to this Department.

Each one of the four charges made in the affidavit of contest is sufficiently stated. No question is raised as to the first three. The fourth charge, "that the said entry was not made in good faith, but fraudulently, and for the purpose of speculation," is equivalent to a charge that the "entry was fraudulent in its inception," and is both broad enough and definite enough to let in any legal evidence of any facts and circumstances, tending to prove that the entryman acted in bad faith at the time of making his entry. The contestant is not bound to make in his charge a recital of his testimony. Indeed the rules of correct pleading forbid such incumbrance of the record. Also see rules of practice 36 to 39 inclusive for the duties of local officers taking testimony in relation to such a charge. The entryman's objection to said charge is overruled.

Rule of Practice 35, under which the testimony in this case was taken, does not require a commission to be issued to the officer taking it. The objection of the entryman in this behalf is also overruled.

The entryman further complains, that the notice of the hearing served upon him on November 1, 1892, did not contain a recital of all the grounds of contest contained in the affidavit of contest; and he, in substance, insists, that the pertinency and admissibility of evidence are to be determined, not by the words of the pleading for which the contestant is responsible, but by the words of the summons issued by the officers of the government, requiring the entryman to appear and answer the charges of his adversary. Service of the summons gives the entryman opportunity for thirty days within which to find out the charges made against him. Rule of Practice No. 7 does not require the register and receiver to copy the charges into their summons. It only requires them to "give the name of the contestant; and briefly state the grounds and purpose of the contest." If the entryman and his attorneys at the time of their appearance to take testi-

mony, did not have with them a copy of the affidavit of contest, it was their own fault, the result of their own negligence. It does not appear that the entryman was subjected to any injury or disadvantage by reason of the form of the summons. His objections on this account were properly disregarded, and are hereby overruled.

The evidence in this case, on both sides, by a clear and palpable preponderance, proves that Murray's entry was in its inception grossly and corruptly fraudulent; that it was made in pursuance of an agreement between him and one Frank Hatton, that he should "hold down the ranch," and keep up a pretence of residence upon the land, for the joint benefit of himself and Hatton, until they could find a purchaser; that Murray never was in fact a *bona fide* resident upon the land; and that all his acts in relation to the land were characterized by bad faith.

The foregoing facts are proved by many witnesses.

On page 116 of the testimony, Murray as a witness was asked by his own counsel the following question:

You may state whether or not, there was ever any agreement or understanding between you and Frank Hatton, to the effect that he was to have an interest of any kind in this land; if so what?

His answer as recorded on page 117, is as follows:

Well, when I took the land up, Yes sir. It was to the effect that Mr. Allen and Mr. Hatton were to have a half interest in the land after I had filed on the land.

In this, and in many other particulars, Murray fully corroborated the testimony of Frank Hatton, who was his accomplice in the fraud perpetrated.

Your office decision is hereby affirmed.

OTOE AND MISSOURIA LANDS—DEFERRED PAYMENTS.

INSTRUCTIONS.

The Secretary of the Interior has due authority under the law, and by virtue of his supervisory power, to cancel the entries of such purchasers of Otoe and Missouri lands as are in default in the matter of deferred payments.

Directions given for notice to all such purchasers that opportunity will be given for payment of arrears with a rebate of ten years' interest, (as agreed to by the Indians) and that on failure to settle in such manner their entries will be canceled.

Secretary Smith to the Commissioner of the General Land Office, July 20, 1896. (J. I. P.)

By letter of July 18, 1895 (21 L. D., 55), you were instructed by the Department to direct the register and receiver at Lincoln, Nebraska, to call upon those purchasers of Otoe and Missouri Indian lands in Kansas and Nebraska, who were in default in payment of either principal or interest for such lands, to pay the respective amounts for which they were in arrears, within ninety days from receipt of notice, and to

advise them that in the event of their failure to do so, their respective entries would be canceled.

Subsequently, on November 9, 1895, you were instructed to advise said local officers not to take final action as directed in said instructions of July 18th (*supra*), until further ordered.

In addition to the efforts which I had previously made under the act of March 3, 1893 (27 Stat., 568), to effect a settlement between the Otoe and Missouri Indians and the purchasers of their lands in Kansas and Nebraska, I again, on April 8, 1896, through James G. Dickson, Special Agent, submitted to the Indians, under said act, for their consent thereto, a proposition for such a rebate and adjustment of their differences with said purchasers as in my judgment the principles of equity demanded. That proposition was rejected without reservation by the Indians, but from a conference with the Indians which occurred afterwards, I was authorized by them to allow a rebate of ten years interest to those of said purchasers who would, within ninety days after notice, pay the residue of the purchase money and interest remaining unpaid after the deduction of said ten years interest.

The apparent delay in submitting the above proposition has been occasioned, principally, because of the fact that the jurisdiction or power of the Department to enforce the collection of the deferred payments remaining unpaid by the purchasers of said lands, has been challenged, and a careful investigation of the question presented was deemed advisable before proceeding further in the matter.

It has been held by the Department, in the case of *Fleming v. Bowe*, on review (13 L. D., 78), that the status of an entry of Otoe and Missouri lands under the acts of August 15, 1876 (19 Stat., 208); March 3, 1879 (20 Stat., 471); and March 3, 1881 (21 Stat., 380), was that of a pre-emption entry.

The status of an entry of Osage Indian lands under the act of May 21, 1880 (21 Stat., 143), has also been held to be that of a pre-emption entry. See *Fleming v. Bowe* (*supra*).

In the case of the *United States v. Johnson* (15 L. D. 442)—an Osage entry—the purchasers were called pre-emptors, and it was held that “until all the preliminary acts required by law have been performed by the pre-emptor he has acquired no right as against the government,” citing *Frisbie v. Whitney* (9 Wall., 189); The Yosemite Valley case (15 Wall., 77). In the case of *Hessong v. Burgan* (9 L. D., 353) it was held that “the settler under the Osage act can have no vested right until he has made proof and paid or tendered the required purchase money,” and in the case of *Fleming v. Bowe* (*supra*) it was declared that no good reason could be perceived “why the entries of the Otoe and Missouri lands should be placed in any different category than the Osage entries.” That declaration had special reference, however, to the application of section 7 of the confirmatory act of March 3, 1891 (26 Stat., 1095).

In the case of William R. Sisemore (18 L. D., 44,) it is held:

When a claimant for Osage land under the act of May 28, 1880, submits proof of his qualifications to enter, shows due compliance with law, and makes his first payment for the land, his right thereto is a vested interest, subject only to the lien of the government for the unpaid purchase money; and the receipt then issued is a "final receipt."

And it is insisted that the principle there enunciated must be applied to the purchasers of these Otoe and Missouri lands.

The decision in Sisemore case is based on the proposition that the Osage act provides that after the first payment the land shall be subject to taxation under the laws of Kansas and for the further reason that said act specifically provides how the forfeiture provided therein, on failure to pay the deferred payments, may be enforced and said deferred payments collected. But the Otoe and Missouri act (21 Stat., 380) contains no such provisions. It provides (section 3) that if the settler fails to make the first cash payment he forfeits all his right to the lands which he has applied to purchase, but it provides no forfeiture in case of default in the deferred payments, nor does it make any provision as to how those payments may be collected in case of default. It will be seen then that the provisions of the Osage act which led the Department to make the holding cited in the Sisemore case, are entirely wanting in the Otoe and Missouri act, and that a purchaser under the latter act can not be held to have "performed all the preliminary acts required by law," or to have "paid or tendered the required purchase money, or to have acquired any right as against the government," until the last deferred payment has been made.

The question then presents itself: Has the Department any power to cancel an Otoe and Missouri entry for failure to make the deferred payment? The *right* which the settler forfeits by failure to make the first cash payment is the right to purchase, acquired by his settlement and application. The practice has been that when proof of settlement was duly made within ninety days from date of application to purchase, and cash payment being made, the entry was allowed. As the cash payment is a condition precedent to entry, it follows that failure to make said payment would furnish no grounds for the cancellation of an entry not in existence, but the right to purchase would be gone and the tract be subject to purchase by a subsequent settler.

The right of the Department to cancel an entry any time before patent, where failure to comply with the law, or bad faith on the part of the entryman is shown, has been decided so often by the Department and the courts that it is elemental, and a reference to authority in support thereof will hardly be required.

By the act of March 3, 1885 (23 Stat., 371), Congress granted an extension of time to said purchasers, expressly stating in the last proviso, but the time for the payment of the whole of said purchase money shall not be extended more than two years from the time the said purchase money became due according to the original terms of sale under said act.

The question at once presents itself: Why did Congress grant an extension of time for the payment of said deferred payments if the rights of the purchasers were in nowise jeopardized by the failure to make said payment, or that forfeiture on account of said default would not follow?

By act of August 2, 1886 (24 Stat., 214), Congress granted a second extension of time to said purchasers in which to make said deferred payments. Without quoting in full the provisions of the act last above mentioned, attention is called to the last two provisos thereof, which are as follows:

Provided, That all other provisions in the acts above mentioned, except as changed and modified by this act shall remain in full force: *Provided further*, That no forfeiture shall be deemed to have accrued solely because of a default in payment of principal or interest becoming due April thirtieth, eighteen hundred and eighty-six, if the interest due upon said date shall be paid within sixty days after the passage of this act.

It will be observed that the first of the two provisos above quoted refers specifically to the two acts mentioned in the body of the act of August 2, 1886 (*supra*), namely, the Otoe and the Omaha acts. It may be conceded for the sake of argument that the payment of interest referred to in the last proviso, referred to the purchasers of Omaha lands, but inasmuch as the first proviso quoted referred to the two acts, it must be admitted, by every rule of statutory construction, that the last proviso referred also to said acts, and the logical inference is, that Congress intended that any other default in payment provided for in either of said act, would render the party in default liable to a forfeiture of his entry. This is so clear to my mind that I do not deem a further discussion of it necessary. It is incredible to believe that Congress intended that by making a first payment the purchasers of these Otoe lands should thereafter be granted absolute immunity from any liability because of default in the deferred payments, or that it intended that the Secretary of the Interior should be compelled to bring them into court to enforce the collection of said deferred payments. To so hold would be to hold that, in this instance, Congress had departed from the policy pursued by it in every other instance where it provided for the sale of Indian lands for their benefit.

But it might be further stated that the right of the Secretary of the Interior, under the supervisory power conferred on him by law, to cancel entries independent of or for other reasons than those specifically mentioned in particular statutes, upon a proper showing, has been decided by the supreme court of the United States. See *Hessong v. Burgan* (9 L. D., 353, at 359); *Lee v. Johnson* (116 U. S., 48); *Buena Vista County v. Railroad Co.* (112 U. S., 165).

I am fully persuaded, therefore, of the power of the Secretary of the Interior to cancel the entries of these purchasers of Otoe and Missouri lands who are in default in the deferred payments.

It has been going on twelve years since default of these deferred

payments commenced, including four years of extension granted by Congress, and during that time the two acts extending time of payment and the act of March 3, 1893, are the only legislation of a remedial character that has been passed by Congress. And during all that time the settlers have been in possession of these lands and have received the benefits of the rents and profits thereof without any accounting. Surely they can not complain of a want of considerate treatment, but the Indians have certainly a right to complain of the delay on the part of the government in collecting their money. It is earnestly hoped that the very liberal proposition authorized by the Indians, which practically concedes all the settlers have asked, will be accepted by them and the settlement of this vexed question accomplished.

You are therefore hereby instructed to direct the local officers at Lincoln to notify those purchasers of said lands who are in arrears on the deferred payments therefor, that all those who within ninety days from notice make settlement in full, a rebate of ten years interest on the amount of principal and interest due at the date of settlement, will be allowed them; and to also notify them that on their failure to settle as proposed, within the time prescribed, their entries will be canceled.

BENESH *v.* KALASHEK.

Motion for review of departmental decision of May 13, 1896, 22 L. D., 530, denied by Secretary Smith, July 23, 1896.

STATE SELECTION—ADVERSE SETTLEMENT RIGHT.

KENT *v.* STATE OF IDAHO.

The preferred right of selection conferred upon the State by the act of March 3, 1893, is not operative as against bona fide settlement rights existing at the time the plat of survey is filed in the local office.

Secretary Smith to the Commissioner of the General Land Office, July 23, 1896. (W. F. M.)

On June 30, 1894, the State of Idaho selected, among other lands, the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 9, and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 8, township 39 N., range 2 E., within the land district of Lewiston, under the grant for the support and maintenance of the insane asylum, conferred by section 11 of the act of July 3, 1890, entitled "An act to provide for the admission of the State of Idaho into the Union," (26 Stat. 215). By the act of March 3, 1893 (27 Stat. 572-592), the State was given a preference right over any person or corporation to select such lands for a period of sixty days after they have been surveyed and declared to be subject to entry, such

right not to accrue against bona fide homestead and pre-emption settlers at the date of filing of the plat of survey in the local office. The plat of township 39, *supra*, was received at the local office on May 4, 1894, and was officially filed so that the lands became subject to entry on July 2, 1894.

On July 16, 1894, Mace E. Kent applied to make homestead entry of the above described tracts, alleging settlement in April, 1894, but his application was rejected for conflict with the State's selection. On appeal to your office a hearing was ordered, and duly held, and the State has now appealed from the decision of your office, affirming that of the register and receiver, holding its selection for cancellation.

The testimony shows that Kent settled on the land in the latter part of April, 1894, and took up his residence thereon in the following month, so that he is protected by the proviso of the act of March 3, 1893, *supra*.

The decision of your office is, therefore, affirmed.

CULLOM *v.* HELMER ET AL.

Motion for review of departmental decision of March 27, 1896, 22 L. D., 392, denied by Secretary Smith, July 23, 1896.

SWAMP GRANT—CHARACTER OF LAND—APPROVED LIST.

DREWICKE *v.* STATE OF MINNESOTA.

When the field notes of survey show that land is swamp in character, and it is listed as such, by the State, and the list approved, it will require positive evidence, by witnesses thoroughly cognizant of the condition of the land, at or near the date of the grant, to justify revocation of the approval.

Secretary Smith to the Commissioner of the General Land Office, July 23, 1896. (G. C. R.)

On July 14, 1894, Lorenz Drewicke made homestead entry No. 12,698 for the SE. $\frac{1}{4}$ of Sec. 7, T. 120 N., R. 41 W., Marshall, Minnesota, "subject to the swamp land claim of the State of Minnesota as to NE. $\frac{1}{4}$ SE. $\frac{1}{4}$."

He submitted final proof April 9, 1895, as per advertisement, duly made, and on May 14, 1895, final certificate 7479 was duly issued.

It appears that on January 3, 1896, your office directed a hearing to determine the character of the land. At the hearing the State and the homestead entryman were notified. The State made default; Drewicke appeared and with him two witnesses. After evidence was taken, the register and receiver decided that the land was "never swamp or

subject to selection or claim" by the State, and accordingly recommended that the entry remain intact.

Your office letters of March 9, 1896, addressed to the entryman's resident attorney and to the register and receiver, recalled and rescinded the letter ordering a hearing. This action was taken because it was discovered that the tract was in a list of swamp lands which was approved by the Secretary of the Interior on February 3, 1872.

The tract was omitted from the patent that subsequently issued to the State on the approved list (June 23, 1874), for the reason that it was in certain railroad limits. The company afterwards relinquished its claim to the land, and the same would have been patented to the State under the order of approval but for the conflict with Mr. Drewicke's entry.

Your office letter ("K") of May 25, 1896, transmits a petition from the entryman's attorney, asking for the revocation of departmental approval of February 3, 1873, as to the tract in question.

The petition, which is sworn to, alleges from information and belief that the land was not at date of grant, and is not now, of the character contemplated in the swamp land act. The petition is supported by three affidavits, stating, substantially, that affiants are now and have been "for many years last past," acquainted with the tract in question; that the same is "dry, sandy soil, and fit for cultivation without artificial drainage, and wholly free from periodical overflow" at all seasons; that the greater part of the same has been broken and cultivated to crop; that the same at date of grant (March 12, 1860,) was dry, &c.; that the approval of the land to the State was the result of fraud or mistake.

The Attorney-General of the State of Minnesota insists that the showing made by petitioner is insufficient to justify setting aside the approval of the land to the State, and asks that patent issue upon said approval.

An examination of the plat and field notes of your office shows that the greater part of the tract in question is "*level marsh*."

At the hearing, the order for which was set aside by your office, the entryman (Drewicke) testified that he had known the land two years. The following question was asked him: "What is the nature of this land with regard to swamp; is it wet? A. Before I went there it was a lake; but it is all dry. It is level nice land. The whole quarter is fit for cultivation."

Charley Kathmarek, aged forty years, testified that he lives two miles from the land, and has been well acquainted with it for eight years; that he does not "think" that the land was ever in a swampy condition in past twenty-five years.

John Hanky, aged sixty-five years, swears that he has known the land for seventeen years; that there has been water in wet seasons; but no water on land for ten years. Does not know whether it has

been swampy in last twenty-five years; but it has not been swampy since he knew it.

The three affiants, whose affidavits accompany the motion, failed to state how long they have known the land.

The State of Minnesota obtained its grant of swamp lands by the act of March 12, 1860 (12 Stat., 3).

The provisions of the act approved September 28, 1850 (9 Stat., 519), applicable to the State of Arkansas and other States, were extended to that State.

By the act of 1850 it was made the duty of the Secretary of the Interior to make out an accurate list and plats of the lands described (i. e., "the whole of those swamp and overflowed lands made unfit thereby for cultivation"), and transmit the same to the governor of the State, and at the request of said governor cause patent to be issued to the State therefor.

The State of Minnesota elected to take the field notes of the survey as a basis for selection, and, as above seen, those field notes show the land to be swamp.

The approval of a list of swamp land selections by the Secretary of the Interior is a judgment by the proper tribunal that the land is of the character contemplated in the grant; the certification of the lists after the approval is only a ministerial act, and when this is done, patent issues on the request of the governor. Before patent issues, however, the Secretary of the Interior has jurisdiction over the lands, and may, upon proper showing of fraud or mistake, set aside an approval of swamp land selections. *State of Wisconsin v. Wolf*, 8 L. D., 555.

But when the field notes of the public survey show that the land is swamp, and the same is listed by the State as inuring thereto under the grant, and the list has been approved, it will require positive evidence by witnesses thoroughly cognizant of the condition of the land, at or near the date of the grant, to justify rescinding the order of approval. The testimony must be from personal knowledge and contain such a description of the land as to leave no doubt that the field notes do not correctly describe the land as of the date when the survey was made.

The affidavits accompanying the petition fail in this necessary respect; not one of the affiants gives the date when he first knew the land. It is possible that the land by cultivation and drainage has been reduced to a fair state of cultivation.

The survey (made in 1866) shows the land to be swamp, and if the field notes correctly describe the land, the same belongs to the State.

Petitioner has failed to present such facts as will justify a second hearing for the purpose of impeaching the correctness of the description of the land as given in the field notes.

The petition is, therefore, denied, and the entry will be canceled as to the forty acre tract in question.

PRICE OF LAND—REPAYMENT—ACT OF JUNE 8, 1872.

CLINTON GURNEE (ON REVIEW).

The Secretary of the Interior, by virtue of the discretionary authority conferred by the act of June 8, 1872, having fixed the price of the lands therein referred to at two dollars and fifty cents per acre, and such price having been paid, it will not now be held, on application for repayment, and the showing made thereunder, that the discretion of the Secretary was exercised under a mistaken apprehension as to the true status of said lands.

Secretary Smith to the Commissioner of the General Land Office, July 23, 1896. (J. L. McC.)

Counsel for Clinton Gurnee has filed in his behalf a motion for review of the departmental decision of August 29, 1895 (21 L. D., 118), denying his application for repayment of moneys paid in excess of single minimum, upon five cash entries in T. 31 S., R. 12 E., M. D. M., San Francisco land district, California.

The lands in question were originally located with Chippewa half-breed scrip, issued in supposed accordance with the seventh clause of article 2 of the treaty of September 30, 1854 (10 Stat., 1110). The supreme court of California subsequently decided that said scrip was issued without authority of law, and was void. On June 8, 1872 (17 Stat., 340), Congress passed an act authorizing the purchase of said lands by the locators of said scrip,

at such price per acre as the Secretary of the Interior shall deem equitable and proper, but not at a less price than one dollar and twenty-five cents per acre.

In pursuance of the above act, Clinton Gurnee, upon showing himself to be the "*bona fide* owner" of the lands located with Chippewa half-breed scrip Nos. 30 B, 163 C, 174 C, 222 C, and 235 C, was allowed to purchase the same for cash. He afterward applied for repayment, on the ground that the double-minimum charge was made upon the presumption that the land was within the granted limits of a railroad; but that, inasmuch as such was not the fact, \$1.25 per acre should be refunded.

Your office, however, by letter of February 23, 1894, rejected his application, on the ground that,

at the date of said entries, the price paid was the proper price per acre without regard to the situation of the lands as to railroad limits.

Counsel for Gurnee appealed from said office decision; but the Department, on August 29, 1895, briefly affirmed it. Counsel for Gurnee has now filed a motion for review, contending that Secretary Delano charged the double-minimum price only because of his understanding that the land was within the granted limits of a railroad.

A careful examination of the record does not, in my opinion, show clearly that Secretary Delano was influenced in fixing the price for the lands here in question solely by the supposition that they were

situated within railroad limits. It would seem that he adopted this rule for his guidance when fixing the price of the land so sold in Minnesota; but he states no reason when fixing the price of these lands in California, and may have been controlled by entirely different considerations. Whatever may have been his reasons, it is sufficient to say that he exercised the authority conferred upon him by the act of Congress, and fixed the price of these lands at two dollars and fifty cents per acre; and having done this, and the amount so fixed having been paid, I doubt the propriety, even if the authority be conceded, to hold, at this late day, that he exercised his discretion under a mistake.

The motion for review is accordingly denied.

SOLDIERS' ADDITIONAL HOMESTEAD—CERTIFICATION OF RIGHT.

ELIJAH C. PUTMAN.

There is no statutory authority for the certification of soldiers' additional homestead rights, nor is such action necessary to the exercise of the additional right of entry either by the soldier or his transferee.

Secretary Smith to the Commissioner of the General Land Office, August
(W. A. L.) 4, 1896. (G. C. R.)

On May 19, 1868, Elijah C. Putman made homestead entry, No. 918, for the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 1, T. 5 S., R. 27 W., Washington, Arkansas; final certificate No. 553 (Camden series) was issued February 17, 1875. The entry was patented August 20, 1874.

On May 20, 1878, J. Vance Lewis, of this city, filed in your office an application for the issuance of a certificate of right to Putman, whose military service was alleged to be in Co. D., 4th Arkansas Cavalry.

This application was rejected by your office letter ("C") of July 17, 1878, for the reason that the War Department reported that there was no record of the military service, as alleged.

On April 6, 1894, Messrs. Smith and Shields, attorneys of this city, applied for the certification of Putman's right to make soldier's additional entry under section 2306 of the Revised Statutes.

Your office thereupon called upon the War Department, which, under date of April 12, 1894, verified Putman's alleged military service as follows:

Elijah C. Putman was enrolled November 19, 1863, at Benton, Arkansas, for one year or during the war, and mustered into service as private in Co. 'D' 4th Reg't Ark. Cav. (Col. Fishback's Cav.), January 7, 1864, and discharged as a private, March 28, 1864, by reason of disbandment of regiment.

On consideration of the application, your office, on April 24, 1894, treated the same as a renewal of that filed by Lewis, May 20, 1878; that the first application was properly rejected, and no appeal was taken. As an additional reason for the rejection of the application, your office

held that the practice of certifying to the additional right was discontinued by the circular of February 13, 1883 (1 L. D., 654), and for the further reason that the affidavit upon which the application is based was executed April 27, 1878, and there was then no evidence filed showing that the soldier was then living, and made the application for his own use and benefit.

A motion for review was duly filed, accompanied by the affidavits filed by the soldier (forms 4064 and 4087), executed May 16, 1894, before the county clerk of Montgomery county, Arkansas.

Your office, on June 14, 1894, denied the motion on the grounds that Putman acquiesced in the decision of your office of July 17, 1878, by not appealing therefrom, or taking any steps to have it set aside, that decision having become final.

Your office, however, held that Putman was at liberty to appear in person at any district land office and make a soldier's additional homestead application, under the regulations of the circular of February 13, 1883.

From that judgment Putman appealed to this Department, when, on December 4, 1895, the decision of your office was affirmed, on the grounds that Putman had taken no steps within a reasonable time after the action of your office of January 25, 1883, returning his application to his attorneys. As a further ground, it was held that,

As he has been silent for so many years, it must be considered that he has abandoned his claim. The re-filing of his application, April 6, 1894, comes by far too late to entitle him to an adjudication of his case under the regulations existing prior to February 13, 1883.

A motion for review of that decision was denied May 14, 1896, because the same was not filed within thirty days after notice of the decision.

Your office letter ("C") of June 12, 1896, transmits a communication filed therein June 4, 1896, by W. E. Moses, of Denver, Colorado. This petition is styled, "Petition for review or modification," and calls attention to the decision by the supreme court of the United States, dated May 18, 1896, in the case of *Webster v. Luther et al.*

It sufficiently appears that Putman served for more than ninety days in the army of the United States during the war of the rebellion; also that he is the identical person who, on May 19, 1868, made homestead entry of the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 1, T. 5 S., R. 27 W., Camden, Arkansas, which tract was afterwards patented to him under that entry. He is, therefore, entitled to the benefits conferred by section 2306 of the Revised Statutes. It is true that his application was rejected because the War Department reported that there was no record of the alleged military service. It was subsequently discovered, however, that he was in fact a soldier for the time prescribed in the statute to entitle him to the additional right.

It is unnecessary to discuss the question as to whether he, or the

War Department, was in error when he first applied. The fact that your office or this Department may have erroneously denied to him a certificate entitling him to the additional homestead right, does not preclude him from obtaining the rights which the statute plainly prescribes.

The circular of February 13, 1883, *supra*, directed that:

The practice which has hitherto prevailed of certifying the additional right as information from the records of this office, and permitting the entry to be made by an agent or attorney, is hereby discontinued.

The circular required the party desiring to make the additional entry to present himself at the local land office and make his application as in an original entry; to establish his identity as a soldier; to give the facts respecting his prior entry; and that he had not previously exercised his additional right, by entry, application, or by sale, transfer, or power of attorney.

Since the passage of the act (June 8, 1872, 17 Stat., 333), giving to honorably discharged soldiers the additional homestead right, the Department has refused to recognize or sanction as a principle the assignability of this right.

It was held in the case of John M. Walker (on review), 10 L. D., 354, that the right of entry provided in the statute "is strictly a personal right"; that it is not in itself a right of property, "but merely a right to acquire property in a certain way and upon a given state of facts, which, without the right thus given, could not be so acquired"; the argument being that since the right unexercised can not be transferred to another by will, it could not be transferred to another by the soldier in his lifetime.

These regulations were made for the avowed purpose of protecting the government against fraudulent entries, it being made to appear that a large number of soldiers' additional entries had been made upon forged applications and by genuine applications by parties not entitled thereto; and that the right to make such entries had been the subject of sale and transfer, effected by means of two powers of attorney—one to make the entry and the other to sell the land when entered.

If, as hitherto held by the Department, section 2306 of the Revised Statutes gave to the soldier "merely a right to acquire property in a certain way," and that the right of entry therein prescribed "is not in itself a right of property," the instructions of February 13, 1883 (*supra*), are logical and clearly right.

In the case of Webster *v. Luther et al.* (*supra*), the supreme court of the United States takes an entirely different view of the purposes of Congress in the enactment of the law in question.

In that case the plaintiff, Webster, read in evidence a quitclaim deed to the land from Mary A. Robertson, widow of James A. Robertson, dated October 7, 1890, acknowledged October 17, 1890, and recorded October 22, 1890; also application of Mary A. Robertson, dated April

7, 1887, together with the receipt of the local land office, showing the payment of the fees and commissions prescribed by law to enter the lands in dispute under section 2306 of the Revised Statutes, granting additional lands to soldiers and sailors who served in the war of the rebellion. The receipt of the land office, dated April 7, 1887, showing payment in full of the balance required by law for the entry of lands under section 2291 of the Revised Statutes.

A patent from the United States to Mary A. Robertson for these lands issued September 21, 1888, recorded February 11, 1889, in the office of the register of deeds, in St. Louis county, Minnesota, and reciting that the claim of the patentee to the lands had been established, etc.

The defendants read in evidence a power of attorney, dated April 28, 1880, and duly recorded April 8, 1887, from Mary A. Robertson to James A. Boggs. This instrument authorized and empowered Boggs, as attorney for his principal, "to sell, upon such terms as to him shall seem meet," any lands which the principal then owned, either in law or equity, and obtained by her as "an additional homestead" under the provisions of section 2306 of the Revised Statutes; to sell any such lands as she might thereafter acquire under said acts; to receive the purchase money or other consideration therefor, and to deliver in the name of the principal such deeds or other assurance in the law therefor as to the agent seemed meet and necessary. It contained these additional clauses:

And my said attorney is hereby authorized to sell said lands, or my interest therein, and to make any contract in relation thereto which I might make if present, and to receive for his own use and benefit any moneys or other property the proceeds of the sale of said lands, or any interest therein, or arising from any contract in relation thereto, or received or recovered for any injury thereto, and I hereby release to my said attorney all claims to any of the proceeds of any such sale, lease, contract or damages. And I further authorize my said attorney to appoint a substitute or substitutes to perform any of the foregoing powers, hereby ratifying and confirming all that my said attorney or his substitute may lawfully do or cause to be done by virtue of these presents.

The admission of this power of attorney in evidence was objected to, and the objection overruled by the court below.

The defendants next read in evidence: 1. Two warranty deeds, each for an undivided one-half of these lands, from Mary A. Robertson, by James A. Boggs, her attorney in fact, one to the defendant Louis Rouchleau and the other to the defendant, Milo J. Luther, each dated April 7, 1887, and recorded April 15, 1887. 2. A warranty deed executed subsequently to the above deeds, by Louis Rouchleau to the defendant Luther, for an undivided one-fourth of the lands.

It will be noticed that Boggs, the attorney for Mrs. Robertson, conveyed the land under his power of attorney on the same day that Mrs. Robertson made application for the land in her own right, namely, April 7, 1887.

The court below adjudged the title to the land to be in the defendants, freed from any claim of the plaintiff, thus holding that Mrs. Robertson, by her power of attorney (above set out), executed April 2, 1880, conveyed her interest in the land, the right to which she might have obtained but for said power of attorney.

On appeal, the supreme court, on May 18, 1896, affirmed that judgment, and in doing so concurred in the views expressed by the supreme court of Minnesota by Chief Justice Gilfillan in that case.

Among other things, the supreme court of Minnesota said:

To secure settlers or require residence or cultivation was no part of the end in view in giving the additional right under the section as amended in 1872. No residence on or cultivation of the land as a condition of securing the additional right was intended. It was a mere gratuity. There was no other purpose but to give it as a sort of compensation for the person's failure to get the full quota of one hundred and sixty acres by his first homestead entry. There is no reason to suppose it was intended to hamper the gift with conditions that would lessen its value, nor that it was intended to be made in any but the most advantageous form to the donee. After the right was conferred it was immaterial to the government whether the original donee should continue to hold it, or should transfer it to another. Or, rather, as policy requires the peopling of the vacant public lands, and as it could not be expected or desired that the homesteader should abandon his first entry to settle upon the additional land, it would be more for the interest of the government that he should be able to assign his additional right, so that it might come to be held by some one who would settle upon the lands.

The supreme court also cited with approval the doctrine laid down in the case of *Barnes v. Poirier*, 27 U. S. App., 500 (Circuit Court of Appeals for 8th Circuit), holding that the right given by section 2306 of the Revised Statutes to the soldier was assignable before entry, there being no restriction as in the homestead act. In that case the lower court had made this statement, which the supreme court considered "well said":

The beneficiary was left free to select this additional land from any portion of the vast public domain described in the act, and free to apply it to any beneficial use that he chose. It was an unfettered gift in the nature of compensation for past services. It vested a property right in the donee. The presumption is that Congress intended to make this right as valuable as possible. Its real value was measured by the price that could be obtained by its sale. The prohibition of its sale or disposition would have made it nearly, if not quite, valueless to a beneficiary who had already established his home on the public domain. Any restriction upon its alienation must decrease its value. We are unable to find anything in the acts of Congress or in the dictates of an enlightened public policy that requires the imposition of any such restraint. On the other hand, the general rule of law which discourages all restraints upon alienation, the marked contrast between the purpose and the provisions of the grant of the right to the original homestead, and the purposes and provisions of the grant of the right to the additional land, and the history of the legislation which is codified in the existing homestead law, leave us without doubt that the assignment before entry of the right to this additional land granted by section 2306 of the Revised Statutes contravenes no public policy of the nation, violates no statute, and is valid as against the assignor, his heirs and assigns.

Finally, the supreme court says:

Much stress is placed by the plaintiff in error upon the practice of the land department during a certain period, based upon the idea that the right of entry given by the statute of additional lands was entirely personal, and not assignable or transferable. We cannot give to this practice in the land office the effect claimed for it by the plaintiff in error. The practical construction given to an act of Congress, fairly susceptible of different constructions, by one of the executive departments of the government, is always entitled to the highest respect, and in doubtful cases should be followed by the courts, especially when important interests have grown up under the practice adopted. *Bate Refrigerating Co. v. Salzberger*, 157 U. S. 1, 34; *United States v. Healey*, 160 U. S., 136, 141. But this court has often said that it will not permit the practice of an executive department to defeat the obvious purpose of a statute. In the present case it is our duty to adjudge that the right given by the statute in question to enter "additional" lands was assignable and transferable; consequently the instrument of writing given by Mary J. Robertson to Boggs was not forbidden by any act of Congress.

It results that the judgment below must be and is affirmed.

It is thus seen that the assignment of the soldier's additional right conferred by section 2306 of the Revised Statutes is not only held to be legal, but the practice is commended, the real value of the right being measured "by the price that could be obtained by its sale."

While this right is subject to sale and transfer, there is yet no law which provides that the data in your office and the War Department shall be employed in the certification of that right to those entitled to make additional entries. The certification of the right would doubtless in many cases simplify and facilitate the sale of the right, by furnishing in a tangible form the evidence upon which the additional entries could be perfected. These certificates would amount to so much scrip, which in the hands of purchasers thereof, could be employed in the entry of the public lands.

More than thirty years have passed since the war of the rebellion terminated; thousands of ex-Union soldiers settled in the western states and entered public lands; many of them entered less than one hundred and sixty acres, and have had the benefit of the soldier's additional right; doubtless thousands more are still entitled thereto. In the administration of the law relating to this right numerous frauds have been discovered; entries have been allowed upon forged applications, and other glaring irregularities have been detected; the soldier, for whose benefit the act was passed, was usually the victim of the fraud. All this was made possible by the practice of certifying the right, which for a time obtained in your office. The lapse of time since the war would render the perpetration of the fraud still easier of accomplishment were the practice of issuing the certificates now resumed.

The soldier may obtain this right for himself or sell it to another; it is not necessary to the exercise of either privilege that the right be certified; no statute requires it, and good administration forbids it.

The petition is denied.

CURNUTT *v.* JONES.

Motion for rehearing denied by Secretary Smith, August 4, 1896; see departmental decision of July 6, 1895, 21 L. D., 40.

HOMESTEAD CONTEST—DEATH OF ENTRYMAN—WIDOW.

KEITHLY *v.* RICHARDSON.

Residence is not required on the part of a widow for the maintenance of her rights under an uncompleted homestead entry of her deceased husband, if she cultivates and improves the land, but her failure to thus comply with the law calls for cancellation of the entry.

Secretary Smith to the Commissioner of the General Land Office, August
(W. A. L.) 4, 1896. (W. M. W.)

The case of Benjamin F. Keithly *v.* Mary Richardson has been considered on appeal of the former from your office decision of March 18, 1895, involving lots 1 and 2, and the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 18, T. 16 N., R. 2 W., Guthrie, Oklahoma, land district.

On August 23, 1889, Aurelius Richardson made homestead entry for said land.

On September 7, 1890, he died leaving a widow, Mary Richardson.

On June 4, 1892, Benjamin F. Keithly filed an affidavit of contest against said entry, alleging that the entryman's widow had wholly failed to cultivate or improve the land at all times after the death of the entryman.

On July 12, 1893, the contestant filed an affidavit in the local office making an additional charge, alleging that Mary Richardson on the 19th of December, 1888, made an entry in her own name, for certain lands at Ironton, Missouri, and sold the same in June, 1892, for a valuable consideration.

A hearing was ordered and had before the register and receiver at which both parties appeared by attorneys.

On September 29, 1894, the local officers found from the evidence—

That since the death of said Aurelius Richardson, September 7, 1890, that said Mary Richardson, the wife of said Aurelius Richardson, has wholly abandoned and failed to cultivate said tract of land as required by law.

Richardson appealed.

On March 16, 1895, your office reversed the judgment of the register and receiver and held the entry intact.

Keithly appealed.

The evidence shows, without conflict, that Mrs. Richardson is the widow of Aurelius Richardson, the deceased entryman; that they were not living together as husband and wife at the date the entry was

made, and continued to live apart up to the death of the husband, September 7, 1890. Keithly is a son-in-law of the deceased entryman, who was advanced in years and in feeble health.

Sometime before the death of the entryman, at his request, Keithly moved his family into the entryman's house on the land in question and has continued to reside upon and cultivate the land ever since. Your office found that—

So far as the record shows, the defendant did not in any manner assert her rights to the land prior to the initiation of this contest.

Under date of June 27, 1892, Mary Richardson executed a power of attorney in the State of Missouri to one Thomas P. Bryan, authorizing him to prosecute in her name and stead, before the land department of the United States, to final completion and full possession of any rights and claim to homestead entry made by my husband in Oklahoma.

There is no evidence tending to show that either Mrs. Richardson or her attorney in fact, or any one else for her, or by her request, ever attempted to take possession of, or make any improvements on, the land included in her deceased husband's entry. There is no evidence showing that Keithly misled Mrs. Richardson by any statement or representation concerning her rights to the land in question.

Your office further found—

That the cultivation and improvement of the land by the plaintiff inured to the benefit of the defendant. It is not shown that there was an express contract of tenancy between him and the entryman, but after the latter's death he continued to reside upon the land and to cultivate and improve the same, notwithstanding the fact that he knew the entryman left a widow upon whom the law cast the descent of his rights under the entry. He is, therefore, estopped from charging her with failure to cultivate and improve the land.

In the appeal the judgment of your office is alleged to be erroneous in law on the facts found.

Section 2291 of the Revised Statutes is as follows :

No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry ; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry ; or if he be dead, his widow ; or in case of her death, his heirs or devisee ; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they, will bear true allegiance to the government of the United States ; then, in such case, he, she or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law.

The rights of Mrs. Richardson to the land in question, must be determined by this section. Her husband made entry of the land and before making proof died ; the marriage relation between them existed at the date of his death and by the plain terms of the statute the right

make proof under his entry and receive a patent for the land vested in her to the exclusion of all others.

This right vested; notwithstanding the fact that she and her husband were not actually living together as man and wife when he died. The right is given unconditionally, but in order to preserve it she is required to either reside upon the land, or cultivate the same, for the same length of time her husband would have been required to reside on and cultivate it. She takes it burdened with the same conditions and prerequisites that would have rested on her husband in order to hold it with the bare exception that she may either reside on the land, or she may reside elsewhere, provided she cultivates and improves it for the time named. A failure to comply with the requirements of the statute on the part of a widow of a deceased entryman, must be followed by the same results as would follow from the failure of the entryman to comply with the law. In other words, the law vests the exclusive right in a widow of a deceased homestead entryman subject to contest for failure on her part to comply with its requirements.

In this case there is a clear failure shown on the part of Mrs. Richardson to comply with the requirements of the law. In cases of this character the contestant stands precisely on the same footing as in other homestead entry cases, and under the act of May 14, 1880, must be accorded the full rights of contestants.

The application of the doctrine of estoppel to this case by your office was clearly erroneous.

Keithly's residence on the land could not affect Mrs. Richardson's right in any way. She was neither a party or privy to it and therefore such settlement could not avail her. *Deery v. Craig* (5 Wallace, 795).

In general the doctrine of equitable estoppel applies only when there has been some intentional deception in the conduct or declarations of the person alleged to be estopped, or such gross negligence on his part as amounts to constructive fraud by which another is misled to his injury. *Brant v. Virginia Coal and Iron Co.* (93 U. S., 326).

Your office decision appealed from is accordingly reversed.

By your office letter of October 18, 1895, there was transmitted the application of one Mary Bryan to contest the entry of the deceased entryman, Richardson, filed in the local office on the 10th of May, 1893, which was rejected by the register and receiver and an appeal taken to your office from their decision. No action appears to have been taken by your office on said appeal and therefore no question arises for the Department to pass upon in connection therewith.

As the entry of Aurelius Richardson will be canceled under the foregoing decision, this contest will follow the course pursued in respect to second contests when the first one is successful.

The papers in this second contest and all other papers in the case are herewith returned.

RAILROAD GRANT—WITHDRAWAL—HOMESTEAD ENTRY.

UNION PACIFIC R. R. Co. (ON REVIEW).

No rights are acquired as against a railroad grant by a homestead entry of lands theretofore withdrawn for the benefit of such grant.

The departmental decision of March 7, 1896, 22 L. D., 291, recalled and vacated.

Secretary Smith to the Commissioner of the General Land Office, August
(W. A. L.) 4, 1896. (W. M. W.)

Counsel for the Union Pacific Railroad Company have filed a motion for a review of the departmental decision of the 7th day of March, 1896, denying the application of said railroad company for a patent to the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 25, T. 7 S., R. 7 E., Topeka, Kansas, land district (reported in 22 L. D., 291).

Soon after the departmental decision was made some doubts arose as to the correctness thereof, and *sua sponte* some steps were taken with a view of reconsidering the case.

The grounds of the motion are as follows:

1. That by the granting act of 1862 and 1864, to the Central Branch, Union Pacific Co., it is provided that, upon filing a map of general route, all lands within twenty-five miles of the line of general route shall be withdrawn from settlement and entry.
2. That the map of general route of the Central Branch, Union Pacific Co., from St. Joseph to the Republican River, was filed June 27, 1863, and lands withdrawn thereunder July 9, 1863. A second map of probable route was filed March 16, 1867, and lands withdrawn thereunder March 27, 1867.
3. The land in controversy is included within the termini of both of these maps, and falls under the operation of both withdrawals.
4. The entry of Frederick Abramson, H. E. No. 2626, and which was, in said decision, held to except the said lands from the operation of the grant to the company, was made May 28, 1868, long subsequent to the withdrawals above referred to.
5. That said subsequent entry of Abramson was without any authority of law, and, therefore, cannot operate as against the grant.
6. That said decision is contrary to law.

In response to a letter of inquiry, respecting this case, from the Department, your office, under date of May 19, 1896, stated that:

The records of this office show that the tract in question was included in the limits of the withdrawal ordered by office letter of July 9, 1863, for the benefit of the Central Branch, Union Pacific Railroad Company, along the line of the proposed route of the company's road; but when the road of the company was definitely located the land was situated in the limits of the grant as extended by the act of July 2, 1864, and not within the ten mile limits thereof under the act of 1862, under which the withdrawal was ordered.

This land falls within the overlapping limits of the grants to the Union Pacific Company and the Kansas Pacific Railway Company, and both were made by the same acts of Congress, to wit: July 1, 1862 (12 Stat., 489), and the amendatory act of July 2, 1864 (13 Stat., 356). The line of the Kansas Pacific road was definitely located January 11, 1866, and the line of this road was definitely located May 29, 1868.

The Union Pacific Road is the successor to both lines, and by reason thereof the real party in interest, and no reason is apparent why a patent should not issue to it, if in law the land was included in the grant and passed to either or both of the roads as a whole or as moieties to each of them.

The land in question was included within the withdrawal of July 9, 1863, and within the limits of the grant as extended by the act of July 2, 1864. This withdrawal remained in force until the definite location of the respective roads, when the land in question passed under the grant to them, for at the time Frederick Abramson made his homestead entry, May 28, 1868, the land covered by his entry was included in said withdrawal. His entry was allowed without authority of law, as the land was not subject to entry by reason of being withdrawn for the benefit of the railroad companies under their grants.

It is a well established doctrine in this Department as well as the courts, that no rights, either legal or equitable, as against a railroad grant are acquired by settlement upon lands withdrawn by executive order for the benefit of such grant. *Caldwell v. Missouri, Kansas and Texas R'y et al.*, 8 L. D., 570; *Shire et al. v. Chicago, St. Paul, Minneapolis and Omaha R'y Co.*, 10 L. D., 85; *Ard v. Missouri, Kansas, and Texas R'y Co.*, 14 L. D., 369; *Woolcott v. Des Moines Co.*, 72 U. S., 681; *Woolsey v. Chapman*, 101 U. S., 755; and *United States v. Des Moines Navigation and Railway Co.*, 142 U. S., 510.

The case of *Kansas Pacific Railway Company v. Dunmeyer* (113 U. S., 629), cited in your office decision is not in conflict with the foregoing authorities.

By the third section of the act of 1862, *supra*, there was excepted from the grant all lands which at the time the definite location of the road is fixed had been sold, reserved, or otherwise disposed of, and to which a pre-emption or homestead claim had attached. Abramson's homestead entry was made after the land was reserved for the purposes of the grant and while such reservation was in full force, and was therefore void and could not serve to except the land from the operation of the grant.

It follows that the departmental decision heretofore rendered in this case was erroneous. It is accordingly recalled and set aside, and your office decision appealed from is reversed.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

CASTELLO *v.* BONNIE.

The cancellation of an entry without notice to the entryman is void for the want of jurisdiction, and an entry so canceled at the passage of the act of March 3, 1891, is in law an existing entry, and confirmed by section 7, of said act, if otherwise within the provisions of said act.

Secretary Smith to the Commissioner of the General Land Office, August
(W. A. L.) 4, 1896. (J. L. McC.)

Your office, by letter of April 29, 1896, transmitted the papers in the case of Patrick Castello *v.* William Bonnie, and the Boston Safe Deposit and Trust Company, transferee, involving Bonnie's pre-emption cash entry for the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 30, and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{2}$, of Sec. 29, T. 59 N., R. 17 W., Duluth land district, Minnesota.

The entry in question was canceled upon the report of a special agent, without notice to the entryman. After such cancellation, Castello was allowed to make homestead entry of the land. On October 23, 1891, your office reinstated Bonnie's entry—deciding further that as two entries of the same land at the same time were not permissible, and as Bonnie's entry had been reinstated because of having been canceled illegally, Castello's entry must be canceled.

On June 16, 1891, the Boston Safe Deposit and Trust Company filed an application to intervene, and asked for the confirmation of Bonnie's entry under section 7 of the act of March 3, 1891, alleging that, after the issuance of the receiver's receipt (March 21, 1885), and prior to March 1, 1888, it became a *bona fide* incumbrancer of said land for a valuable consideration. Your office, on June 17, 1891, granted the application; and on October 23, 1891, your office held that the case came within the provisions of said act. From said decision Castello appealed to the Department, which, on October 11, 1892 (15 L. D., 354), held that the cancellation of Bonnie's entry was an error, and its reinstatement was proper; nevertheless Castello's entry ought not to have been canceled without notice to him, and an opportunity being afforded him to be heard in its defense; and inasmuch as no such opportunity had been afforded him, he should be allowed sixty days after notice of the decision to show cause why his entry should not be canceled. You were further directed that 'if, in your judgment, sufficient cause be shown, you should re-adjudicate the case accordingly; if he failed to make such showing, the decision of your office holding that the case came within the provisions of said section 7 should be affirmed, and the entry confirmed.

Your office issued a rule as above directed upon Castello, who thereupon filed an affidavit alleging that Bonnie's entry was not made in good faith, but in the interest of the C. N. Nelson Lumber Company, and that said company was not therefore a *bona fide* purchaser; also that the Boston Safe Deposit and Trust Company was not a *bona fide* incumbrancer, and he asked for a hearing at which to prove such to be the facts. This application your office denied, on February 10, 1893. Castello appealed to the Department, which, on August 7, 1894, directed that the case

be remanded to the local officers for a hearing upon the allegation that Bonnie's entry was made in the interest of the C. N. Nelson Lumber Company, and upon any

other charge that may be then presented tending to show that Bonnie's entry was properly canceled.

A motion for review of the above departmental decision was filed, but denied on April 12, 1895 (20 L. D., 311).

Your office decision of April 29, 1896 (*supra*), in adjudicating the case upon the basis of the testimony taken at the hearing ordered in accordance with the departmental directions above referred to, found as a fact "that Bonnie had never complied with the law in any respect. The facts stated in his final proof must have been untrue, and his entry, therefore, fraudulent and invalid;" and adds that,

inasmuch as Bonnie's entry has not been reinstated, and no reason appearing why it should be, it would be useless, as well as a disregard of said departmental ruling, to further consider the case. Said entry will therefore remain canceled.

The above conclusion was correct, in view of the departmental rulings then subsisting. Recently, however—to wit, on February 17, 1896—the Department has decided the case of *Drew v. Comisky* (22 L. D., 174), which is in all essential respects similar to the one under consideration. In that case the departmental decision of *Castello v. Bonnie*, on review (20 L. D., 311, *supra*), was discussed. The statement in said last named decision that—

Such cancellation, without giving such notice (that is, cancellation on report of a government agent, without giving the entryman his day in court), was improper, and to all intents and purposes, so far as the transferee is concerned, it may be considered as an existing entry,

was quoted, and re-affirmed as being correct doctrine. The further statement in said decision that—

The reinstatement of the entry on the record would give the transferee only such right as he would have had in case notice had been given,

was quoted, but declared to be erroneous. It was further decided regarding Bonnie's entry that, "inasmuch as it had already been held therein that so far as the transferee is concerned, it may be considered an existing entry," and that, if existing, it was protected under the law, and should be confirmed. Finally said departmental decision in *Castello v. Bonnie* was explicitly overruled, in so far as it conflicted with the ruling in said case of *Drew v. Comisky*.

The case now under consideration was thus explicitly decided in advance. The entry was an existing entry at the date of the passage of the act of March 3, 1891, and was of a character to be confirmed thereunder.

Your office decision of February 25, 1896, to the effect that Bonnie's entry should remain canceled, is therefore reversed. Your office decision of October 23, 1891, holding that the case comes within the provisions of said act, is hereby affirmed, and the entry will pass to patent accordingly.

PATENT—JURISDICTION—CONFLICTING ENTRIES.

FIELDS *v.* KENEDY.

The inadvertent issuance of a patent on an entry that is in partial conflict with a prior entry deprives the Department of further jurisdiction over the tract in controversy; and a final certificate therefor, subsequently issued on the earlier entry, must be canceled, though the original entry on which such certificate rests may be permitted to remain of record.

Secretary Smith to the Commissioner of the General Land Office, August
(W. A. L.) 4, 1896. (C. W. P.)

On February 16, 1880, Nelson Fields made homestead entry 5391, of the W. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of section 24, township 8 S., range 14 E., St. Helena meridian, New Orleans land district, Louisiana.

On May 18, 1880, Samuel Kenedy made homestead entry 5486 of the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 13, the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 24, and the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 14, of the same township and range, on which final proof was made and final certificate 2015 issued July 5, 1887, patent issuing thereon June 25, 1890.

On August 3, 1891, Nelson Fields made final proof on his homestead entry, and final certificate issued thereon August 7, 1893.

On February 20, 1894, your office notified Fields that his entry was held for cancellation as to the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 24, for the reason that it conflicts to that extent with Kenedy's patent.

Nelson Fields appeals to the Department.

The record shows that Kenedy made his entry of the land in question more than three months subsequent to Fields' entry which segregated the land, and Kenedy's entry was improperly allowed. But patent having issued to Kenedy, the Department cannot now determine the conflicting claims of the parties respecting the land. If the patent issued to Kenedy is invalid, and Fields has been injured by the action of the Land Department, the courts are the proper tribunals to adjudicate the matter.

But it appearing that Fields' final proof was made and final certificate issued thereon subsequent to the issuance of patent to Kenedy, the final certificate issued to Fields should be canceled, but his entry will be allowed to remain of record.

Your office decision is modified accordingly.

DAWSON ET AL. *v.* HIGGINS.

Motion for review of departmental decision of May 13, 1896, 22 L. D., 544, denied by Secretary Smith, August 4, 1896.

DONATION CLAIM—HEIRS—FINAL PROOF—ADVERSE CLAIM.

STONE ET AL. *v.* CONNELL'S HEIRS.

On the death of a qualified donation claimant who has complied with all the requirements of the law in the initiation of his claim, and subsequent maintenance thereof, up to the date of his death, the heirs of such claimant become qualified grantees irrespective of any question as to their citizenship.

Under section 8, act of September 27, 1850, proof of compliance with law up to the date of the donee's death is all that is required in the matter of final proof on the part of the heirs, and it is not material in such case by whom said proof is submitted.

A plea of equitable estoppel set up by intervening adverse claimants, as against the rights of heirs under a donation claim, on account of their alleged failure to assert their rights in due season, and thereafter prosecute their claims with diligence, cannot be considered by the Department, if it finds that under the donation law said heirs are entitled to a patent; and especially is the Department limited to such course, in view of the fact that said law prescribes no limit of time within which final proof may be made by the claimant or his heirs at law.

The provisions of the act of July 26, 1894, are not applicable to a donation claim pending before the Land Department at the passage of said act, and in which final proof had been submitted prior thereto.

Secretary Smith to the Commissioner of the General Land Office, August
(W. A. L.) 4, 1896. (A. B. P.)

The land involved in this case consists of parts of sections 25 and 26, T. 20 N., R. 5 E., Olympia land district, Washington, known as the Michael Connell donation claim, and contains three hundred and twenty acres.

It is shown by the record that on December 12, 1853, Michael Connell filed with the proper officer his notification, No. 518, claiming the land in question under the donation act of September 27, 1850 (9 Stat., 496). By that act, after providing, among other things, for the appointment of a surveyor-general for the Territory of Oregon, then embracing this land, it was (section 4) declared:

That there shall be, and hereby is, granted to every white settler or occupant of the public lands, . . . above the age of eighteen years, being a citizen of the United States, or having made a declaration according to law, of his intention to become a citizen, . . . now residing in said Territory, or who shall become a resident thereof on or before the first day of December, eighteen hundred and fifty, and who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act, the quantity of one half section, or three hundred and twenty acres of land, if a single man, and if a married man, or if he shall become married within one year from the first day of December, eighteen hundred and fifty, the quantity of one section, or six hundred and forty acres, one half to himself and the other half to his wife, to be held by her in her own right.

It was further provided (sections 6 and 7) that the settler, within certain prescribed periods, respectively, should notify the surveyor-general of the tract claimed under the act, and submit proof of the fact and time of commencement of his settlement and cultivation; and also, that

he should prove, in the manner prescribed, "at any time after the expiration of four years from the date of such settlement," the continued residence and cultivation required by the act: whereupon certificate for the land should issue from the proper officers, which, if found free from objection, would entitle him to a patent.

By section 8 of the act it was further provided:

That upon the death of any settler before the expiration of the four years' continued possession required by this act, all the rights of the deceased under this act shall descend to the heirs at law of such settler, including the widow, where one is left, in equal parts; and proof of compliance with the conditions of this act up to the time of the death of such settler shall be sufficient to entitle them to the patent.

Connell appears to have been a qualified settler under the act. He was a single man over eighteen years of age, had declared his intention to become a citizen of the United States, and had become a resident of the Territory of Oregon prior to December 1, 1850. He met all the requirements of the act as to settlement and notice, and proof thereof, and as to residence and cultivation from the date of his settlement, August 15, 1853, until the date of his death, which occurred within the boundaries of his claim, about the last of October, 1855, at the hands of hostile Indians. Having thus occupied the land continuously for over two years prior to his death, he was qualified to purchase under the amendatory act of February 14, 1853 (10 Stat., 158), if he had sought to do so. True, he failed to file his notification within the time prescribed by the sixth section of said amendatory act, but no adverse rights having intervened, the claim was protected from forfeiture by the subsequent act of June 25, 1864 (13 Stat., 184).

It is thus shown that Connell had all the qualifications necessary to enable him to take and hold under the act, and that he fully complied with all its provisions while he lived; but he died, still unmarried, before completing the four years of residence and cultivation required to perfect title in him. It is further shown that he left surviving him his father Patrick Connell, then a resident of Ireland, and also several brothers and sisters, among whom was a sister Margaret, now Margaret Rose, a party to these proceedings, who appears to be a citizen of the United States living in the State of Colorado. Under the laws of the Territory at the time of Connell's death his father became his sole heir at law.

At that time and for many years subsequently thereto, it was considered and held by the local Territorial courts, that the heirs at law of a claimant under said donation act, who died before completing the four years' residence and cultivation required, took by descent from the claimant; and as a consequence thereof, many attempts were made to devise such uncompleted claims by will, and not infrequently the probate courts assumed jurisdiction and undertook to dispose of such claims in the winding up of the estates of deceased settlers.

This case appears to be one of the latter class. On December 11,

1855, one James E. Williamson, claiming to be a creditor, qualified as administrator of the deceased claimant. In his application for letters of administration he refers to the father of the decedent residing in Ireland, as his only known heir. On December 12, 1857, there appears to have been filed before the register of the local office two affidavits, conforming in all respects to the final proof required by the said donation act, and showing compliance with its conditions by the claimant Connell up to the time of his death. Another and similar affidavit was filed October 16, 1873. It does not appear certainly by whom these affidavits were filed, though presumably they were filed by Williamson, the administrator, on behalf of the said father, and heir at law. Considerable correspondence appears to have been carried on prior thereto between Williamson and Patrick Connell relative to the property, and in one of the latter's letters, dated November 15, 1856, he says to Williamson: "I am entirely in your hands and shall be guided by you in any manner you will suggest."

The personal property having proved insufficient for the payment of the debts against the estate, proceedings were instituted in the local probate court for the sale of the land in question as a part of the decedent's estate, liable for his debts. Said proceedings resulted in the sale of the land in the year 1866, to one John Swan, at the price of \$550. The sale was confirmed by the court and the land conveyed to Swan, and as there remained in the hands of the administrator, after the payment of debts, a balance of \$231.18, he was ordered by the court to pay the same over to Patrick Connell of Ireland, "who has identified himself as the father of said Michael Connell dec'd, and legal heir to the said estate." This balance was never paid over as directed, but was deposited by the administrator, under a special statute, in the local county treasury, for the benefit of Michael Connell's heirs, where, presumably, it still remains. Certain it is that Patrick Connell, who has been dead many for years, never received it.

It further appears that about the year 1869 Swan died, leaving the land by will to his brother James Swan, who in 1871 conveyed the same to James G. Williams. In 1878 Williams conveyed the land, together with an adjoining claim, to William M. White, one of the appellants here, for the price of \$2500, whereof the sum of \$100 was paid in cash and the balance secured by mortgage given by White on the two tracts of land.

Such was the condition of affairs in January 1880, when in the case of *Hall v. Russell* (101 U. S., 503) the supreme court held in effect that a claimant under the said donation act, prior to the completion of his four years' residence and cultivation, and the performance of other prescribed conditions, obtained no title to the land such as could be devised by will or inherited by his heirs at law; and that in case of the death of the claimant before the performance of the required conditions, his heirs, under section 8 of the act, took title, not by inheritance from

the deceased claimant, but as grantees under the act, directly from the United States.

In view of this decision it is clear that the proceedings in the probate court relative to the claim in question were and are absolutely null and void, and that no title to the land passed by the sale and conveyance made under the orders of that court. Indeed this seems to be practically conceded by all the parties.

It appears, however, that after *Hall v. Russell* was decided the land was sold under the mortgage given by White, and subsequently passed through several hands, until the year 1886, when it was purchased by the appellant Stone, together with the said adjoining claim, at the price of \$6000. Stone is still in possession.

After the decision in *Hall v. Russell* was rendered it was generally considered that the proceedings in the probate court were null and void, and the result was that attempts were made by various parties to obtain title to the lands from the government.

On March 5, 1884, Charles F. Whittlesey and Warren B. Hooker filed homestead applications, respectively, for the east half and the west half of the tract, and sought to contest the donation claim, on the alleged ground that the deceased claimant left no heirs at law, or if he did, that they had wholly abandoned all claim to the land. They asked that a hearing be had, the notification of Connell canceled, and the lands opened to their homestead applications. The applications were rejected by your office, but upon appeal to this Department that action was reversed October 28, 1884 (3 L. D., 469), and a hearing was ordered for the purpose of determining the exact status of the land. Two days later, however, the order was suspended and the suspension was not removed until December 26, 1888. In the meantime the following proceedings took place:

On January 21, 1885, White applied to enter part of the land as a homestead, and to purchase part under the act of June 15, 1880. His application was rejected and he appealed. On December 1, 1886, Stone applied for patent certificate for the entire claim as successor to the rights of the claimant Connell, by virtue of the administrator's sale and the said several mean conveyances; but your office rejected his application and he appealed. On January 5, 1888, James Beardsley and Millard Kirtley applied to file pre-emption declaratory statements, respectively, for the east half and west half of the tract. Your office rejected their applications and they appealed.

Such was the confused condition of things when on December 6, 1888, this Department, on the appeal by Stone, without determining the rights of any party to the record, revoked the order of suspension and directed that the hearing be proceeded with. The other appeals were thereupon severally dismissed without prejudice to any rights asserted, and all the parties were remanded to the hearing as the proper place to present their claims, the same to be finally determined upon the record there made up.

The hearing was finally had March 25, 1891; upon notice to all the parties to the record, but no notice was given by publication, or otherwise, to the "heirs at law" of the deceased donation claimant. The parties notified all appeared. White and Stone submitted evidence, relative chiefly to the improvements made on the land by them, respectively, which appear to be extensive and valuable. A copy of the record of the proceedings in the probate court was also filed.

Upon the record thus made up the local officers on January 11, 1892, recommended that the Connell notification be canceled, the lands subdivided, and the respective homestead applications of Whittlesey and Hooker allowed. White and Stone appealed.

Up to this time there had been no appearance on behalf of the heirs of the deceased claimant. On February 23, 1893, however, Margaret Rose, by her counsel, filed in the local office an application on behalf of herself and other heirs of Michael Connell, deceased, asking that patent certificate issue for the land to the "heirs at law" of said decedent. The application is supported by affidavits showing that Patrick Connell, the father, died long since, and that the only remaining heirs of said deceased claimant are the said Margaret Rose, a citizen of the United States living in Colorado, and Thomas Connell, Catharine Heffernun and Sr. M. De Pazzi, all residents of Ireland. The local officers rejected this application because not made within a reasonable time after the death of the donation claimant, and for the further reason that the land had passed to other parties under their decision upon the record of the said hearing.

Margaret Rose appealed. On June 14, 1894, your office proceeded to consider her appeal, together with the several appeals of White and Stone, and reversed the rulings below, dismissed the applications of Whittlesey, Hooker, White, Stone, Beardsley and Kirtley, and directed that final certificate be issued for the land to the heirs at law of Michael Connell, deceased, upon payment of the legal fees. From this decision Whittlesey, Stone and White have severally appealed.

The first question presented by the record is whether, after the death of the claimant Michael Connell, the land in question passed to his "heirs at law" under section 8 of said donation act. If this question be answered in the affirmative it will be unnecessary to consider any matters relative to the respective rights of the several appellants, as between themselves.

The uncontroverted facts on this subject are, (1) that Connell was a qualified settler under the act; (2) that he filed his notification in writing, properly describing the land, and supplied the proof required of the fact and time of commencement of his settlement and cultivation; (3) that he resided upon and cultivated the land continuously from the date of his settlement to the date of his death; (4) that he died unmarried before the expiration of the four years' continued possession required; and (5) that he left surviving him his father Patrick Connell, a resident of Ireland, as his sole heir at law.

Under a similar state of facts it was held by the supreme court in *Hall v. Russell* (*supra*) that upon the death of the claimant his heirs became qualified grantees; but whether they took immediately upon his death, or after proof of his compliance with the provisions of the act while in life, was a question suggested by the court, but not decided, because not necessary in that case.

In view of the two affidavits of December 12, 1857, and the one of October 16, 1873, as already shown, it is not deemed necessary to pass upon that question in this case. These affidavits, in form and substance, appear to be in strict accord with the character of final proof required by the act, and when taken in connection with the notification and original first proofs filed by the claimant, to which they were attached, they contain substantially all that is required to be shown by said section 8 of the donation act. They also speak of the land in question as "land claimed as a donation by Michael Connell's heirs." It is very evident that they were obtained and filed by some one on behalf of the heirs of the deceased claimant, and it matters not by whom, though I think it is fair to presume, in view of the correspondence between Patrick Connell and the administrator Williamson, as shown, that they were filed by the latter for the benefit of the former—he being the sole heir.

Objection is made to these affidavits being treated or considered as the final proof required by said section 8, because not shown to have been presented by the heir himself, or by some one thereunto specially authorized by him. This objection I think wholly untenable. Said section merely requires proof of compliance with the conditions of the act up to the time of the settler's death, and does not specify by whom such proof shall be furnished. The fact is that the proof *was furnished*, and thereby the requirements of the statute were fully met.

It is further objected that the proofs submitted could not inure to the benefit of Patrick Connell because he was an alien, and for that reason patent could not issue to him under the act.

It will be observed that there is no question of inheritance involved. The heirs took not by inheritance but as grantees under the act. As was said in *Hall v. Russell* (*supra*): "Their title to the land was to come, not from their deceased ancestors, but from the United States."

No attempt by the settler to dispose of the land before perfecting his title, could in any way affect the heirs. Their rights were fixed by the statutes and are not to be restricted, as to qualification to take or otherwise, to narrower limits than are therein prescribed. There is no provision requiring them to make proof of citizenship before becoming qualified grantees. As was further said, in substance, in *Hall v. Russell*, the heirs became qualified grantees under the act upon the death of the claimant before completing title in himself. The fact that the party for whose benefit the final proofs in this case were submitted, was not a citizen of the United States, is therefore not material. Being the

sole heir at law of the deceased claimant, he was, as such, a qualified grantee under the act.

Again, it is objected, and with considerable earnestness, that in view of the great lapse of time, and because of the alleged conduct of Patrick Connell and those now claiming through him, in remaining quiet and failing to assert their rights at an earlier date, and of their consequent apparent acquiescence in the legality of the probate court proceedings, they are estopped from asserting any claim to the land.

With the question thus raised, however, this Department has nothing to do. Its duty is discharged when patent has been issued to the parties entitled under the statute. The courts are the proper tribunals in which to settle all questions of equitable rights, acquired independently of the statute, either before or after the issue of patent. The plea of estoppel necessarily implies the fact of the existence of title antagonistic to the pleader, and is predicated upon the theory that because of certain alleged conduct inconsistent therewith, the party holding the title is precluded from asserting it as against certain acquired rights of the pleader, based upon such conduct. It presents, therefore, no question which this Department can determine. All such questions must be left to the courts. The government can issue its patent only to those in a position to call for the legal title. Moreover, the said donation act prescribes no limit of time within which final proof shall be made, either by the original claimant or by his "heirs at law." (*Veatch v. Park*, 16 L. D., 490.) As we have seen, however, the final proof in this case was submitted about two years after the settler's death.

It is further contended by counsel for appellant Stone, that his claim as successor to the rights of the original purchaser at the sale made under the probate court proceedings should be recognized, and that in view thereof patent should issue to him under provisions of the act of July 26, 1894 (28 Stat., 122).

By the first section of that act it is provided that in all cases arising under the said donation act of 1850, where claimants

have made proof of settlement on tracts of land . . . and given notice, as required by law, that they claimed such lands as donations, but have failed to execute and file in the proper land offices proof of their continued residence on and cultivation of the land so settled upon and claimed, so as to entitle them to patents therefor, such claimants, their heirs, devisees and grantees shall have, and they are hereby given, until the first day of January, eighteen hundred and ninety-six, the right to make and file final proofs and fully establish their rights to donations of lands under the aforesaid act of Congress, and no longer.

By the second proviso of said section it is further declared:

That where any such donation claims or any part thereof are claimed by descent, devise, judicial sale, grant, or conveyance, in good faith, under the original claimant, and are, at the date of this act and for twenty years prior thereto have been, in the quiet adverse possession of such heir, devisee, grantee, or purchaser, or those under whom they claim, such heirs, devisees, grantees, or purchasers, upon making proof of their claims and adverse possession as aforesaid shall be entitled to patents for the land so claimed and occupied by them.

This case, however, does not appear to come within the purview of that act. True, the proof of settlement was made and the notice of the claim given as required by law, but there was not the failure contemplated by the act, to execute and file in the proper land office, proof of continued residence on and cultivation of the land.

The proof here referred to was furnished in this case, as we have seen. Moreover, it is further provided in the second section of said act that:

This act shall not be construed to affect any case now pending before the Land Department in which final proof has been furnished.

This case was pending before the Land Department when said act was passed, and the final proof referred to was furnished by the affidavits of December 12, 1857, and October 16, 1873. It is clear that the act does not apply, and the claim of Stone can not be passed to patent under it.

My conclusion therefore is that upon the death of the claimant Michael Connell, his father and sole heir at law, Patrick Connell, became qualified to take the land as grantee under the eighth section of said donation act, and that upon the proof required by said section being furnished, as was done, the equitable title to the land vested in him, and he became at once entitled to a patent conveying the legal title.

The applications of the appellants White, Stone and Whittlesey, are therefore rejected, the decision appealed from is affirmed, and you are directed to issue patent for the land to "the heirs at law of Michael Connell, deceased," upon payment of the proper fees.

MINING CLAIM—AGRICULTURAL CLAIM—ADVERSE PROCEEDINGS.

POWELL *v.* FERGUSON.

The adverse proceedings provided for in section 2325 R. S., contemplate only suits between adverse mineral claimants, and does not have in view adjudications respecting the character of land as between agricultural and mineral claimants.

Secretary Smith to the Commissioner of the General Land Office, August 4, 1896. (P. J. C.)

A motion for review of departmental decision of May 13, 1896, wherein was formally affirmed the concurring decisions below, has been filed by counsel for W. R. Powell.

The first assignment, or, rather, suggestion of error is that

a very able brief and argument prepared by local counsel for mineral claimant was on file in the local land office (filed July 25, 1895), which was inadvertently held instead of being transmitted before said case was reached for examination and decision by your honor, which brief, had it been considered, we are confident would have reached a decision favorable to the mineral claimant.

The brief is enclosed.

The other alleged errors do not raise any question that was not heretofore considered.

The brief referred to seems to have been filed in the local office in time and should have been forwarded, but was, in some unexplained way, detained there.

There is but one point suggested by this brief that it is now necessary to discuss, the others having been given proper consideration. To a proper understanding of the point of law raised it is necessary to say that in August, 1887, Powell filed an application for patent under the placer mining law for a large tract of land, including the NW. $\frac{1}{4}$ of Sec. 33, T. 1 N., R. 1 E., M. D. M., San Francisco, California, land district, being the land in controversy. Entry was not made under this application, probably for the reason that a number of protests were filed against it. There is not found in the files, however, any protest involving, directly, the land in controversy. Without going into all the details it is sufficient to state that Andrew C. Ferguson was, as against the Western Pacific Railroad Company, within which grant the land is located, by your office decision of August 6, 1892, which became final, adjudged to have the superior right to the land. His homestead entry was allowed and final certificate issued on final proof which showed settlement in 1885. A hearing was ordered on the protest of Powell, to determine the character of land, with the result of concurring decisions all along that it was not valuable for mineral.

It is contended by counsel that, inasmuch as Ferguson did not file his *adverse claim*, as required by section 2325 R. S., that he is forever barred from questioning the character of the land.

This position is wholly untenable. The statute referred to only contemplates adverse suits as between rival mineral claimants to the land, and does not have in view a settlement of the character of the land as between agricultural and mineral claimants. The Department having jurisdiction over all public lands until patent issues, may at any time, either on its own motion or on an application made by others, order a hearing for the purpose of determining its character, and there is no other tribunal provided by law for that purpose, whose judgment would necessarily be binding on the Department. (*Alice Placer Mine*, 4 L. D., 314.)

The authorities cited by counsel in support of his position are not in print. In each of them the rights between rival mineral claimants was the question involved.

It may be well to say that the claim of counsel, that the mineral character of the land at the date of the mineral application was not shown by the testimony, is erroneous. The evidence went back to 1885, the date of Ferguson's settlement, and included the intervening time.

The motion is therefore overruled.

JURISDICTION—NOTICE—TRANSFEREE—CONFIRMATION.

FRANCIS H. FLUENT.

The cancellation of an entry without notice to a transferee, whose interest appears of record, while irregular, is not void for want of jurisdiction, if the entryman was duly notified of the adverse proceeding; and an entry thus canceled prior to the passage of the act of March 3, 1891, is not confirmed by section 7 thereof, as the provisions of said section are only applicable to entries subsisting at the passage of the act.

The case of *Fleming v. Bowe*, 13 L. D., 78, overruled.

Secretary Smith to the Commissioner of the General Land Office, August
(W. A. L.) 4, 1896. (A. B. P.)

This is a petition for certiorari filed by William P. Winn, transferee, in the matter of pre-emption entry made January 15, 1884, by Francis H. Fluent, for the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 10, T. 154 N., R. 64 W., Devil's Lake (Creelburg series), North Dakota.

The petition sets forth that after making his entry, to wit, on May 9, 1885, Fluent transferred the land to one W. S. Graham, who, on July 13, 1885, transferred to Nellie Jenkins; that Nellie Jenkins subsequently intermarried with one E. D. Graham, and, on April 17, 1886, said E. D. Graham and wife transferred the land to the petitioner William P. Winn.

On July 17, 1886, Fluent's entry was held for cancellation by your office upon the report of Special Agent Rowe, charging that the entryman had not complied with the law in the matters of residence and improvements. The report disclosed the fact of the transfer to W. S. Graham.

Fluent was notified of the action taken, by registered letter mailed to his last known address. This letter was returned uncalled for, and no notice was given to any of the transferees. On February 17, 1888, the entry was finally canceled, but no notice thereof was given to any of the parties interested. On March 2, 1889, one John Vanderlinder made timber culture entry for the land.

It being subsequently discovered that Fluent's entry had been canceled without notice to the transferees, your office, on January 8, 1895, directed that Vanderlinder be notified of the irregularity and allowed sixty days within which to show cause why the order of cancellation should not be set aside, his entry canceled, and that of Fluent reinstated. Vanderlinder responded by filing his corroborated affidavit, to the effect that his entry had been made in good faith and that all legal requirements had been complied with.

On May 15, 1895, Winn filed a motion for review of the proceedings of your office, especially the action canceling Fluent's entry (practically a motion for reinstatement of the entry), setting forth that he is a purchaser of the land in good faith, without knowledge of any facts justifying the cancellation or of any adverse proceedings against the entry;

and that neither he nor any of the intermediate transferees had ever been notified of such proceedings or of the result thereof, for which reasons it was urged that the judgment of cancellation was without jurisdiction of the parties in interest and therefore null and void. Accompanying this motion was an application by Winn that the entry be passed to patent under the confirmatory provisions of section 7 of the act of March 3, 1891 (26 Stat., 1095).

Under date of June 8, 1895, your office held, in effect, that the entry could not be reinstated on the ground of want of notice to the transferee; that while the order of cancellation without such notice was irregular, yet as jurisdiction had been obtained by notice to the entryman, given in the regular way, the order was not a nullity but effectively operated to cancel the entry. The motion and application was therefore both denied, but in view of the stated irregularity Winn was allowed sixty days to apply for a hearing, at which the government would be required to sustain the special agent's report by competent proof or in default thereof the entry would be reinstated.

A motion for review of said decision was filed but denied, and subsequently, upon the application of Winn, a hearing was ordered for the purpose above stated.

On March 26, 1896, Winn filed a motion for the recall of the order for a hearing, and asked that the entry be reinstated and passed to patent under said section 7 of the act of March 3, 1891, in view of the recent ruling of the Department in the case of *Drew v. Comisky* (22 L. D., 174). This motion was denied May 8, 1896. Winn filed an appeal which your office declined to entertain. Hence his present petition.

Said act of March 3, 1891 (section 7), provides that:

All entries made under the pre-emption, homestead, desert-land, or timber-culture laws, in which final proof and payment may have been made and certificate issued, and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry, to bona fide purchasers, or incumbrancers, for a valuable consideration, shall, unless upon an investigation by a government agent fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the land department of such sale or incumbrance.

This act can apply only to entries in existence at its date, and the first question presented, therefore, is whether Fluent's entry was an existing entry at that date. This gives rise to the further and controlling question: Did your office have jurisdiction to make the order canceling his entry?

If by notice to the entryman alone such jurisdiction was obtained, the order, however irregular, was not a nullity but was an effective exercise of the authority possessed by the land department in such matters. If, on the other hand, to obtain jurisdiction, notice to the transferees or any of them was necessary, then the order was without

jurisdiction and consequently null and void, as no such notice was given. In the latter event only could it be held that there was a subsisting entry of the land at the date of the passage of said act such as comes within its confirmatory provisions.

The Drew-Comisky case, relied upon by petitioner, was a case where the entry was canceled without notice to the entryman. Here it appears that legal notice, under the rules of practice, was given to the entryman. The cases, therefore, are not parallel.

In *Ex parte* John C. Featherspil (4 L. D., 570), a case involving the question of notice of proceedings against an entry, it was held that notice to the entryman "was sufficient in law to bind him and those claiming under him, whether mortgagees or vendees, if such notice was properly given."

And in that case it was further said:

In determining this case the fact that there is a mortgagee now interested in maintaining the validity of the entry brings no new element into the consideration thereof, inasmuch as he can have no better right than the entryman would have if present, and with whose rights the government deals only, regardless of any sale, assignment or lien made by him to third parties, recognizing, however, the right of said third parties, where their interests have been acquired subsequent to the issue of final certificate, to appear and protect the same by showing proper compliance with the requirements of the law on the part of the entryman.

It thus appears that while the land department obtains jurisdiction by notice to the entryman alone, and deals only with his rights, the transferee is allowed to intervene to protect the entry if he can, as a matter of grace rather than because of any legal right in him to demand that he shall be notified of the proceedings against the entry.

In giving effect to this doctrine this Department has frequently held in cases wherein entries have been attacked, that notice should be given to the transferee whenever the fact of transfer is disclosed by the record, or the transferee has in the proper manner made himself known. *United States v. Copeland et al.* (5 L. D., 170); *Manitoba Mortgage and Investment Company* (10 L. D., 566); *United States v. Newman et al.* (15 L. D., 224), and other similar cases. In all such cases the notice required was for the purpose of enabling the transferee to intervene and protect the entry by showing compliance with the law by the entryman, and for that purpose only. None of the cases is predicated upon the theory that notice to the transferee is necessary as the basis of departmental jurisdiction to deal with the entry, and I know of no ruling or regulation establishing such a doctrine.

The case of *Ex parte* H. B. Ketcham (18 L. D., 93), cited and relied upon by the petitioner, differs from this in that the entry in that case had never been actually canceled, and it was therefore an existing entry at the date of the act in question.

In the case at bar the entry was actually canceled upon legal notice to the entryman, and however irregular or erroneous such cancellation may have been in other respects, it was an act done strictly within

the jurisdiction of the land department and therefore operated as effectively to cancel the entry as though regularly and properly done in all respects.

There was therefore, at the date of the passage of said act of March 3, 1891, no subsisting entry of the land such as came within the operation of that act. For this reason, taking as true all that is alleged in the petition for certiorari, no sufficient grounds are shown for the granting of the writ, and the same is therefore denied. The hearing ordered by your office is the petitioner's remedy.

The case of *Fleming v. Bowe* (13 L. D., 78) appears to be in conflict with the views herein expressed, and to that extent the same is overruled.

SWAMP LANDS—CANCELED LIST OF SELECTIONS.

STATE OF OREGON.

The true effect and meaning of the departmental decision of December 19, 1893, in the case of *Morrow et al. v. State of Oregon et al.*, 17 L. D., 571, was to cancel swamp lists 30 and 31, and to reject and annul all claims of the State, and its alleged assignees, to any and all of the tracts therein described, for the reason that said lands were, at the date of the grant, covered by an apparently permanent body of water.

Secretary Smith to the Commissioner of the General Land Office, August
(W. A. L.) 4, 1896. (J. L.)

On December 13, 1894, your office transmitted to me for approval a list, No. 39, of swamp and overflowed lands, aggregating 794.02 acres, alleged to have been selected by the State of Oregon under the swamp land act of March 12, 1860 (12 Stat., 3). The tracts or subdivisions embraced therein are situated in Lakeview land district, Oregon, and are described as follows:

Lots Nos. 1 and 2, of section 27, T. 39 S., R. 24 E.....	67.40
The SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the W. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 27, T. 39 S., R. 24 E	280.00
The SE. $\frac{1}{4}$ of Sec. 28, T. 39 S., R. 24 E.....	160.00
Lots Nos. 1 and 2 of Sec. 29, T. 39 S., R. 24 E.....	54.91
Lots Nos. 1, 2, 3, and 4 of Sec. 33, T. 39 S., R. 24 E	44.90
Lots Nos. 1, 2, and 3 of Sec. 34, T. 39 S., R. 24 E.....	66.81
The N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 10, T. 33 S., R. 26 E..	120.00
Aggregate	794.02

All of said tracts were included in the lists 30 and 31 heretofore disposed of by this Department.

On December 19, 1894, by request of your office, this Department returned said list for revision.

On January 11, 1895, the attorneys for Jesse Morrow, Alexander Cameron, Robert Beaty, S. E. Sloan, Charles Tonningsen, Nes P. Tonningsen and Walter Poindexter, respectively, filed written protests

against the approval of said list, No. 39, alleging their several interests under the land laws of the United States, in the lands described in said list.

The State of Oregon and her alleged assignees were duly notified of said protests, and the questions involved were argued by counsel on both sides.

On October 4, 1895, by letter addressed to the register and receiver, your office dismissed the protests of Nes P. Tonningsen, Charles Tonningsen, S. E. Sloan, Robert Beaty, and Alexander Cameron; and directed hearings to be had in the case of Jesse Morrow to determine the character of lots 1, 2, 3, and 4, of section 33, and in the case of Walter Poindexter to determine the character of the SE. $\frac{1}{4}$ of section 28, of T. 39 S., R. 24 E.

From said decision Morrow, Sloan, Beaty, Cameron, Poindexter, N. P. Tonningsen and Charles Tonningsen have appealed to this Department.

On October 21, 1895, the attorneys for R. F. McConnaughy *et al.*, grantees of the State of Oregon, filed a petition under rules of practice 83 and 84 for an order directing the Commissioner to certify the proceedings and to suspend action, until the Secretary shall pass upon your letter "K" of January 5, 1895, referred to in your office decision aforesaid. Said letter "K" of January 5, 1895, is the letter in which you transmitted to the register and receiver the departmental decision of December 19, 1893, in the case of Morrow *et al. v. State of Oregon et al.*, reported in 17 L. D., 571; and in which you indicated your construction of said decision, and instructed the local officers how to carry into effect and execute the same.

I have determined to consider said appeals and said application for *certiorari*, together.

The true effect and meaning of the decision of December 19, 1893, in the case of Morrow *et al. v. State of Oregon et al.*, above referred to, was to cancel lists 30 and 31, and to reject and annul all claims of the State of Oregon and its alleged assignees to any and all of the tracts of land therein described. On page 574 of Volume 17, Land Decisions, you will find the following words:

A careful review of the testimony in this case shows beyond all question that the lands involved in this controversy were once covered by a large body of water, known as Lake Warner; and that, at the date of the grant and of the survey, all the lands embraced in lists 30 and 31 were covered by this lake—which, according to the testimony of some of the witnesses, was too deep to be forded; and that between 1874 and 1877 the water began to recede, so that now almost the entire tract which was formerly the bed of the lake is comparatively dry; and that the recession was quite rapid during the last two years prior to March 30, 1889.

The ruling of the Department is, that the lands covered by an apparently permanent body of water at the date of the swamp grant are not of the character contemplated by the grant. (State of California, 14 L. D., 253.) If this ruling be adhered to in this case, and I see no reason to depart from it, the lands embraced in said list are clearly not of the character contemplated by the grant, and the State has no claim to them as swamp and overflowed lands.

These words embrace not only "the areas disclosed by the surveys of Neale," (as you describe them), but also all of the adjacent subdivisions, whether whole or fractional, described in said lists 30 and 31; and especially the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 10, T. 33 S., R. 26 E., Willamette meridian, which were not touched by Neale's surveys, and which were first surveyed by James L. Rumsey in June 1883, as shown by the map on file in your office. It was error for your office to assume that said decision was limited to "the areas disclosed by the surveys of Neale."

Therefore the list No. 39, embracing 794.02 acres of land in twenty-five subdivisions, compiled by your office division "K" from the rejected lists 30 and 31 aforesaid, and submitted for my approval, is hereby rejected and canceled. The lands embraced in said lists 30, 31 and 39 were not on March 12, 1860, swamp and overflowed lands made unfit thereby for cultivation, and the State of Oregon has no right, title, interest or estate therein.

Your office decision of October 4, 1895, is hereby reversed. And you will modify the instructions contained in your letter "K" of January 5, 1895, in accordance with the views herein expressed.

HAMILTON v. GREENHOOT ET AL.

Motion for review of departmental decision of March 26, 1896, 22 L. D., 360, denied by Secretary Smith, August 4, 1896.

RAILROAD LANDS—SETTLEMENT—SECTION 5, ACT OF MARCH 3, 1887.

HUNT v. MAXWELL.

A settler who successfully contests the adverse claim of a railroad company by showing that the land was in fact excepted from the grant, does not thereby acquire a right of entry as against the privilege of a prior bona fide purchaser from the company, who is in open possession of the land, to perfect title under section 5, act of March 3, 1887.

Secretary Smith to the Commissioner of the General Land Office, August 4, 1896. (W. A. L.) (G. C. R.)

This case involves the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 9, T. 14 N., R. 6 E., Marysville land district, California.

The land is within the limits of the grant to the Central Pacific Railroad Company under the acts of Congress approved July 1, 1862 (12 Stat., 489), and July 2, 1864 (13 Stat., 356), the right of which attached to its granted lands in this district at the date of the latter granting act, the road having been definitely located March 26, 1864.

For the purposes of this decision it is important to give a history of the litigation over this land.

It appears that the withdrawal for the benefit of the grant became effective in said land district October 3, 1864, and that the township plat was filed September 18, 1868.

On December 17, 1868, one William G. Pettigrew filed his declaratory statement for the land, alleging settlement thereon November 1, 1857, and on May 7, 1884, one Ezra B. Wright filed his declaratory statement therefor, alleging settlement thereon November, 1867.

These claims were never perfected.

On March 19, 1894, one Felix G. Hendrix filed declaratory statement for the land, and after due publication he submitted pre-emption final proof, which proof was contested by the Central Pacific Railroad Company. The register and receiver decided in favor of the company, and your office on February 3, 1887, affirmed that action.

Maxwell's connection with the land began in 1891, when, on October 20th of that year, the local officers transmitted to your office a prima facie showing, made by him, to the effect that the land was excepted from the grant. Thereupon, your office ordered a hearing; upon this hearing the register and receiver again decided in favor of the company. On appeal, your office, on August 18, 1892, reversed that action, thus holding the land excepted from the grant.

On appeal, the Department, on April 16, 1894 (18 L. D., 454), affirmed that action, and in doing so held that the land was excepted from the grant by reason of Pettigrew's claim of settlement and residence prior to the definite location of the road.

On September 28, 1894, Maxwell made homestead entry of the land. After due publication of notice, he submitted final proof before the register and receiver on November 10, 1894. The final proof shows that he and his family settled on the land October 22, 1888, and thereafter maintained their residence thereon; that he has plowed and fenced about a quarter of an acre and raised thereon "garden crops." In an affidavit accompanying the final proof, he states as a reason for not making more extensive improvements and cultivation that he was deterred from doing so by one Francis Hunt and his employes; that said Hunt owned the land on all sides of the land in question, and claimed to own the land embraced in his homestead entry; that Hunt had him arrested for going through the gate on to the land, and also had his wife arrested for driving his sheep away from the house, and at another time Hunt had both himself and wife arrested for trying to prevent Hunt's employes from plowing the land.

On September 3, 1894, Anna Hunt, assignee of Francis Hunt (deceased), applied to purchase the land; she alleged that she was the widow of Francis Hunt, who died March 25, 1894, the surviving heirs being herself and eight minor children; that she had been appointed administratrix of said Hunt's estate (copy of letters of administration

annexed); that on May 2, 1893, deceased conveyed to her by deed all his estate, personal and real; that in the year 1881 the said Hunt began to use and occupy the land in question, and in 1882 cultivated and raised grain on ten acres thereof; in 1883, he enclosed the land with other lands belonging to him, and the same was in his possession until his death in March, 1894, and since that date the land was in her possession; recites the fact of the land being within the limits of the railroad company's grant; also the decision of your office of February 3, 1887, awarding the land to the company; that relying on that decision the said Hunt purchased one hundred and twenty acres of the land (described) from the railroad company, on May 26, 1890, for the sum of \$600, and at that time paid \$120, balance payable May 26, 1895, with added interest at seven per cent; that said Hunt purchased the remaining forty acre tract (described) on November 12, 1890, for the sum of \$200, paid in hand \$40, and agreed to pay the balance with interest on November 12, 1895; that Maxwell began his contest against the company October 20, 1891, long after Hunt was in possession of the land and after Hunt had purchased the same from the company. Exhibits purporting to be copies of the contract of sale by the company, and copy of deed from her husband, accompanied her application to purchase, and the right of purchase was claimed under the 5th section of the act of March 3, 1887 (24 Stat., 556). The statements made in her application were corroborated.

The register and receiver denied Mrs. Hunt's application to purchase, and held Maxwell's final proof to await the final disposition of the case.

On appeal, your office, by decision dated May 21, 1895, affirmed the action of the register and receiver, and in doing so held, as a reason therefor,

that an original purchaser, after the passage of the act (March 3, 1887), in cases where the purchase was not otherwise shown to be bona fide, is not protected thereby.

A further appeal brings the case here.

The 5th section of the act of March 3, 1887 (*supra*), under which Mrs. Hunt claims the right of purchase, reads as follows:

That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption

and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same shall be entitled to prove up and enter as in other like cases.

The fact that Hunt purchased the land from the railroad company subsequent to the date of the passage of the act of March 3, 1887, does not, as held by your office, preclude him or his heirs or assigns from the benefits of said act. *Sethman v. Clise*, 17 L. D., 307; *Stephan et al. v. Morris*, 21 L. D., 557.

The land was, 1: Of the numbered sections prescribed in the grant; 2: It is coterminous with constructed parts of said road; 3: It was excepted from the operation of the grant.

The applicant to purchase makes a *prima facie* showing that the land was sold by the company to her immediate grantor; that the sale was made in good faith, and that at date of the sale the land was not in the bona fide occupancy of an adverse claimant under any of the land laws.

From this showing it also appears that the company sold the land to Hunt, who was in possession of the same at the date of Maxwell's alleged settlement on the land; that the latter was cognizant of Hunt's claim and possession when he made settlement and brought his contest against the company. Maxwell's settlement, therefore, although made after December 1, 1882, would not, even under the second proviso to the 5th section of the act of 1887 (*supra*) defeat Hunt's right of purchase. *Chicago, St. Paul, Minneapolis and Omaha Railway Company*, 11 L. D., 607; *Holton v. Rutledge*, 20 L. D., 227.

The act of May 14, 1880 (21 Stat., 140), gives thirty days preference right of entry to a successful contestant, and Maxwell by his contest defeated the right of the company to the land, and under ordinary circumstances would be allowed the preference right. But if Hunt purchased the land in good faith from the company, and was in possession of the land under that purchase prior to Maxwell's settlement, and all other conditions referred to in said section 5 were in Hunt's favor, the preference right would not be awarded to Maxwell, for in such case he would be charged with notice and information of the open possession of the land by the purchaser from the company. *Austin v. Luey*, 21 L. D., 507.

A sufficient *prima facie* showing having been made of Hunt's right of purchase under the act of 1887 (*supra*), the case will be returned for a hearing, when evidence of Hunt's purchase, its good faith, etc., will be taken, and the case adjudicated in conformity with the principles hereinabove given.

The decision appealed from is accordingly modified.

SWAMP LANDS—INDEMNITY--WAIVER.

JEFFERSON COUNTY, ILLINOIS.

A claim for swamp indemnity must be rejected where it appears that the tracts of land employed as a basis therefor are included within a prior waiver of all claims thereto executed by a duly authorized agent of the county.

Secretary Smith to the Commissioner of the General Land Office, August 4, 1896. (G. C. R.)

Your office decision ("K") of June 26, 1895, holds for rejection the claim of the county of Jefferson, State of Illinois, for swamp land indemnity under the acts of March 2, 1855, and March 3, 1857.

The tracts of land employed as a basis for the claim are in number three hundred and seventeen, and fully described in the decision appealed from.

The reason given for rejecting the claim is, that Green P. Garner, the duly authorized agent of the county, on December 12, 1891, waived and abandoned "all right, title and interest to the same forever," and on the same day duly acknowledged the waiver to be "his free act and deed."

Mr. Garner, the agent of the county, has appealed from your said office decision, and while he admits that he signed the waiver, he insists in avoidance of the same that the special agent representing the government did not act fairly with him, and refused to adjust the claim of the county as to certain tracts then under consideration, and admittedly swamp, unless Mr. Garner would waive the claim of the county to said three hundred and seventeen tracts.

It is rather strange that Mr. Garner should thus surrender the bulk of his claim for the sake of possible cash indemnity to about eighty-eight tracts. He appears to have been acting for and on behalf of the county, whose agent he was. As such agent, he had full power to waive the claim of the county to the tracts in question, in order that there might be a complete adjustment of all the claims growing out of the swamp land act.

The waiver seems to have been a complete abandonment of the claim of the county to cash indemnity on the tracts waived, and Mr. Garner's reasons for asking that the same be disregarded can not be accepted. Nor does the fact that a few of the tracts were reported to your office by the United States surveyor-general in 1853 and 1854 as swamp lands confirm Mr. Garner in his right to indemnity therefor. Before cash indemnity can be allowed, "due proof" would still have to be made of their actual swampy condition at date of the grant; and Mr. Garner by his waiver acknowledges in behalf of the county that the tracts were not of the character contemplated in the swamp land act, and are, therefore, not the proper bases upon which to claim cash indemnity.

The decision appealed from is affirmed.

PENDING APPLICATION—MILITARY RESERVATION.

SPENCER v. STATE OF FLORIDA.

The departmental decision of June 22, 1893, refusing to recognize the private land claim of Jesse Fish, and directing that appropriate action be taken upon all pending claims to the lands embraced therein under the public land laws, did not contemplate final action thereon, until due opportunity had been given for the assertion of rights thereunder.

It is within the scope of executive authority to reduce the area of a military reservation, created by executive order, so as to exclude lands on which improvements had been made prior to the establishment of said reservation.

Secretary Smith to the Commissioner of the General Land Office, August
(W. A. L.) 4, 1896. (A. E.)

This is an appeal by Spencer from your office decision of July 27, 1895, rejecting his application to make homestead entry of lot 9 of Sec. 27 and the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 28, Tp. 7 S., R. 30 E., Gainesville, Florida.

The records relating to this land show that on July 28, 1888, the State of Florida filed an application to locate the SE. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 28, with Palatka scrip. This application was rejected because the land was claimed as a private land grant from Spain made prior to 1763 to one Jesse Fish (see case of Jesse Fish, 16 L. D., 550). From this rejection the State appealed.

On June 22, 1893, (16 L. D., 550,) the Department declared the private land grant to be barred, because not asserted within the period specified by Congress, and directed your office to take such action upon the applications pending as might be right and proper. At that time there was pending the application, among others, of George H. Spencer. Spencer claims to have made settlement and built a house and improved the lands in controversy, and to have made an application to enter the same as early as August, 1888; and again on January 24, 1890, and still again on May 14, 1895.

Your office does not appear to have passed upon the claims of Spencer until July 27, 1895, on which date you rejected his last application because the State had been allowed to select the SE. $\frac{1}{4}$ of Sec. 28 on May 18, 1895, and because lot 9 of Sec. 27 was included in a military reservation set aside by the Executive on May 14, 1893.

Spencer does not appear to have ever been given an opportunity to assert his claims to this land, and in not affording him this opportunity, the directions of this Department, in the Jesse Fish case, *supra*, were not carried out by your office.

You will order a hearing in this case, affording all parties an opportunity to be heard, with a view to determining who has the prior right to that portion of the land in controversy which lies without the military reservation, at the same time getting the status of Mr. Spencer's claim at the date when the military reservation was extended over it,

as it is quite clear that if he had improvements which were included within the military reservation, at the date when it was made, that it is within the power of the executive to reduce that reservation so as to exclude them.

Your office decision is thus modified.

RHODES ET AL. *v.* TREAS

Motion for review of departmental decision of December 28, 1895, 21 L. D., 502, denied by Acting Secretary Reynolds, August 8, 1896.

HOMESTEAD CONTEST—OKLAHOMA LANDS.

TIPTON *v.* MALONEY.

One who assists another to procure an entry, by furnishing the money for the requisite fees, will not be permitted to attack the good faith of said entry in his own interest.

Entry within the territory during the prohibited period by passing through the country over a public highway does not operate to disqualify an applicant for land within the Sac and Fox country.

Secretary Smith to the Commissioner of the General Land Office, August 4, 1896. (C. W. P.)

On September 29, 1891, Landon P. Tipton made homestead entry, No. 8096, of lots 3 and 4 and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 2, township 17 N., range 4 E., Guthrie land district, Oklahoma Territory.

On January 29, 1892, Tipton applied to enter the NE. $\frac{1}{4}$ of section 11, township 17 N., range 5 E., which was rejected by the local officers.

From this rejection Tipton appealed, and Thomas Maloney having made homestead entry, No. 10,531, on February 3, 1892, of said land, your office, on August 11, 1892, ordered a hearing, which was had on May 15, 1894, both parties appearing and submitting testimony; and on September 25, 1894, the local officers considered the case, and found (1) that Tipton had never established a residence on the land; (2) that Tipton entered into the lands embraced in the act of Congress of February 13, 1891, subsequent to the passage of said act and prior to twelve o'clock, noon, September 22, 1891, and is therefore disqualified to make homestead entry upon said land. Therefore they recommended that Maloney's homestead entry, No. 10,531, remain intact.

Tipton appealed.

Your office held as follows:

If (Maloney's) entry was made at the request of Tipton and for the purpose of protecting the land for him, he should not be permitted to say that Maloney was not a bona fide entryman, but a mere dummy, who had made an entry at his (Tipton's) instance. He should be estopped from so doing, so long as Maloney contends that it was made for his own use and benefit.

I further find from the evidence that Tipton entered the Sac and Fox country on July 1, 1891, during the prohibited period. Tipton, on being asked "When was the first time you were on this claim?" replied, "The first time I was on that land was the first days of July, 1891, on a trip through that country into the Creek Nation."

For the reason above assigned, together with the fact that Tipton is a disqualified homesteader as regards any land in the Sac and Fox country, by reason of having entered the country after the passage of the act of February 13, 1891, and before noon of September 22, 1891, your said decision is affirmed, Tipton's application for the land is dismissed, and Maloney's entry is left intact.

The evidence shows that Tipton is entitled to a restoration of his homestead right, and while a restoration of right is usually given upon the allowance of an application to enter a specified tract, I think Tipton is entitled to a judgment on the record now submitted, and it is ordered that his homestead right be restored, excepting, however, any land in the Sac and Fox country, by reason of his disqualification in respect to these lands.

Tipton appeals to the Department.

The evidence shows that Tipton relinquished his entry No. 8096, made September 29, 1891, because the land embraced therein was covered by the settlement right of one Pyburn, a prior settler; and Tipton received as a consideration for his relinquishment the sum of \$200, from Pyburn, but that this was in payment for Tipton's improvements, and was also understood to be a compromise of Pyburn's contest against Tipton's entry.

The evidence further shows that Tipton purchased the relinquishment of the land in dispute of one Dr. Goss, paying therefor the sum of \$180; that he also paid to a contestant who filed a contest against Goss's entry the sum of \$35; that he filed Goss's relinquishment and after his application was rejected induced Maloney to enter the said land, paying Maloney's fees for making entry, the sum of \$14. Tipton's contention is that he got Maloney to apply to enter the land as his friend, for the purpose of preventing any other person from entering the land. This Maloney denies. But it is not shown that Maloney had any understanding with Tipton to pay any money for the privilege of entering the land. Maloney says he had not. Upon this evidence your view seems to be correct, that the object of Tipton was to get Maloney to enter the land to protect the land from entry by any other person, pending his application (which had been rejected), and his application for a restoration of his homestead right subsequently filed; that otherwise the transaction would be a gratuity from Tipton to Maloney of about \$200, which is altogether unexplained.

I concur in your office decision that Tipton having assisted Maloney to make his entry, furnishing him with the money to pay the entry fees, cannot now be permitted to question that entry. But I do not think that Tipton is disqualified to enter land in the Sac and Fox country by reason of his having passed over the public highway from Oklahoma to the Creek Nation in July, 1891, during the prohibited period, thereby crossing the land which he first entered and relinquished.

Your office decision is thus modified.

TUSTIN *v.* ADAMS.

Motion for review of departmental decision of March 6, 1896, 22 L. D., 266, denied by Acting Secretary Reynolds, August 8, 1896.

HOMESTEAD SETTLEMENT—ENTRY—DEVISEE.

BRYANT *v.* BEGLEY.

Under the act of May 14, 1880, the right of a homestead settler relates back to the date of his settlement, and if at the date of his application to enter he has prior thereto lived on the land and complied with the law for the statutory period, his interest therein, in the absence of any intervening adverse claim, becomes at once a vested and devisable right.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 8, 1896. (C. J. G.)

Charles W. Bryant has appealed from your office decision of February 4, 1896, denying a hearing upon the protest filed by him against the final proof offered by John Begley, devisee of Martin Crow, on lots 3 and 4, Sec. 30, T. 25 S., R. 5 W., Dodge City land district, Kansas.

The ground for said denial was that the plaintiff, in his affidavit of protest, failed to allege a cause of action.

The plaintiff in his affidavit admits that the deceased entryman, Martin Crow, occupied the land in question for grazing purposes and improved the same for a period of eighteen years prior to his death. But as the entryman failed to make homestead entry until June 23, 1892, two years and three months prior to his death, the plaintiff urges that the five years of residence and improvements required by law from date of entry were not completed, and that the deceased entryman's devisee has not shown good faith in the matter of cultivation since the devisor's death. The plaintiff likewise alleges that the settlement and occupancy of the entryman prior to entry can avail him nothing unless residence and cultivation are shown for five years since date of entry.

This point does not seem to be well taken. The third section of the act of May 14, 1880 (21 Stat., 140) provides—

That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the pre-emption laws to put their claims of record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws.

The proof submitted shows that the deceased entryman resided on this land prior to date of making entry, and that he resided thereon almost continuously from date of entry to the time of his death. Thus according to protestant's own admissions the entryman was qualified to submit final proof at the date he made entry, after due publication of notice, he having been a settler on the land for a period of

eighteen years. As soon as he filed his application to enter the entryman had a vested right to this land which related back to the date of settlement. There is no question, too, that under the rulings of the Department this was a devisable right. It does not appear why Martin Crow deferred perfecting his entry for so long a time; but at the same time it does not appear that there was any adverse claimant. It is sufficient to know that he was qualified to submit proof at the date of making entry by reason of his prior settlement and residence.

This being true there would seem to be no occasion for the Department to enter into an investigation of the devisee's good faith in the matter of cultivation since his devisor's death. The devisor's qualifications descended to the devisee, and it is not incumbent upon him to make a showing as to cultivation. Hence it was properly held that plaintiff has failed to allege a cause of action.

The plaintiff attempts to raise the question as to the sufficiency of the will of entryman Crow to pass the full estate, for the purpose designated therein, under section 2288 of the Revised Statutes, and that the said will is void for uncertainty. The interpretation of this will, either as to its definiteness, or the legality of the estate it passes, or the purposes of the devise, is not a matter coming properly within the jurisdiction of this Department. The will appears to have been duly admitted to probate.

Your office decision is hereby affirmed.

MAKEMSON v. SNIDER'S HEIRS.

Motion for review of departmental decision of April 28, 1896, 22 L. D., 511, denied by Acting Secretary Reynolds, August 8, 1896.

FINAL PROOF—REPUBLICATION—PRE-EMPTION CLAIM.

SILVA v. GONZALES.

On the submission of pre-emption final proof, under an order of republication, the proof as originally made, should not be accepted in the presence of a protest against such action by an adverse claimant.

In the case of a pre-emption filing made after the repeal of the pre-emption law the burden of proof rests with the pre-emptor, as against an adverse claimant, to show settlement prior to said repeal and residence as required by law.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 8, 1896. (P. J. C.)

The land involved in this controversy is the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ of Sec. 33, and N. $\frac{1}{2}$ NW. $\frac{1}{4}$ of Sec. 34, T. 10 S., R. 15 E., Roswell, New Mexico, land district, and the plat of said township was filed in the local office March 2, 1891. On March 6, following, Florencio Gonzales filed declaratory statement for the N. $\frac{1}{2}$ NW. $\frac{1}{4}$ Sec. 27, NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ Sec. 28, and

the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Sec. 22 of the same township and range, alleging settlement October 15, 1885. On April 27, following, Felipe Silva made homestead entry of the E. $\frac{1}{2}$ NE. $\frac{1}{4}$ of Sec. 33, and N. $\frac{1}{2}$ NW. $\frac{1}{4}$ Sec. 34 of said township and range, alleging settlement October 4, 1887.

On May 16, 1891, Gonzales filed his application supported by a corroborated affidavit for an amendment of his filing to cover the N. $\frac{1}{2}$ NW. $\frac{1}{4}$ of Sec. 34, the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ of 33, and SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ of 27 of said township, said tracts, except the last named, being covered by the homestead entry of Silva.

Your office by letter of October 11, 1891, directed the local officers to advise Silva of the application of Gonzales for amendment of his filing, and to allow him (Silva) sixty days to show cause why it should not be granted. Silva subsequently filed an affidavit corroborated by several witnesses, setting forth that he settled on the land October 4, 1887; that at that date said tract was unoccupied; that he has resided upon and cultivated the described land continuously, and that Gonzales did not reside upon the said tract or any part thereof; that he has never occupied or used any part of said tract since affiant settled there, except when his fence was broken or his possession invaded without his consent.

A hearing was thereupon ordered by your office on this question. As a result thereof, the local officers filed dissenting opinions. On appeal, by your office letter of May 27, 1893, the amendment of Gonzales was allowed, and it was also ordered that "the homestead entry of Silva will be allowed to remain intact until one of said parties submits his proof."

After publication of notice, Gonzales, on September 22, 1893, submitted final proof before probate clerk of Lincoln county, which was rejected by the local officers January 6, 1894, "for failure to comply with Section 2274 of Revised Statutes."

From this action Gonzales appealed, and with the papers transmitted was a protest of Silva against said proof, on the ground that the publication was made in a paper not of general circulation in the vicinity of the land. Your office by letter of May 7, 1894, held that the proof should not have been rejected for the reason assigned by the local officers, because Silva had made no application for joint entry. The protest of Silva was sustained, and Gonzales was ordered to make new publication in a newspaper nearest the land, "when if no protest or objection is filed, you will, upon payment of purchase price, issue final papers thereon." New publication was made, fixing the time for submitting said proof before the probate clerk of Lincoln county December 22, 1894, and the same witnesses who testified to the first final proof are mentioned as witnesses in the second publication.

At the time and place mentioned Gonzales appeared, and formally tendered the final proof made under the first publication, stating that he "hereby submits the final proof heretofore made by him in this case,

and now on file in said Roswell land office." Silva being present formally objected to receiving the proof thus tendered, setting forth his objections at length.

Prior to this, on February 24, 1894, Silva submitted his final proof under his homestead entry before the same officer, the testimony being taken under objection by Gonzales.

Both parties submitted testimony on the protest offered by each, on the dates their proof was offered, and Gonzales offered himself and both of his final proof witnesses for cross-examination, but Silva declined to cross-examine them, for the reason that

the final proof in the first instance having been rejected, the testimony then given is in no wise a part of this case. [Further, that] the contestee has not furnished a copy of the testimony referred to by him, and we cannot therefore cross-examine the witnesses without seeing the original or a certified copy thereof. [Further,] that any testimony that may have been given in the former application for final proof has no bearing directly or indirectly on subsequent hearing for final proof that was begun anew.

Without taking any formal action on the proof submitted by the parties, the local officers forwarded to your office the proof of Gonzales, and stated that,

the proof of Silva was held to await decision in the proof of Gonzales, which had been forwarded to your office for your decision.

Your office, by letter of March 3, 1895, considered the matter and held that under the evidence submitted at the several hearings, Gonzales had the prior right to the land, and awarded him the tract in controversy. The question as to the manner of submission of final proof by Gonzales was not considered by your office.

Silva has appealed from your said office decision, assigning two grounds of error. The first is to the effect that the decision is contrary to the evidence as to prior settlement and occupancy of the land; and the second raises the question as to the regularity of the proof submitted by Gonzales, and it is contended that the first proof having been rejected by your office and a new publication ordered, new proof should have been submitted

for the reason that the testimony taken in the former could not under any rule of evidence be construed as applicable to or a part of the record in the case at bar, unless the person offering such testimony should allege and prove, that the witnesses testifying at the former hearing were at this time removed from the country, or for some other equally good reason it was impossible to secure their testimony, and that the facts in their knowledge could not be proven by other parties;

that the proceedings under the first publication were void *ab initio*

for if the first step was taken in the wrong direction all further progress in the same line only increased the difficulty. We therefore take the position that the first publication being improper and not as required by law (as held by the Honorable Commissioner) that all proceedings toward submitting final proof that were had in pursuance with said illegal notice was necessarily illegal.

I am impressed with the force of Silva's objection to the reception of

the final proof submitted by Gonzales in 1893 under the republication made in 1894. It seems to have been contemplated by your office order requiring new publication that the former proof submitted might be received, "if no protest or objection is filed." As a matter of fact, however, there was a protest and objection filed to its reception, upon grounds sufficient in themselves to have excluded such testimony in a trial of a cause in the courts. The further reason that neither the proof nor a copy thereof was presented before the probate clerk, where the hearing was had, so that counsel for Silva could inspect the same to enable him to make an intelligent examination of the witnesses, was, in my judgment, a sufficient reason for him to refuse to cross-examine them upon the facts testified to in the final proof. It would seem also that it was necessary for Gonzales to show in said final proof a compliance with the law between the date of the first submission thereof and the last. As the record stands now, the proof submitted in 1893 is presented under an advertisement made more than a year subsequent, and in the presence of an adverse claim and objection to the manner in which the proof was submitted. It would appear as if this proof was not sufficient.

In view of this conclusion, it is deemed advisable to remand the case, with instructions to require Gonzales to submit final proof as of the date of his second publication. Notice of this should be served on Silva that he may appear and protest against the same and offer such evidence as he may desire.

It may be well to add that all pre-emption laws were repealed by section 4 of the act of March 3, 1891 (26 Stat., 1095), with, however, this provision:

But all *bona fide* claims lawfully initiated before the passage of this act under any of said provisions of law so repealed may be perfected upon due compliance with law, etc.

Gonzales' pre-emption declaratory statement, alleging settlement in 1885, was not filed until March 6, 1891, subsequent to the repeal above mentioned. The burden is therefore upon him to prove settlement prior to said repeal and as alleged. There is no law in existence permitting pre-emption filings on March 6, 1891, unless the claim had been lawfully initiated prior to March 3, 1891, and if a settlement on the land was sufficient to bring the present filing within the terms of the proviso of said act, it must be shown by a clear preponderance of the evidence that there was a *bona fide* settlement, and that residence was maintained thereunder as contemplated by law. This is especially true as applied to the case at bar, because at the time Silva made homestead entry the records of the local office were clear as to the fact in controversy; his entry segregated the land, and any one attempting to impeach it by a pre-emption filing based solely upon prior settlement has the *onus* cast upon him to establish that fact.

The case is therefore remanded for further proceedings, as indicated herein.

- PETER DHALIN.

Motion for review of departmental decision of April 24, 1896, 22 L. D., 496, denied by Acting Secretary Reynolds, August 8, 1896.

PRIVATE LAND CLAIM—HOMESTEAD ENTRY.

CONFIRMEES OF DURAN DE CHAVEZ GRANT *v.* SAABEDRA.

By the terms of section 14, act of March 3, 1891, a claim of ownership, asserted under a Mexican private land grant, cannot be considered as against a homestead entry on which final certificate has issued prior to the confirmation of said grant.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 8, 1896. (E. B., Jr.)

The confirmees of the Nicholas Duran de Chavez grant, a Mexican land grant, appeal from the decision of your office of September 16, 1895, dismissing their protest, filed August 13, 1895, against the homestead entry of Roman Saabedra, No. 3042, made March 24, 1888, for the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of section 30, and the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 19, T. 6 N., R. 2 E., Santa Fe, New Mexico, land district, upon which final certificate No. 1987 issued June 27, 1893.

Appellants assert ownership of the tract covered by Saabedra's entry, under the above named grant, which was made in June, 1739, and within the limits of which said tract lies, and under a decree of the court of private land claims rendered August 22, 1893, confirming the grant to the heirs and legal representatives of the grantee, said Chavez. This claim of ownership, together with the contention that all the lands embraced within said grant were reserved from governmental disposal by the eighth section of the act of July 22, 1854 (10 Stat., 308), and by withdrawal in pursuance thereof in June, 1890, by direction of the Commissioner of the General Land Office, is the basis of said protest. The ground of your office decision is that final homestead certificate having issued to Saabedra prior to the confirmatory decree aforesaid, his entry is validated by the fourteenth section of the act of March 3, 1891 (26 Stat., 854). The appeal insists that it was error to hold the entry valid under said section, reasserts the contention of the protest as above stated, and urges that therefore the final certificate issued to Saabedra is null and void.

Section fourteen of the act of March 3, 1891 (*supra*) provides, among other things:

That if in any case it shall appear that the lands or any part thereof decreed to any claimant under the provisions of this act shall have been sold or granted by the United States to any other person, such title from the United States to such other person shall remain valid, notwithstanding such decree.

The issuance of final certificate to Saabedra for said tract amounted to a sale or grant thereof within the meaning and intent of the

language quoted. Such certificate vested a right to patent, or in other words, an equitable title, in him for all the interest of the United States in the said tract (*Simmons v. Wagner*, 101 U. S., 260; *Deffebach v. Hawke*, 115 U. S., 392; and *Cornelius v. Kessel*, 128 U. S., 456).

It is unnecessary under the view the Department takes of the effect of said fourteenth section, as applied to the facts of this case, to consider any claim of ownership under said Mexican grant, or the reservation contained in the eighth section of the act of July 22, 1854 (*supra*), and the said withdrawal thereunder. Furthermore, said eighth section was expressly repealed by the fifteenth section of the said act of March 3, 1891, thus terminating whatever jurisdiction this Department had thereunder relative to Spanish and Mexican land grants. It is not incumbent upon the Department to go behind the language above quoted from the act last mentioned to inquire whether the tract in question was public land, or into the title of the United States thereto at the time Saabedra made his final entry. That title, upon the payment by him of the lawful fees, and the issuing of the receiver's receipt and the register's final certificate prior to the decree of the court of private land claims, vested equitably in him and is validated by the express terms of the act.

The question whether Saabedra has complied with the provisions of the homestead law otherwise than as alleged in said protest is not before the Department. Subject to such question, his final certificate entitles him to patent for the said tract. The decision of your office is affirmed.

ALASKA—FINAL PROOF.

GEORGE W. GRAYSON.

The territory of Alaska is constituted a land district by statute, and final proof on entries therein must be made within said district.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 12, 1896. (P. J. C.)

By the record it is shown that George W. Grayson made application to enter a tract of land, described as survey No. 53, on Wood Island, in Sitka, Alaska, land district, containing 4.88 acres. Notice of publication was published in a paper nearest the land, the first insertion being on July 22, 1893, and "the 21st day of December, 1893, at 10 o'clock A. M., is appointed for such proceedings before this (the local) office." The period of publication expired September 9th. On September 26, following, an affidavit, dated and executed at San Francisco, California, was forwarded to the local office, setting forth that all of the witnesses reside out of Alaska and at or near San Francisco, a

distance of about 1,784 miles from the land, "and it is apprehended that said witnesses may be unable or will refuse to attend before said land office." On this affidavit, the local officers, on October 13, 1893, issued a commission

to the United States Commissioner for the Northern district of California, and the clerk of the United States circuit court of appeals for the ninth circuit, at San Francisco, California, to take the testimony

of the witnesses named. The testimony of the witnesses was taken before this commissioner, etc., November 23, 24 and 25, and, it is stated, "cash papers No. 5 issued December 27, 1893."

On consideration of this matter, your office by letter of April 8, 1895, directed the local officers to—

require the claimant Grayson to re-advertise, post and publish notice of his intention to submit final proof, and to submit the same at the time and place advertised, and as required by said regulations, and if said final proof shall show that he is entitled to a cash entry, the certificate and receipt, which are herewith returned, will be corrected so as to describe the land by metes and bounds.

A motion for review of this decision was overruled, whereupon the claimant prosecutes this appeal, assigning errors as follows:

1. That such proof shows the *bona fide* occupation of said tract for trading purposes.

2. That the taking of final proof at San Francisco under a commission issued by the register and receiver at Sitka is in pursuance of the practice of all courts and tribunals, for the taking of testimony of witnesses at a distance.

3. That the officer before whom such testimony was taken, and who administered the oaths therefor, was and is authorized by law as clerk of the circuit court of appeals to administer oaths in the district of Alaska.

4. That the date mentioned in the published notice of intention to make final proof was notice to all contestants, protestants and adverse claimants, to appear before said land office at the date advertised; that in the event of any such adverse claimants appearing, of course such person would be entitled to cross-examine the witnesses, whose testimony is returned with the commission; that such testimony taken without such appearance of an adverse claimant should be received as evidence in the case; that the fact of no adverse claimant appearing, renders it immaterial what competent officer took the same, so that it was in pursuance of the order of the register and receiver of the Land Office.

5. That it is impracticable for claimants at the westward in Alaska to make a trip of 1500 miles to Sitka land office to submit their final proofs, especially as the parties interested and the witnesses to be examined are mostly residents of the City of San Francisco, and make their summer occupations on the coast of Alaska, by direct trips to and from said City of San Francisco.

6. That it appears from the affidavits filed with the said proof that the notice of intention was posted on the land long prior to the date advertised for taking the same and remained so posted long subsequent to the taking of said proof.

7. That the act of March 3, 1891, allows the Hon. Secretary to establish such regulations with reference to taking final proofs under said act as he may deem proper; that the regulations of June 3rd, 1891, can be modified, if necessary, by said Secretary, the officer promulgating the same, to conform to the necessities of claimants making proof.

8. That the readvertisement and posting of notice of intention would be an onerous and unnecessary expense, as shown by the fact that no opposition was made by

any contestant, protestant or adverse claimant to the acceptance of such proof on behalf of claimant at said land office, at the date named in the published notice of intention, or since filed therein.

By section 8, act of May 17, 1884 (23 Stat., 24), the district of Alaska is "created a land district, and a United States land office for said district is hereby located at Sitka." There is no law by which final proof on entries in that Territory may be made outside of the land district thus created. The universal rule has been that final proof must be made in the land district where the land is situated, and at the time and place, and before the officers, named in the notice. This is specifically contemplated by rule 22 (12 L. D., 591), of the circular of "non-mineral entries in Alaska," which provides that:

If upon the day appointed for making proof and payment for any tract of land by a person, association or corporation, any other person or the representative of any association or corporation, should appear and protest against the allowance of the entry, such protestant should be heard and permitted to cross-examine the claimant and his witnesses, and the complaint and the facts thus developed will be duly considered by the *ex officio* register and surveyor-general and such action taken as they may deem proper. Should the protestant desire to carry his action into a contest so as to introduce the testimony of witnesses either for the government or in his own behalf, he should be required by said officers to file a sworn and corroborated statement of his grounds of action, and that the contest is not initiated for the purpose of harassing the claimant and extorting money from him under a compromise, but in good faith to prosecute the same to a final determination; and this affidavit being filed, the said officers will immediately proceed to determine the controversy, fixing a time and place for the hearing of the respective claims of the interested parties, giving each the usual notice thereof and a fair opportunity to present their interests, in accordance with the principles of law and equity applicable to the case, as prescribed by the rules for the conduct of such cases before registers and receivers of other local offices.

It is difficult to conceive how any one claiming an adverse right to the land sought to be entered could protect himself when the witnesses appeared at a different time and place, outside the land district and gave their evidence. Such a method would be doing violence to the law and regulations, and is without authority or precedent.

Your office judgment is, therefore, affirmed.

TOWN LOT—OCCUPANCY—MUNICIPAL RIGHTS.

HANCE ET AL. v. CITY OF GUTHRIE.

Occupancy of a town lot as the tenant of another, at the date of a townsite entry, confers no right to a deed upon such occupant.

Occupancy of a town lot as the basis of a claim thereto, to be effective, must be maintained up to the date of the townsite entry.

The municipality may become a party to a contest between applicants for a town lot with a view to the assertion of its own rights under section 4, act of May 14, 1890.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 12, 1896. (E. B., Jr.)

This is a contest for a deed to lot 6, block 55, in the city of Guthrie, Oklahoma Territory, under the provisions of the act of May 14, 1890 (26 Stat., 109). Of the numerous parties heretofore contesting for title to said lot all but two, Thomas D. Hance, and Andrew Frink and William Lowe (jointly), have dropped out of the case by default before the local townsite board or by failure to appeal from adverse decisions. The city of Guthrie appears as a party pursuant to paragraph 13 of departmental regulations of November 30, 1894, 19 L. D., 334, to protect its interests in the premises under the fourth section of said act. The case comes before the Department on appeal by Hance, and Frink and Lowe, from your office decision of November 7, 1895, denying the former a deed on the ground of his abandonment of the lot, and the latter on the ground that they asserted no claim thereto prior to the entry of the townsite of Guthrie, and holding that the lot should be disposed of according to the provisions of section four above mentioned. This decision, as to Frink and Lowe, was adhered to by your office January 24, 1896, upon review at the motion of this party.

The record history of the case is fully set out in these decisions, and further recital here, in detail, is therefore unnecessary. The evidence is very voluminous and conflicting, but therefrom the following pertinent facts sufficiently appear:

The lot in question forms part of the land opened to settlement at twelve o'clock, noon, on April 22, 1889, under the act of March 2, 1889 (25 Stat., 1005), and the President's proclamation of March 23, 1889, pursuant thereto, and of the townsite of Guthrie, which was entered August 5, 1890. The first actual occupant of the lot was William C. Jones, then United States marshal for the district of Kansas, which included the country opened for settlement as above, whose tent was erected on the front part of the lot by his deputies prior to or very soon after the hour of the opening. Jones soon afterward erected a frame building on the site of the tent, which he leased to different parties until about October first, 1889. May 17, 1889, Jones was awarded a warranty certificate for the lot by the town authorities.

On October 9, 1889, Frink and Lowe became tenants of the Jones building under a lease executed through Jones' agents, and continued to occupy the same as such tenants, renewing their lease in March, 1891, and to pay rent therefor, until shortly before the second trial before the townsite board to determine the right to possession, in November, 1894. Frink and Lowe now contend that they have claimed said lot in their own right since about December, 1889, when they first learned that Jones was their landlord. This contention is utterly inconsistent with the established facts in the premises. After the entry of said townsite the townsite board on August 23d gave notice for all claimants for lots in Guthrie to present their claims within thirty days. Prior to the first

trial between claimants for this lot, January 26, 1891, seven persons had filed claims therefor. Frink and Lowe, although then residents of Guthrie, and engaged in keeping a restaurant on said lot, made no response to this notice. Not until June 9, 1891, some time after a decision by the local board, adverse to Jones and the other claimants and favorable to the city of Guthrie, and after appeal to your office, did Frink and Lowe file an application for a deed for the lot. At, prior and for a long time subsequent to the townsite entry they were occupying the premises only as the tenants of Jones, and had asserted no claim hostile to him. Jones had been properly decided, both by the townsite board and your office, to have been disqualified as an applicant for a deed to said lot by reason of his "soonerism." But this fact is immaterial so far as the claim of Frink and Lowe is concerned. They entered upon the premises as tenants and continued there as tenants without claiming or asserting any other interest therein until June 9, 1891. They evidently did not intend to deny Jones' title when they entered. The first distinct claim they set up to the lot was when they filed their application with the townsite board. They were not occupants in their own right within the meaning of the law at the date of the townsite entry, and this fact is conclusive against them in their present claim (*Benson v. Hunter*, 19 L. D., 290, and *Bowie v. Graff*, 21 L. D., 522).

Hance's occupancy of said lot commenced about 2:30 P. M. April 22, 1889, was continued, as shown by the evidence and more fully stated in your office decision, by residence, until the latter part of May, following, and by improvements until about the last of November, 1889, when the remnant of a building he had placed thereon was thrown off by the agent of Jones. He was not thereafter in any sense an occupant of the lot. He took no legal steps to regain possession other than to bring his claim before the townsite board. His contention that he removed from the lot in May, 1889, because his business as a restaurant keeper was rendered unprofitable and the health of himself and family jeopardized by the proximity of several privies, and that he feared to return to its former place on the lot the lumber that was thrown off, or attempt to maintain any improvements thereon, lest he become liable as trespasser, and that therefore his failure to retain any possession of the lot is excusable, is not sound. No force or threats were used to eject him or to frighten him away. He left of his own accord, taking up his residence shortly afterward on a claim near the city upon which he continued to reside at the date of the townsite entry. The lumber he used to build sidewalks in front of the Capital Hotel, then owned or leased by him in the same city.

It is in evidence that when asked why he hauled his lumber away, he stated that it was of no use to keep it there, as "Jones will beat me anyway." He must be regarded as having abandoned his possession or right to possession of said lot when he acquiesced in the removal of

his improvements by hauling away the last vestige thereof without protest to Jones or his agent or making any apparent effort to have it restored, or in any other way to maintain an occupation of the lot.

Section four of the act referred to above is as follows:

That all lots not disposed of as hereinbefore provided for shall be sold under the direction of the Secretary of the Interior for the benefit of the municipal government of any such town, or the same or any part thereof may be reserved for public use as sites for public buildings, or for the purpose of parks, if in the judgment of the Secretary such reservation would be for the public interest, and the Secretary shall execute proper conveyances to carry out the provisions of this section.

Your office decision is affirmed. Said lot will be disposed of under the provisions of the section set forth above.

TIMBER TRESPASS—SETTLEMENT.

JOSEPH CLIFFORD.

There is no authority in the Department to accept in settlement of a timber trespass an amount less than that found due the government.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(J. I. P.) *August 13, 1896.* (A. M.)

On the 16th ultimo you submitted the report of a timber trespass on certain unsurveyed non-mineral public lands in Montana by Joseph Clifford, together with his propositions to settle for the wood involved in the trespass.

It appears that Clifford cut three hundred and thirteen cords of wood from the lands, knowing them to be of the above character; that he sold fifty-five cords and that two hundred and fifty-eight cords remain on the ground where cut.

The trespass was a wilful one and under the decision of the U. S. supreme court in the Wooden-ware case—106 U. S. 432—the government is entitled to damages in settlement thereof in the sum of \$644. This total includes \$192.50 the amount received by the trespasser for the wood sold by him and \$451.50 the reported value of the remainder of the wood where found.

In order to effect a settlement Clifford has submitted, one after the other, three propositions. The latest and best of these contains the offer to pay \$313 for the wood at \$1 per cord.

In summing up the case your letter states that this

proposition does not cover the full amount of his liability for the enhanced value of said timber and under a strict construction of the law, the proposition would have to be rejected.

Doubts are also expressed in your letter as to the recovery of any amount in case of suit and that it is not probable that judgment would be rendered for an amount in excess of that offered and you have

accordingly recommended that this last proposition be accepted in full of his liability.

I do not agree with this recommendation.

In stating the case, and in referring to one of Clifford's propositions, you used this language:

the proposition was rejected, in view of the decision—5 L. D. 240—that there is no authority in this Department for accepting in settlement for trespass an amount less than that due the government.

The ruling in the decision cited is that which governs in all cases of timber trespass and was properly applied by you in rejecting the proposition then before you. It is equally applicable to the proposition that I am asked to accept, for in both propositions the offer is below the amount ascertained to be due the government.

The only course open to this Department is to submit the case to the Department of Justice for civil suit. With that end in view the original papers submitted by you are returned herewith that you may supply copies of them for transmission to the Attorney General.

WOOD *v.* BEACH.

Motions for review and rehearing in the case above entitled denied by Acting Secretary Reynolds, August 15, 1896. See departmental decision of March 26, 1896, 22 L. D., 382.

LEAVE OF ABSENCE—EFFECT OF APPLICATION.

ESTHER L. WILSON.

On a proper showing a second year's leave of absence may be granted without requiring an intervening period of personal presence on the land.

Where an application for leave of absence is wrongfully denied, and afterwards allowed on appeal, the applicant will be protected as to any absence during the period covered by the application.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 15, 1896. (J. L. McC.)

Esther L. Wilson has appealed from the decision of your office, dated November 16, 1895, rejecting her application for leave of absence for one year from October 1, 1894, from her homestead claim, to wit, the SW. $\frac{1}{4}$ of Sec. 29, T. 15 N., R. 14 W., Kingfisher land district, Oklahoma Territory.

Mrs. Wilson had been absent from her claim for one year, because of a failure of crops. When the year of her absence had nearly expired she was taken sick with asthma, with which she was confined to her room and her bed (in Lawrence, Kansas). She thereupon applied for another year's leave of absence.

Your office decision quotes the law of March 2, 1889 (25 Stat., 854), providing for leave of absence, for certain reasons specified, "for a period not exceeding one year at any one time"; and it holds that,

in view of the fact that said party has been granted a leave of absence for one year, under section 3 of said act, she cannot be granted an additional leave of absence for one year without any period of time intervening.

The Department has held that

when the condition named in section 3, act of March 2, 1889, are made to appear to the local office, leave of absence should not be denied for the reason alone that no period of personal presence on the land has intervened between the expiration of a formal leave and the application for a second or subsequent leave. (May Lockhart, syllabus, 22 L. D., 706.)

In my opinion, in view of the showing made by Mrs. Wilson in the case at bar, a second year's leave of absence should have been granted without requiring her to return to the claim. But inasmuch as nearly two years have elapsed since the application the case will be treated as though said application had been granted, and any absence on her part from the land during the period designated in said application will be protected under the provisions of the law.

The decision of your office is reversed.

HOMESTEAD CONTEST—PRIORITY OF SETTLEMENT.

SUMNER *v.* ROBERTS.

In case of a contest against an entry on the ground of a prior settlement right, the burden of proof is upon the contestant to show that his settlement antedates both the entry and settlement of the contestee, and if he fails to thus show such priority the entry must stand.

In a contest of such character, doubt as to the fact of priority, or a finding of simultaneous settlement, does not justify an arbitrary division of the land between the parties, or an award thereof to the highest bidder.

Secretary Smith to the Commissioner of the General Land Office, August
(W. A. L.) 24, 1896. (C. J. W.)

On September 28, 1893, Albert M. Roberts made homestead entry of the NE. $\frac{1}{4}$ of Sec. 22, T. 25 N., R. 1 W., Perry, Oklahoma. This land is in the Cherokee Outlet, and was opened to settlement September 16, 1893.

On October 27, 1893, William M. Sumner filed a contest against said entry, alleging settlement prior to said entry and prior to Roberts' settlement.

The case was heard on November 30, 1894, and the local officers found that both parties arrived on the land on the evening of the 16th of September, 1893, and performed certain initial acts of settlement which were followed by more valuable and permanent improvements, within

a reasonable time, and that each had established a residence on the land. They say that—

while there is a conflict in the testimony on this point, we think there is a preponderance going to establish the fact that contestant was the first of these parties to reach the land on the day of the opening and claim the same as a homestead.

From this decision Roberts appealed. On May 24, 1895, your office, passing upon the case, said:

The testimony is conflicting as to whether the plaintiff or defendant reached the land first.

The plaintiff introduced fifteen witnesses and the defendant nine witnesses. From an examination of all the evidence on the question of prior settlement, a preponderance shows that the plaintiff was the first to reach the land and make settlement.

Sumner built a house and established residence on the land, October 3, 1893. Roberts built a house and established residence on the land December 16, 1893. Both parties seem to have manifested good faith. Their respective rights clearly hinge upon the question of fact as to which arrived first upon the land and staked it. In some almost similar cases, the settlement of the question of fact has been evaded and the practice resorted to of dividing the land between the parties. The Department has had occasion to consider the soundness and propriety of this policy, which seems to have been adopted to some extent without the careful consideration it should have received. It is believed that there is no express authority of law for the Department of its own motion to cut up and divide the lands which constitute a homestead as applied for by the parties. If the authority to do so is to be found in the supervisory powers lodged in the Secretary, it should be used only in cases where it manifestly furthers justice, and denies no legal right to either of the parties.

In cases where entries have been made and contests thereafter instituted upon the ground of prior settlement, unless the contestant shall successfully carry the burden of showing by proof that his settlement antedates the entry, and the settlement of the entryman, the rule that the entry will stand will be adhered to. The cases in which this rule would seem to have been disregarded will no longer be regarded as precedents to be followed. The fact of prior settlement is lawful authority for the cancellation of an entry of record, but evidence which leaves the question in doubt as to which settled first, the entryman or the contestant, and is without some degree of preponderance in favor of the contestant, will leave the entry intact. Even if the evidence should show that settlement was made simultaneously by a contestant and an entryman, this will not authorize the cancellation of an entry properly of record as was held in the recent case of *Perry et al. v. Haskins* (23 L. D., 50). Your office in the case of *Heatherton v. Montgomery*, in which you reversed the local officers, held that if, under an allegation of prior settlement, simultaneous settlement was shown instead, that it would authorize the cancellation of the entry and the

division of the land. There seems to have been no appeal from that decision. In the case of *O'Toole v. Spicer* (20 L. D., 392), the same principle seems to have been announced by your office, and acquiesced in here, and in some other cases the principle is to some extent recognized. The result is apparently to multiply conflicting decisions and to afford facilities for evading the responsibility of deciding at all, in difficult cases, by simply classifying them as doubtful, and making doubt the basis for a division of the land. It is believed that the legal rights of parties will be best secured and greater uniformity in decisions reached, by following the law, and abandoning the practice of forced division of homestead lands. In cases where parties themselves regard their rights, as so nearly equal and so difficult of demonstration, as to induce them to voluntarily agree to a division of the land, there is no objection to their doing so; but there is no lawful authority in the Department to compel, compromise, and force a division of a homestead by an alternate judgment of sale, unless division is agreed upon. In cases of simultaneous applications to enter, the regulations of the Department provide, that where neither party has improvements on the land the right of entry should be awarded to the highest bidder, as between the applicants (Circular G. L. O., 1895, p. 14). This can hardly be construed into authority for either dividing the land, or for offering it to the highest bidder, after entry and after settlement, upon the theory that the settlements were simultaneously made, since the rule does not apply to cases where either party is a settler. The decisions in which it has been said that in contests in cases based on prior settlement, the record entry is without significance, go too far, and are misleading, since the assertion of priority of settlement is an affirmative declaration that the contestant was the first settler, and denies the right of the entryman, both by virtue of his entry and by virtue of his settlement. It follows that the assertion of a right based on priority of settlement, where an entry of record is in the way, puts the burden on the contestant of showing that he not only made settlement before the entryman made entry, but before he made settlement also, and failing to do this the entry will stand. It may be said that as settlers have three months within which to make entry, after settlement no entry made and allowed within that time ought to have any significance as against him. This law was not intended to encourage delay in making applications to enter upon the part of settlers, but simply to fix the limitation beyond which delay could not go, without terminating such settlement rights as to third parties. There is no reason why, as between contesting settlers, the one first making application to enter and getting his application on record, should not have the benefit of his diligence. It is a general rule that the law favors the diligent, and it is upon this the rule rests, that the first qualified applicant in order of time, to enter land subject to entry, shall be awarded the right to make such entry, over others who make application later. An entry of record which is not fraudulent cannot be treated as a

nullity signifying nothing at all. It follows that where a contest is based on priority of settlement, and the defendant has an entry of record, and the plaintiff fails to show prior settlement, and only shows simultaneous settlement, that he fails to show a lawful cause for the cancellation of the entry. The decisions in which the questions herein discussed may seem to be in conflict with this decision may stand as the law of the cases wherein they were rendered, but will not hereafter be followed as precedents. Having discussed the rules applicable to contests generally based on prior settlement, it remains to apply the principles to the case under consideration.

The local officers and your office have concurred in finding that contestant made settlement prior to defendant, and prior to his entry. The record seems to support this conclusion. Your office decision is accordingly approved, and the entry of the defendant will be canceled.

NORTH PERRY TOWNSITE ET AL. v. MALONE.

Motion for review of departmental decision of July 9, 1896, 23 L. D., 87, denied by Secretary Smith, August 27, 1896.

RAILROAD GRANT—TERMINAL LIMITS—ADJUSTMENT.

NORTHERN PACIFIC R. R. Co.

The arrangement made between the Northern Pacific, and the Lake Superior and Mississippi companies with respect to the latter company's line of road from Thomson's Junction to Duluth, was such a consolidation, confederation, and association of the two companies as was contemplated by the grant to the former company, by means of which said company effected its connection with Lake Superior, and thereby fixed the eastern terminus of its grant at Duluth, the point of said connection.

In the adjustment of the grant to the Northern Pacific between Thomson's Junction and Duluth the land covered by the prior grant to the Lake Superior company must be deducted, so that between said points the Northern Pacific company will take only the granted lands within the lateral limits of its own grant, which fall outside the limits of the former grant, and will be entitled to indemnity only for losses sustained outside the limits of the former grant.

Secretary Smith to the Commissioner of the General Land Office, August 27, 1896. (A. B. P.)

On November 13, 1895, this Department had before it for consideration list No. 21, embracing certain selections of lands for indemnity purposes, by the Northern Pacific Railroad Company, the bases whereof were alleged losses within what were claimed to be the primary limits of its grant in the State of Wisconsin east of Superior City. See 21 L. D., 412.

It was decided in that case that said company had no land grant on account of constructed road within the State of Wisconsin east of

Superior City, and the list submitted, for that reason, was not approved. Whether said company had any land grant east of Thomson's Junction in the State of Minnesota was a question suggested but not decided, because not properly an issue in the case, and for the further reason that certain necessary evidence was not in the record. In view thereof, however, you were directed to suspend action upon all cases involving the question of the company's right to a grant between Thomson's Junction and Superior City until that question could be determined in a case properly presenting it.

On May 14, 1896, you transmitted to this Department a letter addressed to your office by Messrs. Britton and Gray, local counsel for the Northern Pacific Railroad Company, under date of May 8, 1896, inclosing certain documentary evidence bearing upon the question, and asking that the same be referred to this Department for final action thereon. By said letter and accompanying papers the question of the company's rights under its grant east of Thomson's Junction is presented and asked to be determined without further delay, in order that the company may be speedily relieved from the effect of said suspension.

The documentary evidence now furnished by said company consists chiefly of certain written agreements made between the Northern Pacific Railroad Company and the Lake Superior and Mississippi Railroad Company, and various other parties, relative to the future use, occupancy and ownership, by said railroad companies, of that portion of the railroad previously constructed by the Lake Superior and Mississippi Company, running from Thomson's Junction to Duluth on Lake Superior. As far as material to the question under consideration, this evidence will be more particularly referred to later on.

In order to determine the question presented it is necessary to refer briefly to some of the provisions of the act of Congress by which the Northern Pacific Railroad Company was incorporated. That act was passed July 2, 1864 (13 Stat. 365), and by the first section thereof the Northern Pacific Railroad Company was—

Authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin; thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget Sound, with a branch, via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon, etc.

The company was invested with all the powers, privileges and immunities necessary to carry into effect the purposes of its incorporation.

By the third section of the act there was granted to said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, etc., over its said line of railway—

Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad

line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office, etc.

Provision was also made in said third section for the selection by the company of indemnity lands in lieu of those lost in place because granted, sold, reserved, etc., or otherwise disposed of prior to the definite location of its line of road. Then follow two provisos in these words:

Provided, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act:

Provided, further, That the railroad company receiving the previous grant of land may assign their interest to said "Northern Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act.

By the fourth section it was provided that whenever said company should have twenty-five consecutive miles of said railroad and telegraph line ready for the service contemplated, the President should appoint three commissioners to examine the same, upon whose report, if favorable, patents were to issue for the lands as far as earned; and, from time to time, as every additional twenty-five miles were ready for service, and verified by said commissioners in the manner prescribed, patents should issue for the lands earned, etc., and so on until the road was completed.

By the eighth section it was provided, as one of the conditions of the grant, that the whole road should be completed by July 4, 1876. This limitation was extended, however, for the period of two years, by the act of May 7, 1866 (14 Stat., 355).

It is not deemed necessary to refer specifically to the several plats or maps of general route filed by the company at different times prior to the definite location of its road, presumably under section six of the granting act. For a detailed statement of the transactions of the company in this regard, reference is made to the decision reported in 21 L. D., 412, hereinbefore mentioned.

On November 20, 1871, the company filed its first map of definite location. The road as located by that map started at the point of its junction with the Lake Superior and Mississippi Railroad, at Thomson, in Minnesota, and extended westward to the Red River of the North at Fargo, Dakota.

By act of May 5, 1864 (13 Stat., 64), Congress had made a land grant to the State of Minnesota for the purpose of aiding in the construction of a railroad in said State from the city of St. Paul to the head of Lake Superior. This grant was for the amount of five alternate sections per mile, on each side of said railroad, on the line thereof, within said

State. The Lake Superior and Mississippi Railroad Company became the grantee of the State of Minnesota under that act, and had constructed the road in aid of which the grant was made prior to the filing by the Northern Pacific Company of its said first map of definite location. The latter company had, however, on March 6, 1865, filed in your office a plat or map on which was designated the general route of the entire line of its road from Lake Superior to Puget Sound, making Duluth, on said lake, the initial or starting point. From Thomson, in Minnesota, eastward to Duluth, in said State, the route of the former company's road, and the designated general route of the latter company's road, were found to be upon the same general line.

This was the condition of things on July 9, 1870, at which time, as appears from the evidence submitted and forwarded with your said letter of transmittal, an agreement was entered into between the Northern Pacific Railroad Company, the Lake Superior and Mississippi Railroad Company, the Lake Superior and Puget Sound Company, and the Western Land Association, whereby it was stipulated and agreed, among other things, that the Northern Pacific Company should connect its road with the road of the Lake Superior and Mississippi Company at or near the Dalles of the St. Louis River, in Minnesota (a point practically the same as Thomson), in order to open direct communication by rail with the town of Duluth, and to maintain such connection so as to make Duluth "one of its principal points of trade and transshipment on Lake Superior;" and to accomplish that object it was further agreed that said two railroad companies should enter into just and equitable running arrangements. It was also agreed that the Northern Pacific Company should make its first connection east from said point of intersection by way of the line of the Lake Superior and Mississippi Company, and that it would not build any other road for the purpose of forming such eastern connection prior to the completion of its road to the Missouri River. Under what authority this agreement was made does not appear. It is hardly such an agreement as was contemplated by the fifth section of the granting act, wherein it was provided that:

It shall be the duty of the Northern Pacific Railroad Company to permit any other railroad which shall be authorized to be built by the United States, or by the legislature of any Territory or State in which the same may be situated, to form running connections with it, of fair and equitable terms,

though probably made in view of that provision.

Running arrangements were entered into between the two railroad companies in accordance with said agreement, and, presumably, the same were continued until January 1, 1872. On that date an agreement in writing between the Lake Superior and Mississippi Railroad Company and the Northern Pacific Railroad Company was made, whereby the former company agreed to sell and does sell to the latter company an undivided one half interest in, and the right to jointly

use and operate, that portion of the former company's main line of railroad between Thomson's Junction, in Minnesota, and the city of Duluth, on Lake Superior, in said State. The consideration for the sale was the sum of \$500,000 which was to be paid by the Northern Pacific Company on the first day of January, 1896, if the premises on that date should be unincumbered of certain existing mortgages, or as soon thereafter as they should become free from said mortgages; and until said sum of \$500,000 should so become due and payable the Northern Pacific Company was to pay semi-annually, as interest thereon, on the first days of January and July of each year, the sum of \$17,500, to be applied to the payment of the semi-annual interest accruing upon certain mortgage bonds of the said Lake Superior and Mississippi Railroad Company, and certain taxes against the same. Provisions were made for the joint occupation, use, and operation of the road by the contracting companies; and at the same time a deed was made and executed by the Lake Superior and Mississippi Company, conveying to the Northern Pacific Company an undivided one half interest in all that portion of the grantor's said main line of railroad between Thomson's Junction, in Minnesota, and Duluth, on Lake Superior, and in all and singular the appurtenances thereto belonging, in accordance with the terms of said agreement. By this arrangement the Northern Pacific Railroad Company was enabled to connect and did connect its road with Lake Superior at Duluth, in Minnesota, from Thomson's Junction, in said State, a distance of about twenty-five miles, over the line of a railroad to aid in the construction of which lands had been previously granted by the United States (act of May 5, 1854, *supra*).

A third agreement is filed in the record, dated August 9, 1876, which was made between the Northern Pacific Railroad Company, as party of the first part, the Lake Superior and Mississippi Railroad Company, as party of the second part, and certain persons representing the holders of the first mortgage bonds of the latter company, as parties of the third part. It is not deemed material to refer to the matters contained in this last agreement further than to say that it expressly confirms to the Northern Pacific Company all the rights acquired by that company under the aforesaid agreement and deed of conveyance of January 1, 1872.

After having continued thus for a number of years to operate its railroad, from Lake Superior to Thomson's Junction under the said agreement and contract of purchase of January 1, 1872, and westward from the latter point over the line of road constructed by itself, the Northern Pacific Company, in July, 1882, filed what purports to be a map of definite location eastward from Thomson's Junction to Superior City, near the western end of Lake Superior, in Wisconsin, and thence further eastward to a point on Bad River, off Lake Superior, in said State. A railroad was finally constructed by said company, over the route thus located, as far east as Ashland, Wisconsin, but no road has ever been constructed beyond that point.

The claim of the company is that under its granting act, it is entitled to the full amount of ten alternate sections per mile on each side of the road thus constructed by it, between Thomson's Junction, in the State of Minnesota, and Ashland, in the State of Wisconsin. The Department having already held (21 L. D., *supra*,) that the company had no land grant east of Superior City, it remains to be determined what its rights are, if any it has under said grant, between Thomson's Junction and Superior City. The solution of this question involves also the determination and final settlement of the eastern terminus or initial point of said railroad as contemplated by the granting act.

The road was to begin "at a point on Lake Superior in the State of Minnesota or Wisconsin," and was to run from that point westerly, by the most eligible railroad route within certain prescribed lateral limits, "to some point on Puget's Sound." We have seen that the first connection with Lake Superior made by the company was at Duluth, which is situated slightly north of the western end of said lake, in Minnesota; that a second connection with said lake was made by the company some ten years later, at Superior City, in Wisconsin, slightly southeast of the western end of said lake; and that a third connection was made still later at Ashland, in the latter State. It necessarily follows from the decision that the company has no land grant east of Superior City, that Ashland can not be considered the eastern terminus of the road under the grant. Either Duluth or Superior City, therefore, must be established as such terminus or initial point.

It is evident that Congress had in mind the securing of a line of railway transportation, connecting the waters of Lake Superior on the east and those of Puget's Sound on the west. To secure that connection, and the consequent advantages which would accrue to the government in many ways, and especially from the opening and development of the immense territory through which the road was to pass, a very large grant of lands was made. But it was not the intention of Congress, in my judgment, that the grant could be enlarged by extending the road to a greater length than was necessary "by the most eligible railroad route" to accomplish the end desired, or that the company, when it had once effected a connection of its road with Lake Superior, within the terms of the grant, should be allowed, subsequently, to make another and different connection, and thus increase the amount of its grant.

The road was to be constructed from "a point" on Lake Superior to "some point" on Puget's Sound, and two ways were prescribed in the granting act whereby this could be accomplished:

First: The company might construct its own road upon the entire route between said two points, or

Second: If said route should be found to be upon the line of any other and prior land grant railroad route, as far as the two routes were upon the same general line (that is, as far as the route or general line selected was common to both roads), the company receiving the previous grant might assign its interest to the Northern Pacific Company, or

might "consolidate, confederate and associate" with said company for the construction and operation of the road along such common route. In any event, however, so far as the two roads were upon the same general line, the amount of land previously granted was to be deducted from the amount granted by the Northern Pacific act.

There can be no doubt that, westward from Thomson's Junction, the company adopted the former plan, and constructed its own road. But the question here presented is, whether or not the arrangement effected between said company and the Lake Superior and Mississippi Company by the agreement and contract of purchase of Jan'y. 1, 1872, was such a consolidation, confederation or association of the two roads as was contemplated by the granting act. If it was, then the rights of the Northern Pacific Company east of Thomson's Junction are to be measured and determined by the aforesaid two provisos of the third section of the act, and the city of Duluth, on Lake Superior in Minnesota, must be recognized and established as the eastern terminus, or initial point, of the company's road.

Upon this question the facts appear to be, (1) that the routes of the two roads were found to be upon the same general line between Thomson's Junction and Lake Superior; (2) that by the said agreement and contract of purchase the Northern Pacific Company became the absolute owner of the one half interest of the main line of railroad between these two points, which had been constructed by the Lake Superior and Mississippi Company under a previous congressional land grant; (3) that by said agreement running arrangements were formed and entered into, and the two companies became associated together in the ownership, use and operation of the said main line railroad between said points; (4) that the Northern Pacific Company thus effected the connection of its own constructed road with Lake Superior, the eastern terminal limit of its grant; and (5) that said company continued thus for nearly ten years (and the arrangement still continues for aught the record shows), and until after the time limited by the grant for the completion of its road had elapsed, to use and operate the line of road it had thus acquired, in all respects as though it were a part of its own main line of road from Lake Superior to Puget Sound, required to be constructed by its grant.

In view of these facts it is difficult to arrive at any other conclusion than that the said arrangement was a consolidation, confederation and association of the two roads, such as it was the intention of Congress to provide for. The circumstances which led up to the contract of association and the results accomplished by it seem to have been, in all respects, just such as were contemplated by Congress when it adopted the said two provisos. The routes of the two land grant roads were found to be upon the same general line between the points named, and by means of the said association and confederation the two railroad companies were enabled, together, to aid, and did aid, to that extent,

in the accomplishment of the object of the grant, namely, the construction of a "continuous railroad" from Lake Superior to Puget's Sound.

That there was a consolidation and confederation of the two roads between said points there cannot be any reasonable doubt. By the arrangement the companies became the joint owners of that part of the road. What power or authority had the Northern Pacific Company to enter into such an arrangement? Certainly none whatever, except as conferred by its charter—the granting act. The powers of corporations organized under legislative statutes are such only as those statutes confer. (*Thomas v. Railroad Company*, 101 U. S., 71-82.) Power to consolidate is not implied, but must be expressly given in the charter (2 Morawetz, Sec. 940-1; Cook on Stock and Stockholders, Sec. 668). In the present case the granting act authorized the Northern Pacific Company "to consolidate, confederate and associate" with any other and prior land grant railroad, as far as the routes of the two roads were found to be upon the same general line, upon the terms named in the first section, namely, for the construction of a "continuous railroad" from Lake Superior to Puget's Sound; and no authority was given for such consolidation, confederation or association, upon any other terms. The company's charter is the measure of its powers, and the enumeration of those powers necessarily implies the exclusion of all others (*Thomas v. Railroad Company*, *supra*). It necessarily follows, therefore, that the Northern Pacific Company had no power or authority to effect the arrangement it did effect with the Lake Superior and Mississippi Company—whether it be called a consolidation, a confederation, or an association, of the two companies it matters not—except upon the terms prescribed in the granting act, and it will not be presumed that said company undertook to violate the terms of its charter, or, on the other hand, to do a vain thing.

True it appears that the Board of Directors of the Northern Pacific Company, on February 14, 1873, adopted certain resolutions denying that it was the purpose of the company by said agreement and contract of purchase of January 1, 1872, to fix the eastern terminus of its road at Duluth, and asserting that said arrangement was effected for the sole purpose of making the city of Duluth "one of its principal points of trade and trans-shipment on Lake Superior," and claiming the right under its grant to extend its road further eastward to the mouth of the Montreal River, the most easterly point on Lake Superior in the State of Wisconsin. By what authority the company would have the right to establish more than one "principal point of trade and trans-shipment on Lake Superior," under its grant, the resolutions do not undertake to show. Evidently, only one such point was contemplated by the grant. The road was to begin at "a point on Lake Superior," and, when once "a point" of beginning had been established on Lake Superior, which was done, as we have seen, by the consolidation and association aforesaid, the requirements of the grant were fully met.

and its demands satisfied, so far as they relate to the initial point of the road. Therefore any other point of connection with Lake Superior, subsequently established by the company, must necessarily have been effected outside the terms of its charter. It is the settled law that where power is given a chartered company to do an act, that power becomes exhausted when once exercised, unless it clearly appears from the charter that a continuous exercise of the power was intended (East Tenn., etc., R. R. Co. v. Frasier, 139 U. S., 288). I do not think any such intention is to be gathered from the company's charter in this case.

It is scarcely conceivable that Congress could ever have designed that the grant company, when it had once made its connection with Lake Superior within the terms and conditions prescribed, should afterwards be allowed to form other connections, and finally designate and establish the one most advantageous to its interests and which would secure to it the largest amount of lands under its grant; or that it should be allowed to use and operate such first connection as a compliance, to that extent, with the terms of the grant, and afterwards waive such compliance and establish another connection; or that it was contemplated that the company could, under its grant, establish more than one principal point "of trade and trans-shipment on Lake Superior." No such powers are given in express terms, and I do not think they are fairly inferable from any reasonable construction of the grant. And the company could not establish such rights, or confer such powers upon itself, by resolution of its Board of Directors or otherwise.

It is also the settled law that all grants like the one under consideration are to be construed most strongly against the grantees. In the case of Fertilizing Co. v. Hyde Park (97 U. S., 659-666) the supreme court said:

The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court.

See also Pearsall v. Great Northern Railway, 161 U. S., 664.

Hence, the right of the Northern Pacific Company, after having once effected a connection of its road with Lake Superior, under the terms of the grant, by means of the consolidation and association aforesaid, to effect another and different connection under the grant with said lake, can not be recognized unless such right is given in clear and unambiguous terms. The same is true of the right of the company, under its grant, to establish several "principal points of trade and trans-shipment" on Lake Superior as claimed. In neither case do I find such authority given by the granting act.

As furnishing additional light upon the question under consideration reference is made to Smalley's "History of the Northern Pacific Railroad," published in 1883, a work which purports to give a detailed statement of all the facts and circumstances which led up to the making of the grant by Congress for the purpose of "connecting the waters of the Great Lakes with those of the Columbia River and Puget Sound," together with a complete history of the organization of the company under the grant, and of all its transactions relative to the construction and operation of the road from the beginning down to 1883. The work appears to have been written and published from the standpoint of entire friendliness toward the company, if not, in fact, for the purpose of promoting its interests. It may not be amiss, therefore, to quote a few extracts from it bearing upon the question, and as showing some of the current historical facts connected with the selection by the company of the eastern or lake terminus of its road.

On page 145 the author, after speaking of the election of a new board of directors in May, 1867, says:

The new board appointed Edwin F. Johnson chief engineer, and ordered him, under direction of the President (of the company), to commence surveys and locate a line between Lake Superior and the Red River of the North; also to explore the western end of Lake Superior, with a view to the location of the eastern terminus of the road.

On page 151, the author, speaking of the work of the engineers and the report of Johnson, their chief, says:

The search for a good harbor for a lake terminus was confined to three points—Chegwanigon Bay and the Lake Shore behind the Apostle Islands (the same as Ashland); Superior Bay at Superior City, Wisconsin, and Superior Bay at Duluth, Minnesota.

On pages 186-7 it is said:

In June, 1870, a contract was made for the construction of the Minnesota division of the road, and ground was broken in July, at Thomson's Junction, where the line left the Lake Superior and Mississippi Railroad. A half interest in the road of the latter company from the Junction to Duluth was purchased, and an artificial harbor was created at Duluth by cutting a canal across the low sandy peninsula through which vessels could enter the waters of the bay. The town of Superior, lying in sight from Duluth across the bay, had a natural harbor, and had been waiting for a quarter of a century for the railroad to give it prosperity. Great disappointment was felt in that town at the determination of the Northern Pacific to make its terminus at Jay Cooke's new speculative city of Duluth, and the governor of Wisconsin was induced to bring suit against the company on account of a dyke constructed in Superior Bay, within the limits of Minnesota, which it was alleged was detrimental to the harbor of Superior. This suit was withdrawn on the promise of the company to build a line to Superior and to put that place on an equal footing with Duluth for lake traffic; a promise which the company was not able to redeem until 1882.

The large banking house of which Jay Cooke was the head was at that time the financial agent of the Northern Pacific Company, which doubtless explains the reference to his name. It would thus seem that of the three points considered, Duluth was finally selected and deter-

mined upon as the eastern or lake terminus of the road; and only a promise was made "to build a line" to Superior, not for terminal purposes, but in order "to put that place on an equal footing with Duluth for lake traffic."

On page 205 the road is spoken of as having been built, prior to the panic of 1873, "westward from Lake Superior to the Missouri River, a distance of about 450 miles." At that time the only road the company had east of Thomson's Junction was the road owned and operated by it together with the Lake Superior and Mississippi Company, under the arrangement aforesaid, and yet the road is spoken of as having been built from Lake Superior 450 miles westward.

On page 382 the author continues:

The Lake Superior and Mississippi Railroad was opened through from St. Paul to Lake Superior in the summer of 1870, and became the supply line for the transportation of construction materials for the Northern Pacific. The purchase of a half interest in its track east of the junction fixed Duluth as the lake terminus of the Northern Pacific line, and caused the remote and almost unknown hamlet bearing that name to develop, with great rapidity, into an active town.

From another part of the work (Ch. 28) it appears that during the years 1877-80 the company made repeated but unsuccessful efforts to secure additional aid from Congress for the building of the road, and an extension of the time prescribed for its completion, the last effort in that direction having been made in 1880, at which time it is stated that:

The company was energetically pushing the road from both ends. The gap remaining to be built June 25, 1880, was at that time about one thousand miles.

It thus seems that as late as 1880 the company still regarded and relied upon the arrangement effected with the Lake Superior and Mississippi Company as a compliance with the terms of its grant relative to that part of the road between Thomson's Junction and Lake Superior; otherwise it could not have been said that the road was being pushed forward "from both ends," or that the only part remaining to be built was "the gap" of about one thousand miles. This gap must necessarily have been west of the western boundary of the State of Minnesota.

In the annual report of the President and Directors of said company to its stockholders, made September 27, 1876, the following statements are found:

The twenty-five miles of railroad used by this Company between Thomson Junction and Duluth, was built by the Lake Superior and Mississippi Railroad Company, and is a part of their road from Duluth to St. Paul. The line of the Northern Pacific extends on the southerly side of Lake Superior to the easterly border of Wisconsin, at Montreal River. But to save a duplication of expenditure, its original managers contracted for the purchase of a half interest in the Lake Superior and Mississippi Road, between Thomson and Duluth, agreeing to pay therefor half a million of dollars, in installments. . . .

The bondholders of the Lake Superior and Mississippi Road having indicated their intention to commence foreclosure proceedings under their mortgage, it was deemed

important to conclude prior arrangements for securing the permanent use of this piece of road, . . .

After a long and tedious negotiation, an arrangement has at length been made, by which the use of the road is secured," . . .

It thus appears that it was "to save a duplication of expenditure" that the "original managers" purchased a half interest in the Lake Superior and Mississippi road, and secured the "permanent use" thereof to the Northern Pacific Company. It may be pertinently asked how the expenditure thus sought to be avoided could be saved to said companies by the arrangement, if the same was not a consolidation, confederation and association of the two roads, such as the Northern Pacific grant authorized.

These brief references to some of the historical facts connected with the construction of the road will serve to illustrate the real purposes of the company in effecting the aforesaid arrangement with the Lake Superior and Mississippi Company. In my judgment, they point irresistibly to the conclusion that the company's object at that time was to thus connect its road with Lake Superior within the terms of its grant under the provision allowing it, for that purpose, to "consolidate, confederate and associate" with any prior land grant company, so far as both roads were upon the same general line.

In view of all the foregoing, my conclusions are:

1. That the arrangement made between the Northern Pacific Railroad Company and the Lake Superior and Mississippi Company, as shown, was such a consolidation, confederation and association of the two companies, as was contemplated by the grant, and that thereby a connection was affected with Lake Superior at the city of Duluth, in Minnesota, in the manner prescribed in the granting act, of the company's line of railroad to secure which the grant was made; and

2. That under the grant the eastern terminus or beginning point of said railroad on Lake Superior, must be established at said city of Duluth, and the company's rights east of Thomson's Junction must be determined accordingly.

In the adjustment of the company's grant for that part of the road from Thomson's Junction eastward to Duluth, on Lake Superior, therefore, the amount of land previously granted to the Lake Superior and Mississippi Railroad Company, namely, "the amount of five alternate sections per mile on each side of the said railroad on the line thereof, within the State of Minnesota," must be deducted from the amount of land granted to the Northern Pacific Company. The Northern Pacific Company will not be entitled to any of the granted lands within the common limits, nor can it have indemnity for the same, as lands lost in place. The amount of the prior grant is to be deducted from the amount of the Northern Pacific grant. Between the points named, therefore, the Northern Pacific Company will take only the granted lands within the lateral limits of its own grant, which fall outside the limits of the

former grant, and will be entitled to indemnity only for losses sustained outside the limits of the former grant.

It does not appear that said company has ever filed in your office, under section 3 of the granting act, a plat of the line of its road as definitely fixed between those points; nor does that part of the road appear to have been examined and verified to the President under section 4 of the act. I do not think it necessary, however, that these things should be done as to this particular part of the company's road—the same having been located and constructed by a prior land grant company, and accepted by the government under the prior grant. The authority given the Northern Pacific Company in its grant to effect a consolidation and confederation with a prior land grant road for the purposes stated, necessarily implies, I think, the acceptance by the government, under the Northern Pacific grant, of such prior road as constructed and accepted under the prior grant; and there would seem to be no necessity for filing a plat of definite location, because that has been done under the prior grant and the line of road definitely fixed thereby. To hold otherwise would be to require a duplication of work and expenditure with no resultant benefit either to the government or the company.

I see no reason, therefore, why you may not proceed at once with the adjustment of the company's grant eastward from Thomson's Junction to Duluth on Lake Superior, in accordance with the principles announced in this opinion.

RAILROAD LANDS—RES JUDICATA—ACT OF MARCH 3, 1887.

OSBORN ET AL. *v.* KNIGHT (ON REVIEW).

The doctrine of *res judicata* will not prevent departmental action where such course is the only one by which substantial justice can be secured, and the subject matter remains within the jurisdiction of the Department.

Under an application to perfect title in accordance with section 5, act of March 3 1887, to land excepted from a railroad grant on account of pre-emption filings, the good faith of the applicant's purchase from the company is not impugned by the fact that prior to said purchase he had been register of the land district in which the lands were situated, and must therefore have known that said lands were excepted from the grant by said filings, where it appears that during said period the Department did not recognize a pre-emption filing as sufficient in itself to work an exception under the grant.

The fact that the transfer from the company is by quit claim deed cannot of itself affect the right of purchase under said section; nor will the speculative value of the land be considered in determining the bona fides of the purchaser, especially where such point is raised by a stranger to the original transaction.

The right of purchase under said section is not affected by a settlement claim initiated after the passage of said act.

The case of *Balch v. Andrus*, 22 L. D., 238, cited and distinguished.

Secretary Smith to the Commissioner of the General Land Office, August 27, 1896. (W. A. L.) (F. W. C.)

I have considered the motion, filed in behalf of A. R. Osborn *et al.*, for review of departmental decision of April 10, 1896 (22 L. D., 459), in the case of A. R. Osborn *et al. v. John H. Knight*, involving certain lands in Sec. 35, T. 48 N., R. 4 W., and Sec. 3, T. 47 N., R. 4 W., Ashland land district, Wisconsin, in which departmental decision of March 3, 1893, not reported, was disregarded and the application by Knight to purchase under the provisions of section 5 of the Act of March 3, 1887 (24 Stat., 556), as to certain lands, was reinstated.

A brief recitation from the decision under review will aid the consideration of the motion:

This land is within the limits of the indemnity withdrawal made under the grant of June 3, 1856 (11 Stat., 20), to aid in the construction of the Bayfield branch of the road now known as the Chicago, St. Paul, Minneapolis and Omaha railroad.

By the act of May 5, 1864 (13 Stat., 66), the grant of 1856, before referred to, was increased from six to ten sections per mile, and a new grant was also made of ten sections per mile to aid in the construction of a road afterwards known as the Wisconsin Central railroad. Upon the location of the last mentioned road the land in question was included within the primary limits of said grant and was also found to be within the four miles additional grant for the Omaha road, so that it is within the common ten miles limit of the two grants under the act of 1864.

Under the rulings of this Department, made prior to the decision of the supreme court in the case of the Wisconsin Central railroad company *v. Forsyth* (159 U. S., 46), it was held that lands within the indemnity limits under the act of 1856 were excepted from the grant made by the act of 1864, so far as the Central company is concerned. This was the ruling which prevailed at the time of the adjustment of the Omaha grant, and the land in question was held to have been excepted from the Central grant, because of said reservation for indemnity purposes under the act of 1856.

On October 25, 1889, Knight filed an application to purchase land within the sections first described, under the provisions of section five of the act of March 3, 1887 (24 Stat., 556), alleging that he had purchased the land from the Wisconsin Central railroad company for a valuable consideration. Protests were filed against the acceptance of Knight's proof, by A. R. Osborn *et al.*, and upon the record made in said controversy your office found that Knight was not a *bona fide* purchaser for the reason that it was shown that he had been register of the local office at Bayfield, and was, therefore, apprised of the condition existing between the two grants and must have had knowledge of the fact that these lands had been reserved for the Omaha grant prior to the date of the passage of the act making the grant for the Central company and the location thereunder, which decision was sustained by this Department in the decision of March 3, 1893 (not reported).

A review of this decision was denied March 3, 1894, not reported. Following the decision of the supreme court in the case of the Wisconsin Central railroad *v. Forsyth*, *supra*, in which it was held that the reservation for indemnity purposes on account of the Omaha grant did not prevent the attachment of rights under the Central grant, a motion for re-review was filed on behalf of John H. Knight, which was considered in departmental decision of October 1, 1895 (not reported).

In said decision it was held:

"As before stated, Knight's application to purchase was denied, and the supreme court having held that the title to said land is not in the United States, a review of that part of the decision can avail nothing.

"But in view of the fact, that the recent decision of the court reversed the previous decision of this Department as to the rights of the Wisconsin Central R. R. Company within the conflict before referred to, and of the further fact that entries have been allowed to the lands under the previous ruling, I have to direct that these entrymen be called upon to show cause why their entries should not be canceled, to the end that in case there is no reason shown for holding the lands to have been excepted from the Wisconsin Central grant, otherwise than the fact that they were within the indemnity withdrawal under the act of 1856, the conflicts may be cleared from the record. The previous holding of the Department that the withdrawal under the act of 1856 served to defeat the grant under the act of 1864, for the Wisconsin Central railroad company, in view of the decision of the supreme court in the case before referred to, must be recalled and vacated, and the rights of the Wisconsin Central railroad company, within said conflict, must be adjudicated in accordance with the decision of the supreme court before referred to."

Acting under the directions given, it appears that those who had been permitted to make homestead entries of the lands covered by the former application by Knight were called upon to show cause why their entries should not be canceled, to which, all except one, it appears, responded.

In considering the showings made your office decision of February 12, 1896, found that the lands in question are opposite and coterminous to the constructed part of the Wisconsin Central railroad, but that certain of the lands were excepted from said grant by reason of the existence of pre-emption filings at the date of the attachment of rights under said grant. As to the land not so included, it is held that the same passed to the Central grant, but as to those tracts covered by filings, it is held that the same are excepted from the Central grant. In the matter of the latter class the question of the respective rights of the entryman and Knight, under his application to purchase made in 1889, as before stated, is further considered, and it is held that in the light of the recent decision of the supreme court, before referred to, the knowledge of which is held to have been apprised by reason of his position as register, cannot be held to affect the *bona fides* of his purchase from the Wisconsin Central railroad company, and said application to purchase is, as to the said lands, re-instated and recommended for allowance, and the conflicting homestead entries held for cancellation.

In the decision under review this recommendation was concurred in, the matter of the respective rights of Knight under his application to purchase, and the conflicting homestead entries being considered under the supervisory power of this Department, the land being still within the jurisdiction of this Department, and the previous adjudication made upon Knight's application to purchase, being based upon a mistaken construction of the law affecting the disposition of the land. This action was taken in order to give full effect to the adjudication made in 159 U. S., 46, which practically reversed the action of the Department on the issues involved. Were the circumstances so that no substantial right of Knight would be jeopardized, I should have hesitated at this late day, under the supervisory powers given to the Secretary by law, to interfere with a ruling made so long ago as to be justly considered as making the issues raised *res adjudicata*, but I was induced to open and reverse the ruling made against the defendant Knight in the decision of March 3, 1893, because it probably affords the only method of doing substantial justice in this particular case.

As thus presented the doctrine of *res adjudicata* can have no application and need not be further considered.

The grounds of error being so numerous, I have considered them collectively; first considering those affecting the question of *bona fides* in Knight's purchase from the company, and, second, those presenting adverse rights under the homestead entries allowed after the rejection of Knight's application to purchase.

As before shown, Knight claimed through the Wisconsin Central railroad company, and after this land was held to have been excepted from the Central grant he made due proof under the act of March 3, 1887.

If the land passed under the grant to that company, or was subject to Knight's application to purchase, this Department was thereafter without jurisdiction to make other disposition of it, and as it was required by the act of March 3, 1887 (*supra*), that all railroad grants be adjusted in accordance with the decision of the supreme court, it became necessary, upon the rendition of the decision in the Forsyth case, to respect the Central grant where it had formerly been held to be defeated by the indemnity reservation for the Omaha company.

Knight had been charged with knowledge of a fact, supposed to be a controlling one in the disposition of the land covered by his application, but which, under the recent decision of the court, was not a material one, and could therefore in no wise affect the *bona fides* of his purchase.

He had been register at the Bayfield office from 1871 to 1883, this land at that time being within the Bayfield district, and he was held to be charged with knowledge of the fact that these lands had been reserved on account of the Omaha grant at the date of the passage of the act making the Central grant and also at the date of the attachment of rights thereunder. This withdrawal the court holds did not defeat the Central grant.

In the recent adjustment of the Central grant, as to the land covered by Knight's application to purchase, it was held that the land passed to the Central grant, except as to certain tracts covered by pre-emption filings, which tracts were held to be excepted from the Central grant, to which extent Knight's application to purchase was reinstated.

It is urged in the motion that Knight is presumed also to have had knowledge of these filings, and must have known that they served to defeat the grant.

A review of the decisions of the Department upon the question as to the effect to be given to pre-emption claims, not perfected, as against a railroad grant, will not support the claim.

As late as 1879 pre-emption claims were held not to be sufficient to defeat the attachment of rights under a railroad grant unless the pre-emptor completed his claim into cash entry, the circular of November 7, 1879, relating to the adjustment of railroad land grants, providing that:

A pre-emption claim which may have existed to a tract of land at the time of the attachment of a railroad grant, if subsequently abandoned and not consummated,

even though in all respects legal and *bona fide*, will not operate to defeat the grant, it being held that upon the failure of such claim the land covered thereby inures to the grant as of the date when such grant became effective.

Under this ruling, therefore, no hearings can be ordered for the purpose of ascertaining the facts respecting the settlement, occupation, improvement of the land, etc., by such pre-emption claimant, for even if such facts were established, still, under the decision, the land inures to the grant.

It is true that in the case of the St. Paul and Pacific R. R. Co. v. Larson (3 L. D., 305), decided October 30, 1884, it was held that a pre-emption filing capable of being perfected, defeated an indemnity withdrawal, but to determine whether the filing was capable of perfection made it necessary to show that the pre-emptor had complied with law.

It was not until the decision in the case of Malone v. Union Pacific R. R. Co. (7 L. D., 13), decided July 9, 1888, that it was held that a filing of record, *prima facie* valid, at the date of attachment of rights under a railroad grant, served to except the land covered thereby from the operation of such grant.

It is further urged that the deed from the Central company was a quit-claim deed and was for an inadequate consideration, viz, \$9,600, while it is claimed the lands are worth \$90,000, and that these facts tend to show that the transaction was not *bona fide*.

The fact that the transfer from the company was by quit-claim cannot of itself affect the right of purchase under the act of 1887 (Stebbins v. Croke, 14 L. D., 498), nor can the speculative value of the land be considered in determining the *bona fides* of the purchaser, especially where the attack is made by a person a stranger to the original transaction.

So far, therefore, as the motion questions the recognition of Knight's *bona fides* in the matter of his purchase from the company the exception to the decision is overruled.

It is further urged that the entrymen were not accorded opportunity to show cause why their entries should not be canceled for the reason that, after the issue of the rule to show cause, the same was withdrawn and their entries held for cancellation; that it was error to hold that their entries were instituted subsequently to Knight's application to purchase, when the fact is that their settlements ante-dated Knight's application to purchase, and that since the decision in the case of Balch v. Andrus (22 L. D., 238), wherein it was held that the fact that purchase was made from the company subsequently to the passage of the act of March 3, 1887, did not affect the right of purchase from the United States under the provisions of section 5 of that act, the rights of settlers under the second proviso of said section should also be construed to include settlements made after the passage of said act.

As to the opportunity afforded the homestead entrymen to show cause why their entries should not be canceled, the Commissioner in his letter of February 12, 1896, reports that:

The local officers were instructed to notify all of said parties except John R. Prince that they will be allowed 60 days in which to show cause why their entries should

not be canceled in so far as they embraced any portion of the tract held not to have been excepted from the operation of the grant to said company, but upon failure to make such showing their entries will be canceled to the extent of the conflict with said grant. Lamal, Snyder, Beaser and R. B. Prince have responded by motions for review of said decision, showing cause why their entries should not be canceled and have also made answer to Knight's motion for review asking that his application to purchase under the act of March 3, 1887, be considered and allowed.

Judd has failed to respond and show cause why his entry should not be canceled, and has also been served with a copy of Knight's motion for review asking that his application to purchase the land embraced in his homestead entry which was held to have been excepted from the grant, be considered and allowed; therefore, I see no reason why the right of said parties to this litigation may not be considered and passed upon from the record now before me.

From the proceedings heretofore had in this case it would appear that full opportunity has been afforded the conflicting homesteaders to present their case.

Under the repeated rulings of the Department, a settlement claim initiated after the passage of the act of March 3, 1887, cannot affect the right of the purchaser from the company to make purchase from the United States under the provisions contained in the body of section five of said act (Chicago, St. Paul, Minneapolis and Omaha Ry. Co., 11 L. D., 607; Union Pacific R. R. Co. *et al.* v. McKinley, 14 L. D., 237; and Swineford *et al.* v. Piper, 19 L. D., 9).

I can see no reason for changing this holding, nor does the decision of this Department in the case of Balch v. Andrus (*supra*) make a change necessary.

The fifth section of the act of March 3, 1887, was remedial in its nature, and should be liberally construed to embrace the remedy, viz: the protection of those who had in good faith brought lands supposed to have passed under a railroad land grant which had, for any reason, been excepted therefrom.

In the case of Balch v. Andrus (*supra*), it was held:

That it can make no difference whether the purchase from the company was made before or after the passage of the act of March 3, 1887, if made in good faith, believing the title to be good and before the land purchased was held to be excepted from the grant.

The second proviso to said section in favor of settlers was a limitation upon the right of purchase and should be strictly construed. To hold that it embraced settlements made after the passage of the act of March 3, 1887, would be to offer an inducement to "jumpers" to settle upon lands held under a title believed to be good, a purpose it cannot be believed was intended by the legislators. Were it otherwise, however, it would not benefit the entries here involved.

The motion urges that while these entries were made subsequently to Knight's application to purchase, yet they are protected because their settlements ante-dated his application to purchase.

This is not borne out by the record. Knight first applied to purchase in October, 1889, and in the notice advertised that proof would be offered in support thereof in January, 1890.

At the hearing held each of the entrymen alleged settlement in the early part of January, 1890, subsequent to the application by Knight but prior to the date set for his offer of proof.

It but remains to consider the 17th exception which raises a question of fact, and is as follows:

It was error to find that the lands in question are beyond and outside of the terminus of the constructed portion of the Wisconsin Central Railroad and are not coterminous with the constructed portion of said railroad; and it was error not to conclude therefrom that the application made by Knight to purchase these lands must be denied and rejected on that ground.

In the decision under review it is stated that:

In considering the showing made your office decision of February 12, 1896, found that the lands in question are opposite and coterminous to the constructed part of the Wisconsin Central railroad.

After thus fully considering the grounds upon which the motion is based and failing to see any good reason to change the conclusion arrived at in the decision under review, the motion is denied and herewith returned for the files of your office.

MINERAL LANDS—MINING CLAIM—DISCOVERY—PETROLEUM.

UNION OIL COMPANY.

In the case of a mineral entry by an association there must be a discovery shown on each twenty acres of the land so entered.

Land containing petroleum does not fall within the contemplation of the mineral laws, and can not be located and entered as a placer mine.

Secretary Smith to the Commissioner of the General Land Office, August 27, 1896. (P. J. C.)

The record before me shows that the Union Oil Company of California, made mineral entry No. 140 of the Central Oil Mine, lot No. 43, Los Angeles, California, land district, consisting of 78.82 acres, January 16, 1894.

When the matter was reached in your office it was, by letter of May 19, 1894, determined, among other things, that the land had been selected by the Southern Pacific Railroad Company, per list No. 25, and that the company should be given sixty days within which to show cause why its selection should not be canceled as to the conflict; also that the applicant was

required to show a discovery of a valuable deposit of mineral for each twenty acre tract or fractional part thereof contained in said Central Oil Placer, the evidence of such discovery to consist of the affidavit of two or more persons.

The oil company has appealed from your office decision, on the ruling above quoted, and in a number of specifications sets forth its objections thereto. The principal objection is "that neither the statute nor the

rulings and regulations in force at the time the location was made" and the entry allowed required a discovery of mineral on each twenty acre tract of a placer mining claim, where, as in this case, five persons locate a placer claim of one hundred acres.

It is strenuously insisted by counsel that the judgment of the Department in the case of *Farrell et al. v. Hoge et al.*, (18 L. D., 81), wherein it is held that there must be a discovery on each twenty acres in a placer of one hundred and sixty acres located by an association, "is a startling departure from the established rulings and precedents which have governed the land department in the adjudications of mining claims." It is asserted by counsel that the "decisions of the supreme court and that of the Department upon this identical question cannot be reconciled," and in support of this proposition counsel cite *Smelting Company v. Kemp*, 104 U. S., 636; *Jackson v. Roby*, 109 Id., 440; and *Chambers v. Harrington*, 111 Id., 350; also *The Good Return Company*, 4 L. D., 221.

An examination of these authorities shows that counsel have fallen into the error of confounding the word "discovery" with "expenditures" or "improvements," or "developments," and use the three latter as synonymous with the first. There is a broad and distinctive difference, as applied to the mining laws, between the word discovery and the other terms named.

Discovery is the initial act upon which all mining rights are based. The right of appropriation and possession rests wholly upon a discovery of minerals (*Waterloo Mining Company v. Doe*, 56 Fed. Rep., 685). Discovery is the source of title. There is no variation in the authorities so far as my research has extended upon this point, and it would seem to be a work of supererogation to again cite adjudicated cases in support thereof.

The terms development, improvements and expenditures, as used in the statute, refer only to work required to be done after the discovery and location. For instance, in section 2323, in relation to tunnel rights, the language is, "where a tunnel is run for the development of a vein or lode." This particular language certainly pre-supposes a discovery.

Again, in section 2324, in regard to annual work, the requirement is that on each claim located after May 10, 1872, "not less than \$100 worth of labor shall be performed or improvements made," and on those located prior to that date, "\$10 worth of labor shall be performed or improvements made" for each 100 feet of the vein, and the section provides how each co-owner may be required to pay his proportion of the "expenditures" thus demanded. This requirement is for each claim located, and as before said, there can be no location until there has been a discovery.

Section 2325 requires a certificate of the surveyor-general before patent can issue, that "\$500 worth of labor has been expended or improvements made" on the claim.

It seems too plain to need argument to convince one that these latter provisions have no reference to the discovery. It is matter of common knowledge, I take it, that discoveries of veins are frequently made on the surface of the ground without any expenditure of labor or money in so doing, except that spent by the prospector in his general search for the treasures of nature. On the other hand, fortunes are expended in explorations for veins of mineral bearing rock. Congress did not fix any amount to be expended, either of money value or labor, in the discovery of mineral. Most of the mining States and Territories have statutes defining what shall be done. For instance, in Colorado, it is necessary before filing the location certificate to sink "a discovery shaft upon the lode to the depth of at least ten feet from the lowest rim of such shaft at the surface, or deeper, if necessary, to show a well defined crevice" (General Statutes of Colorado, Section 2401).

The authorities relied upon by counsel have no reference whatever to discovery, as such. In the case of *Smelting Company v. Kemp*, in so far as the question of expenditure before patent and improvements is concerned, refers wholly to work done for the development of a number of placer claims, and the amount that was necessary to be done in order to secure a patent, where all the locations had been transferred to one person, and he has applied for the consolidated locations. The court below had held that there should be separate applications for patent for each twenty acre location, thereby necessarily requiring \$500 worth of labor or improvements on each location. The supreme court reversed this ruling, and in so doing used the language quoted by counsel as applicable to a discovery, to wit:

It would be absurd to require a shaft to be sunk on each location in a consolidated claim, where one shaft would suffice for all locations; and yet that is seriously argued by counsel, and must be maintained to uphold the judgment below.

Preceding this language of the court is given quite fully the reasons why "it would be absurd to require" such work. The question of discovery was not suggested.

Chambers v. Harrington was wholly on the question of annual expenditures for labor on claims held in common as provided for by section 2324, Revised Statutes, and the court held (syllabus)—

Where several adjoining claims to mineral lands are held in common work for the benefit of all done upon any one of them in a given year to an amount equal to that required to be done upon all in that year meets the requirements of section 2324, Revised Statutes.

This was the issue in *Jackson v. Roby*, wherein the court announced the general doctrine that was followed in the *Chambers-Harrington* case.

In *Good Return Mining Company*, the question, so far as applicable to the case at bar, was similar to those quoted above, and those cases are referred to and followed.

The case of *McDonald et al. v. Montana Wood Company* (35 Fed. Rep.,

668), cited by counsel, was referred to in the decision of the Department, on review, in *Ferrell et al. v. Hoge et al.*, and the Department declined to be controlled by that decision.

The Department is not aware that any different rule has ever prevailed than that announced in *Ferrell v. Hoge*.

Counsel do not cite any authority in support of the assertion and research in this office fails to disclose any such. It seems to me that the official announcement by the Department that there must be a discovery of mineral upon any mining claim before the location thereof is nothing more or less than reiterating the plain and unmistakable intent of the statute.

The mining laws were originally intended, in my judgment, for the purpose of allowing the discoverers of valuable mineral to secure the right of possession and the nation's title thereto, and it makes no difference whether twenty acres is located by one person, forty acres by two persons, and so on, up to one hundred and sixty acres by eight persons; there must be a discovery of mineral in each and every instance on every twenty acres, the amount of acreage which each locator would be entitled to. The labor and improvements for development, after the discovery, may be done in common. The object of the statute in allowing an association of persons to take more than the individual was not, in my judgment, to avoid discovery or annual work, but solely for the purpose of permitting them thus to consolidate and join in one system of development for the convenient working of the land.

The language used by the court in *Smelting Company v. Kemp*, in meeting the objection of counsel to the consolidation of several placer locations in one application, on the ground that it would create a monopoly, is peculiarly applicable to this discussion. It said—

Every one at all familiar with the mineral regions, knows that the great majority of claims, whether on lodes or on placers, can be worked advantageously only by a combination among miners, or by a consolidation of their claims through incorporated companies. Water is essential for the working of mines, and in many instances can be obtained only from great distances, by means of canals, flumes, and aqueducts, requiring for the construction enormous expenditures of money, entirely beyond the means of a single individual. Often, too, for the development of claims, streams must be turned from their beds, dams built, shafts sunk at great depth, and flumes constructed to carry away the debris of the mine. Indeed, successful mining, whether on lode claims, or placer claims, can seldom be prosecuted without an amount of capital beyond the means of the individual miner.

If lands containing petroleum can be taken at all under the mineral laws, the law in all its features must be complied with. It was contemplated by Congress that lands valuable for mineral only should be taken as such, and in order to determine whether they fall within this classification, a discovery must be made.

The railroad company has filed a paper in the nature of an exception to your office ruling against it, claiming that its selection should not be canceled for conflict with the mineral entry, "for the reason that

petroleum is not mineral within the mineral exception to the Southern Pacific Railroad Company's grant."

It would have been better form, perhaps, for the company to have appealed from your office decision, but inasmuch as the applicant here treats the question as if raised by appeal, and inasmuch as it is a question of some importance, that it be determined, I have concluded to consider it on the company's objection.

The railroad company cites and relies on the case of *Dunham and Shortt v. Kirkpatrick*, 101 Penn. St., 36. That was an action of *quare clausum fregit* by Kirkpatrick for entering and boring for petroleum, and for cutting timber. It appears that Kirkpatrick was the owner of a tract of land which he had purchased from Wood *et al.*, by article of agreement by which he took and retained possession. Afterward the legal title was conveyed to him, but with the reservation: "Excepting and reserving all the timber suitable for sawing; also all minerals," etc. Dunham *et al.*, under a lease from the grantors of Kirkpatrick, for oil purposes, had entered upon the land, drilled a well and were taking oil therefrom. The question presented was whether the reservation of "all minerals" would include petroleum.

The defendants (plaintiffs here) who claim under a lease from the vendors, in the agreement above stated, contend that it is their right, under the reservation, to enter upon, and take from, the premises in said agreement described, all the petroleum, or mineral oil, that may be found therein. This contention can be sustained only under the hypothesis that the word "minerals" in the reservation includes petroleum. The court below refused to sustain the interpretation put upon the agreement by the defendants, and entered judgment on the case stated, for the plaintiff. In this we think it was right. The whole argument used for the purpose of convincing us that this decision is not correct is based on the allegation that petroleum is a mineral. It is true that petroleum is a mineral; no discussion is needed to prove this fact. But salt and other waters, impregnated and combined with mineral substances, are minerals; so are rocks, clays, and sand: anything dug from mines or quarries: in fine, all inorganic substances are classed under the general name of minerals: Bou. L. Dic.: Wor. Dic.: Dana's Geology: Grey's Botany. But if the reservation embraces all these things, it is as extensive as the grant, and therefore void. If, then, anything at all is retained for the vendor, we must, by some means, limit the meaning of the word "minerals." But the rule by which this may be done is well stated by Chief Justice Gibson in the case of the Schuylkill Navigation Co. v. Moore, 2 Wh., 477, as follows: "The best construction is that which is made by viewing the subject of the contract as the mass of mankind would view it; for," continues the learned Chief Justice, "it may be safely assumed that such was the aspect in which the parties themselves viewed it." . . . Certainly, in popular estimation, petroleum is not regarded as a mineral substance any more than animal or vegetable oil, and it can, indeed, only be so classified in the most general or scientific sense. How, then, did the parties to the contract under consideration, think and write? As scientists; or as business men, using the language and governed by the ideas of everyday life?

As we have before observed, if this reservation is to have a strictly scientific construction it is as extensive as the grant, hence, works its own destruction: On the other hand, if we adopt the popular understanding we cannot regard petroleum as a mineral. Moreover, we may be very sure that when Wood and Co. made their contract with Kirkpatrick, they did not intend to reserve the mineral oil that might afterward be found in the land, otherwise that intention would have been expressed

in no doubtful terms. They were, doubtless, at that time unaware of the character of the property as oil territory. But if they did entertain such an idea, and expected to reserve oil under the general term "mineral," they were mistaken, and should have known that they were using that word in a manner not sanctioned by the common understanding of mankind, hence, in a manner that could not be approved by the courts of justice.

It is asserted by counsel for applicants that the same court in a later case "squarely overrules the former decision upon the identical question at issue here." The case referred to is that of *Gill v. Webster* (110 Penn. St., 313). I cannot agree with counsel's contention. The cases are not identical in any sense, as I read them. The later case was one of trover and conversion for machinery removed from leasehold premises by the lessee. An act of the legislature of that State, in 1855, provided for the mortgaging of a leasehold of "any colliery, mining lands," etc., and the court held "that the act applied to and authorized a mortgage of a leasehold in oil land, although the act was passed before petroleum was discovered." In discussing the question the court says, as in the *Dunham* case, that petroleum is a mineral product; also that "lands from which it is obtained may with propriety be called mining lands." But this is solely for the purpose of making available the mortgage act, and has no reference to a grant such as contained in the former case, or as in the act of Congress making the grant to the railroad company.

If the decision in the *Dunham* case is to be accepted as an authority, then lands containing petroleum are not excluded from the grant which reserves therefrom all "mineral lands."

In my opinion, Congress did not have in contemplation at the time of the passage of the act the reservation of lands containing petroleum under the designation of mineral lands. In my view of the statute, it was only contemplated that lands containing the more precious metals enumerated in section 2320, Revised Statutes, gold, silver, cinnabar, etc., that should be excluded. In the case of *Tucker et al. v. Florida Railway and Navigation Co.* (19 L. D., 414), the question was as to whether land containing phosphates were excluded from the selection by the railroad company under the act of June 22, 1874 (18 Stat., 194), which gave it the right to select "from any public lands not mineral," etc. It was said in reference to previous railroad grants which contain the exception of mineral lands—

It would seem, therefore, that the word mineral is given a limited construction, and when this fact is taken into consideration with what has been before stated on the subject of mineral legislation, it would seem that the purpose of the word mineral, as used in the act of June 22, 1874, *supra*, was to except from selection, on account of said act, those lands containing valuable metals, such as gold, silver, cinnabar and copper. The word was not used in its broader sense, for the greater part of the earth contains mineral in some form, the value of which often depends on its location, or the date or advancement of science which makes known its uses.

I am clearly of the opinion that the word mineral, as employed in the act of June 22, 1874, *supra*, cannot be construed to include lands containing deposits of phosphate.

But it seems to me that the more serious question presented by this discussion is whether lands containing petroleum can be taken under the placer mining law. It would appear that if the lands are not to be excluded from the grant because they do not come within the classification of mineral lands as used in the granting statutes, as a corollary, they should be excluded from location and entry under the mining laws. If this question were an original proposition, I should have no hesitancy in determining that this class of lands should not be so taken. But the subject has been, indirectly, at least, before the Department several times, and while it has never been definitely decided, so far as I can ascertain, yet there seems to have grown up the idea that the rule prevails. An examination of the cases, however, will demonstrate the fact, I think, that there is no precedent for such belief.

The first mention of petroleum in connection with the mineral laws that I am able to find is in the case of *Maxwell v. Brierly* (9 C. L. O., 50), decided April 16, 1883, where the land sought to be taken was valuable for limestone. In discussing this question, after referring to *W. H. Hooper* (1 L. D., 560), Mr. Secretary Teller said that

limestone so found subjected the tract to the operation of the mining laws, as has been held under other rulings with respect to asphaltum . . . petroleum, slate and other substances, under like conditions.

The emphasis is mine, and this language would seem to imply that petroleum had been the subject of consideration previous to that case.

The next case is that of *Downey v. Rogers* (2 L. D., 707), decided December 8, 1883, which was an application by Rogers to enter four oil claims of one hundred and sixty acres each, against which Downey filed an adverse, alleging prior ownership and possession; that Rogers' publication was defective and that there was an error in one of the courses of survey. Mr. Teller, in deciding the matter, after referring to his former letter of January 30, 1883 (1 L. D., 56), wherein was allowed entries of land containing borax, etc., in certain named States and Territories, adds: "Whether or not the same ruling should apply to oil lands, is an undetermined question," and a hearing was ordered to determine the character and value of the land.

Thus it will be seen that the later expression of Mr. Teller seems to negative the expression in the former case that I have italicised.

This same application came before Mr. Secretary Lamar, and a decision was rendered by him December 16, 1885. (*Samuel E. Rogers*, 4 L. D., 284.) It came in the shape of a request for a patent which was based upon a report of a special agent to the effect "that the land is only fit for extracting petroleum." Mr. Lamar declined to direct the allowance of the entry, or to pass upon the question of good faith "and of the value of the improvements raised by the report of your special agent," and the case was returned to your office. It is stated in the opinion that the investigation was ordered for the purpose of determining 'whether or not the same ruling as in letter of January 30, 1883, should apply to oil lands.'

So that it would seem, as far as this case is concerned, it was still an undetermined question at the date of the Rogers decision whether oil lands could thus be taken.

Prior to the rendition of this judgment, however, July 22, 1885, the case of *Rogers v. Jepson* (4 L. D., 60), was considered by Mr. Lamar. This case was a contest between an agricultural claimant and an oil location, and as a result of the hearing it was decided in favor of the former. After deciding that the burden of proof was on the contestant and that he had failed to make out his case, the opinion says:

A careful examination of the testimony shows that the contestant has failed to establish the character of the land as oil land, and, therefore, subject to location under the mineral laws.

The inference would be, perhaps, from the expression I have italicised, that if he had established the oil character of the land it might have been subject to a mineral location. But this negative statement of such a proposition which is purely *obiter* is not in itself sufficient to be treated as a precedent.

The only other case that I have found bearing upon the question is that of *Piru Oil Company* (16 L. D., 117). It is not stated in the opinion whether the mining claims were taken and held on account of oil or not, and the only indication that they were is derived from the names applied to the several claims. But the direct question as to whether oil lands could be taken under the mineral laws was not discussed or decided. It was an *ex parte* case, and the only question involved was whether a subsequent homestead entry irregularly allowed for part of the land should impair the rights of the mineral claimant, and the decision was that a hearing be ordered for the purpose of permitting the agricultural claimant to show why his entry should not be canceled.

After a diligent search among the reported cases these are all the decisions I have found bearing upon this question, and I do not think it can be seriously claimed that either of these can be accepted as an authority for the proposition that lands containing oil can be taken under the mineral laws. It is true, scientifically speaking, that petroleum is a mineral. But the same may be said of salt and of phosphates, and of clay containing alumina, and other substances in the earth. Yet it does not follow that they come within the meaning of the mineral statutes, and it has been decided that they do not. (See *Salt Bluff Placer*, 7 L. D., 549; *Southwestern Mining Company*, 14 Id., 596; *Jordan v. Idaho Aluminium M. & M. Co.*, 20 Id., 500.) It would seem as if oil was regarded by science as a mineral only because of its inorganic character, as a sort of distinction from a vegetable product.

But be that as it may, I am unable to agree that it falls within the contemplation of the mineral laws, and that it may be located and entered as a placer mine.

For these reasons I think the entry of the *Union Oil Company of California* should be canceled, and to this extent your office judgment is modified, but in all others is affirmed.

SWAMP LANDS—SURVEYOR'S RETURN—SECTION 2488 R. S.

STATE OF CALIFORNIA (ON REVIEW).

The approved formula "swamp and overflowed lands unfit for cultivation" employed in the returns of the surveyor-general, follows the words of the statute, and must be taken as sufficiently indicating the character of the land, without the additional statement that the lands were swamp and overflowed at the date of the swamp grant.

The acceptance by the Commissioner of the General Land Office of a survey, as returned by the surveyor-general, with directions that the plat shall be filed in the local office, amounts to an approval of such survey.

Under the first paragraph of section 2488 R. S., the return of land as swamp and overflowed, by the U. S. surveyor-general for the State of California, is conclusive evidence as to the character of the land so returned and represented as such on the approved township surveys and plats; and lands thus returned must be certified to the State as inuring thereto under the swamp grant.

The decision of March 17, 1892, 14 L. D., 253, vacated.

Secretary Smith to the Commissioner of the General Land Office, August 27, 1896. (W. C. P.)

I have considered the motion filed in behalf of the State of California for review of departmental decision of March 17, 1892 (14 L. D., 253), rejecting the application of said State to have the lands embraced in what is known as the Norway survey on the borders of Lake Tulare, certified to it as swamp and overflowed lands.

Surveys of townships and plats of townships in the neighborhood of Lake Tulare were made prior to 1880, and certain lands adjacent to the margin of the lake, as shown upon the plats of those surveys were returned as "swamp and overflowed" and were held to have passed to the State under the swamp land grant. In 1880 upon request of the governor of California, another survey was made by deputy surveyor Creighton, which showed a different line as the margin of said lake. The lands within this survey were returned as "swamp and overflowed" and were awarded to the State (1 L. D., 320). Afterwards, in 1884, upon the request of purchasers or intending purchasers from the State, still another survey was made in this neighborhood, by which the line marking the margin of the lake was given another location and the lands between the Creighton line and the line shown by this last survey (made by deputy surveyor Norway) were returned as "swamp and overflowed."

The application of the State to have these lands certified as passing to the State under the swamp land grant was refused (14 L. D., 253). The history of this matter is given quite at length in that decision, and it is unnecessary to repeat it here.

Many errors in said decision are alleged in support of the motion for review, but the main objection presented is as to the jurisdiction of this Department. It is contended by oral argument and by printed briefs, that the law vests in the United States surveyor general for the State

of California full jurisdiction to determine what lands are swamp and overflowed, and that this Department is by the act of July 23, 1866 (14 Stat., 218), relieved of all duties and all responsibilities connected with the adjustment of the swamp land grant to that State.

The provisions of said act of 1866 which relate to the swamp land grant are incorporated in section 2488, Revised Statutes, which reads as follows:

It shall be the duty of the Commissioner of the General Land Office, to certify over to the State of California as swamp and overflowed lands, all the lands represented as such upon the approved township surveys and plats, whether made before or after the 23d day of July, 1866, under the authority of the United States.

The surveyor-general of the United States for California, shall under the direction of the Commissioner of the General Land Office, examine the segregation maps and surveys of the swamp and overflowed lands, made by said State; and where he shall find them to conform to the system of surveys adopted by the United States, he shall construct and approve township plats accordingly, and forward to the General Land Office for approval.

In segregating large bodies of land, notoriously and obviously swamp and overflowed, it shall not be necessary to subdivide the same, but to run the exterior lines of such body of land.

In case such State surveys are not found to be in accordance with the system of United States surveys, and in such other townships as no survey has been made by the United States, the Commissioner shall direct the surveyor-general, to make segregation surveys, upon application to the surveyor-general, by the governor of said State, within one year of such application, of all the swamp and overflowed land in such townships, and to report the same to the General Land Office, representing and describing what land was swamp and overflowed, under the grant, according to the best evidence he can obtain.

If the authorities of said State, shall claim as swamp and overflowed, any land not represented as such upon the map or in the returns of the surveyors, the character of such land at the date of the grant September twenty-eight, eighteen hundred and fifty, and the right to the same shall be determined by testimony, to be taken before the surveyor-general, who shall decide the same, subject to the approval of the Commissioner of the General Land Office.

The purpose and effect of this legislation was considered by the supreme court of the United States in the case of *Tubbs v. Wilhoit* (138 U. S., 134). Speaking of section four of the act of 1866, it was said:

By this section, rules and methods were established for the identification of swamp and overflowed lands in California, which superseded all previous rules or methods for that purpose.

Farther on in the same decision it was said as to the duties of your office under said law:

Whether the township plat be considered as approved by the action of the surveyor-general or by the subsequent recognition of its correctness by the Commissioner of the General Land Office, when approved, the duty of the Commissioner to certify over to the State the lands represented thereon as swamp and overflowed, was purely ministerial. He could not defeat the title of the State by withholding such certificate, nor could he add to the title by giving it. Its only effect would have been to facilitate the proof of the vesting of the title in the State by its additional recognition of the land as that covered by the congressional grant of 1850. It would not have added to the completeness of the title.

In *Heath v. Wallace* (138 U. S., 573), the court referring to the fourth section of the act of 1866, used the following language:

As held in *Tubbs v. Wilhoit*, *supra*, this section of the statute established rules or methods for the identification of swamp and overflowed lands in California, which superseded all previous rules or methods for that purpose. The several rules or methods provided for were intended to meet any emergency that might arise, and thus give to the State all the swamp and overflowed lands within her limits. The method provided in the first clause was but one of several specified in the section. But one thing was required to be shown under this clause—only one kind of evidence as to the character of the lands was necessary—in order to give the State the right to demand the certification of them over to her as swamp and overflowed lands; and that evidence the United States furnished in the plat of the survey of the township in which the lands were situated. An inspection of the township plat would show whether or not any lands in the township were returned as swamp and overflowed. If they were, that designation was sufficient and conclusive evidence, under the first clause of section 4 of the act, to establish the title of the State to them.

In many cases decided both before and since these decisions of the supreme court, this Department has announced practically the same views, as to the effect of the returns of the surveyor-general. (*Central Pacific R. R. Co. v. California*, 2 C. L. L., 1052; *California v. United States*, 3 L. D., 521; *California v. Martin*, 5 L. D., 99; *Davis v. California*, 13 L. D., 129.)

The correctness of these views is not questioned in the decision under consideration, but it is affirmed. The survey in question is not a segregation survey, but is a survey made under the authority of the United States, and therefore is of the character contemplated by the first paragraph of section 2488 of the Revised Statutes. It is immaterial therefore whether it was requested by the governor of the State or not.

In the decision under consideration it is said that the return of the surveyor-general does not allege that the lands in question were swamp and overflowed at the date of the grant, and that therefore that return cannot be accepted as conclusive evidence of their swampy character at that date. The law in question prescribes a rule of evidence which is binding upon and conclusive against the grantor, the United States. This rule was not, however, conclusive against the grantee, it being provided that if the State should claim as swamp and overflowed any land not so represented in the plats, the character of the land at the date of the grant should be determined by testimony. Because of this the act of 1866, which was remedial in character, is to be strictly construed upon this point, and the return of the surveyor-general must clearly show the land to be of the character contemplated by the granting act. The designation must be clear and explicit and nothing is to be placed thereunder by implication. *Heath v. Wallace*, *supra*.

On these plats the mark used to indicate swamp lands is found in the body of the plat, while on the margin is found an entry reading as follows:

Area of swamp and overflowed lands unfit for cultivation surveyed in 1880.... acres.
Area of swamp and overflowed land unfit for cultivation surveyed in 1884..... acres.

On the plat of township 23 S., Range 21 E., the entry is:

Area of swamp and overflowed lands unfit for cultivation..... 16568.56 acres.

The survey of 1880 did not include any portion of this township. It seems evident that the words "surveyed in 1884" were simply added to the marginal note for the purpose of indicating the amount of lands covered by said survey of 1884, which together with the amount included in the survey of 1880 made up the total amount of swamp lands in the township.

The formula "Swamp and overflowed lands unfit for cultivation" has been in use for the designation of lands which passed under the swamp land grant since the date of that grant. The fact that it was not stated on these plats that the lands were swamp and overflowed at the date of the grant is not a defect. The return made is in the words of the statute, and the formula used is that which has been sanctioned and approved by your office ever since the date of the grant. It is sufficient to meet the requirements of the statute.

The plats in question, indicating all the lands thereon as swamp and overflowed were approved by the surveyor general and transmitted to your office with his letter of October 14, 1884. The action of your office thereon is shown by letter of October 27, 1884, to the surveyor-general, in which the following language is used:

The returns of the survey executed by W. H. Norway deputy surveyor under his contract, No. 337, dated December 3d, 1883, and received with your letter dated October 14, 1884, have been examined and accepted.

You are hereby authorized upon receipt hereof to transmit the triplicate plats to the proper United States land office.

If the approval of the Commissioner of the General Land Office be necessary this action accepting the plats, and authorizing their filing in the local land office, together with their official use after that time is sufficient to meet such requirement. In the case of *Wright v. Roseberry* (121 U. S., 488, 517), the court held that official use of a plat constituted approval thereof.

We have in this case a survey made under the authority of the United States, the approval of the plats thereof, and the representation upon those plats that the lands in question are swamp and overflowed. All the facts and conditions necessary to conclusively establish under said law, as against the United States, the character of this land to be swamp and overflowed exists here. The facts exist on the face of the record, which make it the duty of the Commissioner of the General Land Office, to certify the land to the State.

The decision in question treated this act as constituting the surveyor general a special tribunal to determine what land in the State of California passed under the swamp land grant, and the arguments in support of the motion for review are found along the same line. This treatment is not strictly correct. That act as said by the supreme court in *Heath v. Wallace*, prescribed rules or methods for the identifi-

cation of swamp lands in California, that is, it established a rule of evidence by which the Department, as the tribunal to determine the identification of lands, passing under said grant, is conclusively bound. The rule announced in the decision in question, that the judgment of a special tribunal is final when acting within its powers, but is not binding when it goes beyond the scope of its authority, is not to be disputed. That rule does not, however, seem applicable in this case. The question here is not as to the finality of a judgment of the surveyor-general, but as to the character of his return as evidence. The law says that return is conclusive evidence, as to the character of the land to which it relates as against the United States.

This evidence is furnished by the grantor, and hence it seems not improper to make it conclusive as against it. We may doubt the propriety of the legislation, and entertain the belief that its provisions are more liberal in favor of the State than a due and just appreciation of the best interests of the government would dictate, but we are not for that reason justified in disregarding its provisions. It is not, however, certain that this law conferred any great benefit upon the State, except in a way of making possible a speedy identification of the lands granted.

The State had not enjoyed to the full extent the benefits of the grant. The condition of this class of lands was changing rapidly by reason of cultivation and the appropriation of water for irrigation purposes incident upon the rapid influx of settlers in the years immediately following the discovery of gold. The task of establishing the true character of any tract of land in the year 1850 was difficult because of the changing population and was becoming more difficult each year. Under these circumstances Congress deemed it necessary to afford the State relief and provide a method for the speedy adjustment of the grant. The act in question is the result of this conclusion.

After a full examination of the questions presented, I have concluded that the evidence furnished by the records conclusively establishes the fact that this land is swamp and overflowed, and that the petition of the State for certification must be granted.

The decision complained of is therefore set aside and the application of the State will be allowed.

CONTEST—DEFAULT—PROCEEDINGS UNDER SECOND CONTEST.

HEINRICHS *v.* BAKKENE ET AL.

The failure of the local office to dismiss a contest, for default on the part of the contestant, will not operate to prevent the filing of a second contest, and the issuance of notice thereon, nor interfere with any rights attaching thereunder.

Secretary Smith to the Commissioner of the General Land Office, August
(W. A. L.) 27, 1896. (J. A.)

The land involved herein is the NE. $\frac{1}{4}$ of Sec. 18, T. 134 N., R. 46 W., St. Cloud, Minnesota, land district.

June 3, 1882, Knudt O. Bakkene made timber culture entry for said tract. December 6, 1892, John Lloyd filed an affidavit of contest against said entry, alleging failure to comply with the requirements of the timber culture law. Notice was issued and hearing was set for June 17, 1893, at which time neither of the parties appeared and no action was taken by the local officers.

July 11, 1893, Joseph Heinrichs filed affidavit of contest against the entry on the same charges that had been brought by Lloyd. The local officers thereupon, on the same date, issued notice on Heinrich's contest, setting a hearing for September 7, 1893.

On July 13, 1893, Bakkene's entry was canceled by relinquishment executed July 12, 1893, and on the same day Lloyd made homestead entry for the tract.

On Heinrichs' motion, hearing on his contest was continued to September 30, 1893, and it was ordered that testimony be taken before a notary public September 27, 1893. On the last mentioned date Heinrichs submitted evidence against Bakkene's entry showing that no trees had ever been planted on the land.

March 26, 1895, the local officers rendered decision stating that Lloyd was allowed to make homestead entry on July 13, 1893, immediately after the cancellation of Bakkene's entry, for the reason that through an oversight the contests brought by Lloyd and Heinrichs had not been entered on the records. They found that Bakkene's relinquishment was not executed as a result of Heinrichs' contest and therefore recommended the dismissal of the contest.

Heinrichs appealed to your office, contending that the preference right of entry should have been awarded to him on Bakkene's relinquishment.

Your office rendered decision July 6, 1895, holding that because of the failure of the local officers to dismiss Lloyd's contest it remained pending until the date of Bakkene's relinquishment; that it was error to order a hearing on Heinrichs' contest, which was subject to that of Lloyd; and that Heinrichs can not be heard to complain, as his contest abated by operation of law on the relinquishment of Bakkene's entry. Lloyd's entry was therefore allowed to remain intact.

Heinrichs' appeal from said decision brings the case before me for consideration.

Through the negligence of the local officers no record was made of Lloyd's contest against Bakkene's entry. As far as the record shows, Heinrichs, at the time of filing his contest, knew nothing of Lloyd's prior contest. It does not appear when he was informed of Bakkene's relinquishment and Lloyd's entry.

The decision of your office holds Lloyd's entry of July 13, 1893, intact, merely for the reason that through the failure of the local officers to dismiss his contest on his default made June 17, 1893, the same was still of record at the date of Bakkene's relinquishment. Had the local officers dismissed his contest, as they should have done, there would have been no question that Heinrichs was entitled to the right of entry.

Lloyd contends that the failure of the local officers to dismiss his contest gave him the status of a prior contestant at the date of Bakkene's relinquishment; and that his entry can not be disturbed, for the reason that he was, as prior contestant, entitled to the right of entry.

After his failure to appear on June 17, 1893, the date set for hearing on his contest, and until July 11, 1893, the date of issuance of notice of Heinrichs' contest, Lloyd could still, because of the failure of the local officers to dismiss his contest, have asked for the issuance of a new notice of hearing. He was still a contestant. But the issuance of notice on July 11, 1893, on Heinrichs' contest, gave Heinrichs the status of prior contestant, although his affidavit of contest was filed subsequent to that of Lloyd. The failure of the local officers to dismiss the first contest for default should not be allowed to prevent the filing of a second contest, nor to interfere with any right attaching thereunder.

In the case of *Hanscom v. Sines et al.* (15 L. D., 27), the Department held that (syllabus):

A pending contest precludes action on the subsequent application of another to proceed against the entry in question.

However, the mere pendency of a contest, where the contestant is not actually proceeding to secure the cancellation of the entry, does not come within the spirit of that decision. The pendency of a contest is, when the contest is subject to dismissal because of failure to appear at the hearing, no bar to the issuance of notice on a subsequent contest. Your office erred in holding that Heinrichs could not be permitted to proceed against Bakkene's entry before the final disposition of Lloyd's contest. Lloyd could not, after July 11, 1893, have moved for the issuance of notice on his contest. His contest was, after that date, subject to that of Heinrichs.

On July 13, 1893, the date of Bakkene's relinquishment, Heinrichs was a prior contestant. Whether the relinquishment was filed as a result of the contest does not enter into the consideration of the case. He has proved his charges against Bakkene's entry and is therefore entitled to the preference right of entry (*Jackson v. Stults*, 15 L. D., 413).

Lloyd's entry must be held subject to Heinrichs' right of entry. The decision appealed from is accordingly reversed.

ABANDONED MILITARY RESERVATION—ACT OF AUGUST 18, 1856.

THE STATE OF FLORIDA.

The act of July 5, 1884, providing for the disposition of abandoned military reservations is not applicable to a reservation restored to the public domain prior to the passage thereof, and as section 4 of said act repeals in terms the act of August 18, 1856, with respect to such reservations in the State of Florida, it therefore follows that in case of such a reservation in said State, that is restored to the public domain prior to the act of 1884, and to which no rights had arisen under the repealed statute, there was no statutory authority for the disposal thereof until the enactment of August 23, 1894, and that the provisions of said act, and the amendatory act of February 15, 1895, must now govern the disposition of said lands.

Secretary Smith to the Commissioner of the General Land Office, August 27, 1896. (J. I. P.)

On the 3rd of February, 1894, August 10, December 1, and December 4, of the same year, the State of Florida through its agent, one W. W. Dewhurst, made application at the Gainesville land office in the State of Florida, to locate with Palatka scrip, certain tracts of land within the limits of the Fort Jupiter abandoned military reservation as follows:

On the first named date: the E $\frac{1}{2}$ NE $\frac{1}{4}$ and the NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Sec. 24, and lots 4 and 7 and the E $\frac{1}{2}$ SE $\frac{1}{4}$ of Sec. 25, all in T. 40 S., R. 42 E.; also lots 1, 2 and 3 in Sec. 36, T. 40 S., R. 42 E.; and lots 1, 2 and 3 in Sec. 19, T. 40 S., R. 43 E. and lot 4 and the W. $\frac{1}{2}$ NE $\frac{1}{4}$ and E $\frac{1}{2}$ SW $\frac{1}{4}$ of Sec. 30 and lot 3, Sec. 31, T. 40 S., R. 43 E.

On the second named date: lots 2 and 5 Sec. 25, lot 3, Sec. 26, and lots 6 and 7, Sec. 36, in T. 40 S., R. 42 E.

On the third named date: the E. $\frac{1}{2}$ SE $\frac{1}{4}$ of Sec. 25, lot 3 of Sec. 26 and lots 1 and 2 of Sec. 36, T. 40, R. 42 E. and the W. $\frac{1}{2}$ of the NE $\frac{1}{4}$ of Sec. 30, T. 40, R. 43 E.

On the last named date: the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 24, lot 6 of Sec. 25 and lot 4 of Sec. 26, T. 40 S. R. 42 E. and lot 1, Sec. 19 and lots 1, 2 and 3, Sec. 30, T. 40, S., R. 43 E.

Each of these applications was rejected by the local officers for the reason that the lands within the limits of said reservation could only be disposed of under the act of July 5, 1884 (23 Stat., 103). From each of said rejections the State of Florida through its agent appealed to your office, which, by its decision of June 26, 1895, affirmed said decision of the local officers, and held that the land within the limits of said reservation could be disposed of only under the act of August 23, 1894 (28 Stat., 491), as extended by the act of February 15, 1895 (28 Stat., 664). An appeal from that decision by the State brings the case here. Since the case has been here a relinquishment has been filed by the State as to lots 2 and 3 of Sec. 19 and lot 1, Sec. 30, T. 40, R. 43, and there has also been received a protest from the Commissioner

of Agriculture of said State against the attempt to locate said scrip on lot 3, Sec. 31, T. 40 S., R. 43 E., which is covered by the homestead entry of George Proctor.

The Fort Jupiter military reservation was established by executive order of May 14, 1855, and was relinquished and turned over to the Interior Department for disposition under the act of August 18, 1856 (11 Stat. 87), on the 16th of March 1880, with the exception of a certain described tract reserved for light-house purposes.

At the time when the State made its first application to locate said Palatka scrip, to wit: on February 3, 1894, the rule of the Department as established by its decisions was that lands within the limits of an abandoned military reservation having the status of this one could be disposed of only under the act of July 5, 1884, *supra*. Hence the rejection by the local officers of said application was in accordance with the departmental rule at that time. But by its decision of July 24, 1894, in the case of Mather *et al. v. Hackley Heirs* on review (19 L. D., 48), the Department changed its former ruling and held that the disposal of lands within a military reservation in the State of Florida, abandoned and restored to the public domain prior to the passage of the act of July 5, 1884, *supra*, is governed by the provisions of the act of August 18, 1856 (11 Stat., 87). That decision applied apparently to this reservation. And, while the action of the local officers in rejecting the application of the State on February 3, 1894, was in accord with the rule then in vogue, yet the decision above referred to, in effect, held that rule to be without authority of law.

When the second application of the State was made, the rule under which the local officers rejected it and under which they acted in the first instance had been abrogated by the decision in the case of the Hackley Heirs, *supra*.

On November 22, 1894, the Department by its decision (19 L. D., 477), held that the lands in the abandoned Fort Jupiter military reservation in Florida, could be disposed of only under the act of August 18, 1856, unaffected by the act of August 23, 1894, above cited. It is true that immediately after the rendition of that decision your office was verbally instructed to suspend all disposition of lands within the limits of said reservation, pending the action by Congress in certain legislation, relative thereto, then before it; that the legislation in question resulted in the act of February 15, 1895, *supra*, and that on June 17, 1895, this Department by letter of that date, directed your office to discontinue the suspension verbally ordered as stated and to proceed to dispose of said lands under the act of August 23, 1894, as extended by the act of February 15, 1895, *supra*. But the decision of November 22, 1894, *supra*, was in no wise affected by the proceedings above detailed. It was allowed to stand, and if it is sound, it must be held to have established a rule of property concerning the acquisition of title to these lands by which the Department is bound. The third and fourth appli-

cations of the State were made within two weeks after the rendition of that decision.

Referring to the decision of the Department in the case of *Mather et al. v. Hackley Heirs*, (on review) *supra*, it was there held:

The act of July 5, 1884, providing for the disposition of abandoned military reservations, is limited in its application to military reservations that were in existence at the date of its passage, or that should be thereafter created.

As the Fort Jupiter reservation was not in existence July 5, 1884, having been restored to the public domain prior to that time, the lands within its limits would not be disposed of under the act of that date. That is very clear. But the decision goes further and holds in effect:

The disposition of a military reservation in Florida, abandoned and restored to the public domain prior to the passage of the act of July 5, 1884, is governed by the provisions of the act of August 18, 1856, and under said act the Commissioner of the General Land Office was authorized to dispose of such lands either at public sale, or under the homestead and pre-emption laws.

The holding is sound in my judgment so far as it applies to the lands in the Fort Brooke reservation which were in controversy in the case of *Mather et al. v. Hackley Heirs* as the rights there adjudicated attached under the act of August 18, 1856.

In the Fort Jupiter case, *supra*, the above holding is cited with approval, and is applied to the lands within the limits of the Fort Jupiter reservation, which it is held must be disposed of under the act of August 18, 1856, for the reason that it was restored to the public domain and the control of the Secretary of the Interior, prior to the act of July 5, 1884, *supra*. That decision is clearly erroneous. I do not now know how Sec. 4 of the act of July 5, 1884, *supra*, escaped observation when the Fort Jupiter case was considered, but that it did so is apparent. That section, without any reservation whatever repeals the provisions of the act of August 18, 1856.

I have already shown that as held, in the case of *Mather et al. v. Hackley Heirs*, *supra*, the lands within the Fort Jupiter reservation could not be disposed of under the act of July 5, 1884. The effect of the repeal by Sec. 4 of said act of the provisions of the act of August 18, 1856, was that it left no law in existence under which the lands in the Fort Jupiter reservation could be disposed of, unless it be held that said lands came within the purview of the act of June 9, 1880 (21 Stat. 171) under which this Palatka scrip was issued, which provides that said scrip may be located on any vacant and unappropriated public lands of the United States in Florida. There can be no question that on February 3, and August 10, 1894, when the State made its application to locate this scrip, these lands were "vacant and unappropriated", but when the applications to locate were made December 1 and 4, 1894, the disposition of these lands was controlled by the act of August 23, 1894 *supra*, and those applications must in any event be rejected. But admitting for the sake of argument that the applications of February

3, and August 10, 1894, were properly made under the act of June 9, 1880, *supra*, the fact remains that pending their approval or action thereon by this Department, Congress by the act of August 23, 1894, and of February 15, 1895, *supra*, provided that lands in reservations of this size, should be opened to settlement under the public land laws and gives a preference right of entry for six months from the date of the last named act to *bona fide* settlers, residing and having improvements on such lands.

The right of Congress to make such provision as it may see fit for the disposal of the public domain can not be questioned. It is also true that the selection by the State of Florida, under the act of June 9, 1880, *supra*, of lands in the Fort Jupiter reservation did not cause title to said lands to vest in the State. That can only occur when the selections are approved by the Department, and the lands certified to the State. Before that is done Congress provided that these lands must be disposed of as above stated.

It is the duty of this Department to execute the law, Kaweah Co-operative Colony *et al.* (12 L. D., 326 at 330), Jefferson Davenport (16 L. D., 526).

As these lands can only be disposed of under the acts of August 23, 1894, as extended by the act of February 15, 1895, *supra*, your decision rejecting the applications to locate said Palatka scrip, is affirmed.

SUSPENDED ENTRY—NOTICE OF THE REMOVAL OF SUSPENSION.

WHITE *v.* DODGE.

The notice given an entryman of the revocation of an order suspending his entry is insufficient, if not definite and certain in its terms.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(W. A. L.) August 28, 1896. (E. M. R.)

This case involves the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 2, T. 26 S., R. 24 E., Visalia land district, California, and is before the Department upon motion for re-review by William H. White of departmental decision of December 16, 1895 (unreported), which was re-affirmed upon review on March 11, 1896.

It appears from the record that George S. Dodge made desert land entry for the above described tract March 30, 1877. On April 10, 1891, William H. White filed an affidavit of contest, alleging failure to reclaim within the time allowed by law. On April 27, 1894, the local officers rejected the application to contest on the ground that

the allegations attack only the non-reclamation and are premature in that three years from the date of entry, exclusive of the period from date of suspension to date of notice of its revocation, have not elapsed. Notice of the revocation was registered to claimant August 21, 1893.

Upon appeal your office decision of June 25, 1894, affirmed the action of the local officers, and upon further appeal this Department, in the decision now sought to be reviewed, affirmed that action, and upon motion for review, on the date given, March 11, 1896, that action was adhered to.

In the motion for re-review it is urged that notice to Dodge's counsel was given prior to the day fixed in the decision complained of, to-wit, on February 10, 1891, and counsel cites the following records of your office:

That on February 15, 1890, Britton and Gray addressed the following letter:

Hon. JOHN W. NOBLE,
Secretary of the Interior,
Washington, D. C.

SIR: We file herewith our printed argument (three copies) in the case of the United States v. J. B. Haggin *et al.*, involving Visalia, California Desert Land entries. . . .

Very respectfully,

BRITTON & GRAY,
Attys. J. B. Haggin et al.,
Desert Entrymen.

And that the brief began as follows:

This case involves one hundred and sixty three desert land entries in Kern County, California, aggregating about 40,000 acres of land.

and it is signed (page 69) "Britton & Gray, Attorneys for Desert Entrymen."

In the argument of Britton and Gray submitted at the oral hearing in this cause they state that in 1890 they were attorneys for George S. Dodge and that they received from the Commissioner of the General Land Office a letter dated February 10, 1891, to the following effect:

Referring to your appearance for a large number of parties whose entries were included in office letter of September 28, 1877, suspending all D. L. E. from No. 1 to 337 inclusive made in the Visalia, Cal. land office, you are advised that by letter of even date to the register and receiver at Visalia, said order was revoked, and a number of applications to contest certain of the entries, were returned for appropriate action.

The question presented for determination is whether the notice shown to Britton and Gray was binding upon George S. Dodge, and inasmuch as there is no dispute over the question that notice to counsel is notice to the client, the question raised resolves itself into one of the sufficiency of the notice shown. The maxim "*id certum est quod certum reddi potest*" does not apply to questions of pleading, and therefore it can not be argued that one can look outside of the notice (*supra*) into the letter to the register and receiver of the Visalia land office to supply defects, if any, in the notice received by Britton and Gray. It has been held by this Department that it is not necessary to send a copy of a decision to local counsel. The case that has gone furthest on this question is that of *Weed v. Sampsel* (19 L. D., 461), the syllabus of which case is as follows:

Written notice from the General Land Office to the resident attorney of record in a case that "action has this day been taken" therein, is sufficient notice of an adverse decision.

The rule that requires a copy of the decision to accompany the notice thereof is not applicable where the notice is sent by the General Land Office to attorneys of record resident in Washington.

The notice given in that case was as follows:

WASHINGTON, D. C., *March 30, 1893.*

MESSRS. PADGETT AND FORREST,

Attorneys-at-law, Washington, D. C.

GENTLEMEN: As attorneys for Edwin A. Weed in the matter involving lot 9, block 56, Oklahoma, you are advised that action has this day been taken in the case of Edwin A. Weed *v.* John A. Sampsel. Reference is had to your letter of May 26, 189-.

Very respectfully,

EDWARD A. BOWERS,

Acting Commissioner.

The distinction between that case and this appears to be as follows:

That in the notice shown in the case at bar the name of the case does not appear, nor is there a description of the tracts of land; whereas in the case (*supra*) the title of the case is given with a description of the tract involved. It further appears from the decision itself that the point upon which counsel in that case urged the insufficiency of the notice was as follows (page 462):

Counsel for Weed contend at length, that your office should have notified them that a "decision" had been rendered, and not that an "action" had been taken. I fail to see any force in this position in view of the fact that the two words are often used interchangeably in the rules of practice and in the departmental decisions.

Recurring, therefore, to the notice given in this case, it appears to be valueless by reason of its uncertainty.

Subsequent to the hearing counsel for the petitioner furnished a copy of the letter of September 25, 1891, of your office, to the register and receiver at Visalia, California, in which it appears that in the case of Cottle *et al. v.* George S. Dodge, being an application to contest the entry of the defendant, the following appears:

The affidavits of contestant fail to show that the tract was non-desert at the date of the entry. The said entry was one of the number suspended by order of September 28, 1877, which order was revoked by office letter "H" of February 10, 1891, and this office, by its decision of July 30, 1891, in the case of Vradenburg *v.* Orr, having held upon substantially a similar state of facts that the entrymen should be allowed three years in which to comply with the law, exclusive of the period of suspension, the charge of failure on the part of Dodge to comply with the law was premature.

On the same day it appears that the following letter was addressed:

MESSRS. BRITTON AND GRAY,

Attorneys-at-law, Washington.

SIR: Referring to your appearance for the defendant in the case of F. L. Cottle, E. E. Cottle and J. D. Rush *v.* G. S. Dodge, involving desert land entry No. 2, Visalia, California, land district, you are hereby notified that by letter of this date directed to the local officers said case was dismissed and the case closed.

Respectfully,

W. M. STONE,

Assistant Commissioner.

It is urged that this showing is sufficient notice. All the objections that exist to the prior notice exist to this notice. The notice to Britton and Gray gives the title of the case and the number of the desert land entry and states that the contest initiated by other parties against this entry had been canceled and refers to the corresponding letter of September 25, 1891, to the register and receiver, which in turn refers to the revocation of the suspension by referring to office letter "H" of February 10, 1891. The petition for re-review is therefore denied.

COAL LAND—PROOF AND PAYMENT—ADVERSE CLAIM.

OUIMETTE v. O'CONNOR (ON REVIEW).

On the failure of a coal claimant to perfect title within the statutory period the work done by him inures to the benefit of a valid adverse claim then asserted for the land involved.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 28, 1896. (J. A.)

March 25, 1895, your office rendered decision in the above entitled case, dismissing Ouimette's protest against O'Connor's final proof for the land in controversy, rejecting his coal declaratory statement, and suspending O'Connor's entry for further consideration in the event of said decision becoming final.

On Ouimette's appeal said decision was, by departmental decision of May 13, 1896 (22 L. D., 538), reversed, and you were instructed as follows:

As the proceedings before the local officers appear to have been unskillfully conducted, and as the record before me is unsatisfactory, both parties should be given an opportunity to submit evidence in support of their respective claims. You will therefore direct the local officers to order a hearing between Ouimette and O'Connor at which O'Connor will be allowed to show whether Bridges (the former claimant) had opened a vein of coal on the land prior to the filing of his relinquishment, October 2, 1894, and at which the parties may introduce such further evidence as to them seems proper.

By letters of June 11, and July 1, 1896, your office transmitted motions for review of said decision, filed by Ouimette and O'Connor, respectively. Ouimette's motion was filed in your office June 5, and O'Connor's motion was filed in the local office June 16, 1896. By letter of July 27, 1896, your office transmitted a motion filed by Ouimette in the local office July 17, 1896, to dismiss O'Connor's motion for review on the grounds,—

1. That it is not accompanied by an affidavit that it was made in good faith and not for the purpose of delay, and

2. That the copy of the motion served on Ouimette June 16th was not accompanied by a copy of the required affidavit.

Attached to O'Connor's motion for review is an affidavit executed June 17, 1896, the day after the filing of the motion, that the motion is

made in good faith, and not for the purpose of delay. It was not necessary under rule 114 of practice to give Ouimette notice of the motion for review. Ouimette's motion to dismiss is therefore denied.

O'Connor's motion for review consists of a twenty-five-page argument. The grounds for the motion, set out on the first page of the argument, are as follows:

First: Because it appears that material facts, in the case, have been misapprehended, and therefore, have not received due consideration.

Second: Because the conclusions reached, and the decision rendered in the case are not sustained by law, and the practice of the Department.

None of the material facts which it is alleged have been misapprehended are specified in the assignments of error. The motion is denied for the reason that it does not conform to Rule 114 of Practice as amended June 1, 1894, which provides that "each motion must state concisely and specifically, without argument, the grounds upon which it is based."

Ouimette's motion for review assigns errors as follows:

First: In finding that Charles S. Bridges, the former claimant, relinquished his coal declaratory statement.

Second: In finding that Charles S. Bridges made no assignment of his right to purchase to Ouimette.

Third: (a) In holding that Ouimette acquired no right by his purchase of Bridges' improvements; (b) in holding that immediately upon the filing of Bridges' relinquishment (which was never filed) the work done by him on the land inured to O'Connor's benefit, if O'Connor's claim was valid.

Fourth: In allowing O'Connor at the hearing to be had "to show whether Bridges had opened a vein of coal on the land prior to the filing of his relinquishment, October 2, 1894."

The records of your office show that Bridges did not relinquish his coal declaratory statement October 2, 1894, as stated in said departmental decision of May 13, 1896. He filed his statement August 28, 1893, alleging settlement on the same date. The time within which he could have made proof expired by limitation on October 28, 1894.

Ouimette's motion is in effect a request that the statement made in said decision, that Bridges relinquished his coal declaratory statement October 2, 1894, be corrected. Under a strict observance of Rule 114 of Practice it would be necessary to notify the parties that the motion is entertained, and to allow them time within which to file argument. However, as a mistake of this nature may be corrected upon the suggestion of one of the parties, it is not deemed necessary to formally entertain the motion. As Bridges did not relinquish his coal declaratory statement, and as the time within which he could have made proof expired by limitation on October 28, 1894, the work done by him inured to O'Connor's benefit on that day, instead of October 2, 1894, if O'Connor's claim is valid. The finding that Bridges made no assignment of the right to purchase under paragraph 37 of the regulations of July 31, 1882, does not prejudice Ouimette's claim, as he did not make proof

and payment before October 28, 1894, but relies upon his claim initiated by the filing of his declaratory statement on October 2, 1894. O'Connor will be allowed, at the hearing ordered by departmental decision of May 13, 1896, to show whether Bridges had opened a vein of coal on the land prior to the date of the expiration of his right to purchase, October 28, 1894. To that extent the said decision is modified.

* * * * *

ALASKA LANDS—SURVEY—TRADE AND BUSINESS.

F. P. KENDALL.

The survey of a tract of land in Alaska, with a view to the purchase thereof, must be rejected, where the alleged trade or business to be transacted thereon is entirely prospective and no improvements have been placed on said land.

Acting Secretary Reynolds to the Commissioner of the General Land Office, August 28, 1896. (W. M. B.)

With your office letter of June 12, 1895, is transmitted the papers relating to survey No. 107, executed by Albert Lasey, U. S. deputy surveyor—under provision of sections 12, 13 and 14 of the act of March 3, 1891 (26 Stat., 1095)—of a tract of land containing 150.29 acres, situate on Coal Point, Kachemak Bay, Cook's Inlet, district of Alaska, made upon the application of F. P. Kendall, claimant, with a view to the purchase and entry of the tract embraced in said survey.

When the survey, and the plat made in conformity with the field notes thereof, were examined and considered in your office, the same were rejected, it appears, upon the grounds stated in your office letter of May 14, 1891, to the United States marshal, *ex-officio* surveyor-general, to the effect that the act of March 3, 1891, providing for the disposal of public lands in Alaska actually occupied for the purpose of trade or manufacture does not provide for the entry of lands for the purpose of securing rights of way for railroads, or for the entry of such lands where no business or trade is in operation thereon.

The applicant Kendall, appealing from the action of your office, as above indicated, files the following assignments of error, to-wit:

1. That the area of the tract surveyed is less than the quantity of land allowed by the act of March 3, 1891.
2. That the tract of land is bounded by navigable waters on the easterly and westerly sides.
3. That the claim is occupied for the purpose of carrying on a trade and the shipping of coal from the mines in the vicinity.

The deputy surveyor, in his report, to be found at the close of his field notes relating to this survey, states that:

The location in connection with the other locations on the spit (Coal Point) is valuable on account of its proximity to the coal fields on the Kenai peninsula, the spit forming a natural road bed for a railroad from the coal fields to the only anchorage at the extreme southern point of the spit.

The record submitted discloses the further material facts—a portion of which are set out in your office letter—that said claimant was a non-resident claiming possession of the land in question, but had never made any improvements thereon; that claimant and other parties—some of whom were adjoining locators—stated that it was their intention to build a railroad jointly on the spit, and that the purpose of the locators was to secure a right of way for such road.

Setting up an adverse claim under the *proviso* contained in section 12 of the said act of March 3, 1891, J. K. Luttrell, President of the Cooper Coal and Commercial Company, a corporation organized under the laws of the State of California, filed his written protest against the right of Kendall to purchase the tract described by survey No. 107, stating, among other things, in his affidavit of February 3, 1893, that his company had a right superior to that of Kendall to the land in question, and that the said company had for a long time claimed a right of way for a railroad from their coal mines on Kenai peninsula at the head of the spit, and across the tract located by Kendall, to their stores and place of business situate near the end or southeast extremity of said spit.

It appears that Coal Point is a long, narrow, gravelly spit, which the surveys thereof represent to be about five miles long and about one fourth of a mile wide at point of greatest breadth, extending about half way across Kachemak Bay.

It is very clear that claimant, as well as protestant, desires to secure a right of way for a railroad over the land involved, and that the tract possesses but little value for any other use that could be made of it, but the value thereof for the use or purpose named might prove to be very considerable since the coal at the mines in process of development on Kenai peninsula at the head of the spit can only conveniently reach deep water anchorage by being carried over the entire length of the spit to the southern extremity thereof.

There can be no doubt from the evidence furnished by the record that there was merely a location made—without actual occupancy for any purpose—of the tract in question by the claimant Kendall.

The unverified allegation of appellant that the tract “is occupied for the purpose of carrying on a trade and shipping of coal”, has sole reference to such business as is contemplated to be transacted when the railroad is constructed, which necessarily implies that the business proposed to be transacted is simply and entirely prospective.

Where a business or trade is thus prospective, and the land for the survey of which application is made—and upon which it is proposed to transact such business or trade—contains no “improvements” thereon at the time such application is made and survey executed, as is the case with respect to the survey under consideration, it is proper for your office to wholly reject the survey made under such circumstances.

For the reasons herein contained your office decision of May 14, 1895, rejecting survey No. 107 is hereby affirmed.

RAILROAD GRANT—SETTLEMENT ON DESERT LAND CLAIM.

WILSON v. NORTHERN PACIFIC R. R. CO.

A settlement on public land with intent to appropriate the same under the desert land law does not operate to except the land from the effect of a railroad grant.

Assistant Secretary Reynolds to the Commissioner of the General Land
(W. A. L.) *Office, August 28, 1896.* (A. E.)

This is an appeal by Wilson from the decision of your office, dated May 15, 1895, holding intact on the list the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 19, Tp. 13 N., R. 19 E., North Yakima, Washington, formerly listed by the Northern Pacific Railroad Company on September 26, 1888.

It appears from the papers in the case that the land involved in this controversy is within the grant to the Northern Pacific Railroad Company. The map of definite location opposite this tract became effective on May 24, 1884. Wilson settled upon the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ in 1883, with the intention of buying it from the railroad company. In 1884 he made entry, under the desert land act, of the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the forty acres adjoining that in dispute. On March 23, 1892, Wilson filed an affidavit claiming that his application to enter the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ had been refused, and asked for a hearing. This request was granted. At the hearing held Wilson does not show that he tendered, prior to the date of definite location, the formal application and purchase money required by the act, but admits he made but a verbal request of the local officers.

The settlement of Wilson, with the intention of taking the land in controversy under the desert land act, did not confer upon him any rights either as against other settlers, entrymen or the railroad company. The desert land act confers no preference right until entry, which includes the payment of fees and a portion of the purchase money. Until the entryman performs this requirement he initiates no right which another who takes the step could not defeat. The desert land act is similar in its object to the timber culture act, and each is different from pre-emption or homestead act. The first two were passed in order to encourage, respectively, the reclamation of arid land by irrigation and the growth of forests; the latter two to populate and improve the vacant agricultural lands.

The Department has held, in the matter of settlement with intention to take under the timber culture act, that such settlement does not confer such a right as will except the land so settled upon from the grant to the Northern Pacific Railroad. (See 19 L. D., 28; id., 452).

The desert land act is in this respect analogous to the timber culture law, and settlement with intention to take under its provisions would not be such an appropriation of the land as would prevent the right of the railroad company from attaching on selection.

Your office decision is therefore affirmed.

HOMESTEAD CONTEST—ACT OF JULY 26, 1894.

WEEDIN *v.* LANCER.

The tender of proof and payment is an act that may be invoked by the claimant for his protection, but cannot be used by a contestant to defeat the operation of the act of July 26, 1894, extending the time for proof and payment; nor will an intervening contest, resting alone on the charge of failure to make proof and payment within the statutory period, have such effect.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 28, 1896. (P. J. C.)

I have considered the case of Thomas F. Weedin *v.* Andrew Lancer, involving the homestead entry of the latter for the SW. $\frac{1}{4}$ of Sec. 1, T. 5 S., R. 2 E., Tucson land district, Arizona.

Lancer made said entry on January 10, 1887. On January 12, 1894, Weedin filed affidavit of contest, containing several allegations, all of which have been tacitly abandoned and waived, except the one that Lancer did not make final proof within seven years from date of entry.

The local officers found as a fact, that Lancer applied to make final proof on February 5, which final proof was filed March 27, 1894, and as more than seven years had elapsed from date of entry, and contest had been instituted, they recommended the cancellation of the entry.

Lancer appealed to your office, which found that the affidavit of contest was not corroborated as required by Rule 3 of Practice,—there being no corroborating witness—and therefore dismissed the contest; adding that “the time for making final proof was extended for one year from January 10, 1894, by Sec. 1, act of July 26, 1894 (28 Stat., 123).”

From this decision of your office Weedin appeals, contending, in substance, “that an affidavit of contest is in the nature of an information, and when accepted, notice issued, and service made, jurisdiction is acquired;” and that “the act of July 26, 1894 (28 Stat. 123), does not apply to this contest.”

The testimony taken at the hearing is insufficient to sustain any of the charges made, but by the records of the local office it is clear that Lancer had not made his final proof within seven years from the date of his entry. Thus the only charge that would be effective for the purpose of cancelling this entry is one based wholly on facts within the knowledge of the government.

The act of Congress referred to in your office decision reads,—

That the time for making final proof and payment for all lands located under the homestead and desert-land laws of the United States, proof and payment of which has not yet been made, be, and the same is hereby, extended for the period of one year from the time proof and payment would become due under existing laws.

This is a remedial statute enacted for the purpose of allowing those who had failed to make proof and payment within the period limited by law one year from the expiration of the time when proof and

payment would become due, in which to do so. The act is by its terms restrictive, and would therefore cover the case of Lancer.

If it be claimed that Lancer had made proof prior to the passage of the act, and thus taken his case out of the operation of the statute, it may be said that the statute contemplates "proof and payment" and it is not shown that payment was made or tendered. The proof itself was not acted upon by the local officers, so far as disclosed, hence it cannot be said that it was made as contemplated by this act.

The tender of proof and payment is an act that may be invoked by the claimant for his protection, but cannot be used by the contestant to defeat the operation of the statute; nor will an intervening contest resting alone on the charge of failure to make proof and payment within the statutory period, have such effect.

Your office judgment is therefore affirmed.

REPAYMENT—MINERAL ENTRY—ASSIGNEE.

JOSEPH H. HARPER.

The return of purchase money, in case of an entry erroneously allowed and canceled, may be made on the application of one who shows a partial interest, according to the proportion of his interest.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 28, 1896. (E. B., JR.)

On February 28, 1891, Helena, Montana, mineral entry No. 1485, made December 31, 1886, for the Fontenoy Placer claim, embracing the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 25, and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 26, T. 3 N., R. 8 W., containing eighty acres, was canceled by your office on the ground that the tract was not mineral land and therefore not subject to entry under the mining laws.

On November 10, 1894, Joseph H. Harper filed an application for the return of the money paid the government for said land, amounting to \$200.

On September 25, 1895, your office refused repayment to Harper, holding that no repayment could be made until all the interests in said claim at date of entry were represented in the application, and that Harper was not shown to have acquired the interest of P. F. Kelly, one of the entrymen, by conveyance in writing, such conveyance being essential under the laws of Montana to the acquisition of the interest of the latter. From this decision Harper appeals, contending that it was not necessary to show a transfer in writing from Kelly, and that even if Kelly's interest was not represented Harper's application should have been allowed to the extent of his interest in the claim, which was three fourths.

The application for repayment in this case is made under the provisions of the act of June 16, 1880 (21 Stat., 287), authorizing repayment of the purchase money in case of an entry of public lands erroneously allowed and therefore canceled, to the person who made the entry, his heirs or assigns, under rules and instructions therein provided for. Paragraph nine of instructions dated August 6, 1880, under said act declares that:

Those persons are assignees, within the meaning of the statutes authorizing the repayment of purchase money, who purchase the land after the entries thereof are completed and take assignments of the title under such entries prior to complete cancellation thereof, when the entries fail of confirmation for reasons contemplated by the law.

See also cases of Adolph Emert and Albert G. Craven, 14 L. D., 101 and 140, respectively, and case of Alpha L. Sparks, 20 L. D., 75.

Paragraph ten of said instructions contains, among other things, the following:

Where applications are made by assignees, the applicants must show their right to repayment by furnishing properly authenticated abstracts of title, or the original deeds or instruments of assignment, or certified copies thereof, and also show by affidavits or otherwise that they have not been indemnified by their grantors or assignors for the failure of title, and that title has not been perfected in them by their grantors through other sources.

It appears from an abstract of title to said placer claim on file that John Coleman, Patrick F. Kelly, William E. Davidson and Cornelius J. McSherry, who made said entry, then held the entire interest in the claim, that said Harper acquired an undivided one-fourth interest therein from said McSherry January 7, 1887, and an equal interest from Coleman April 27, 1888, and that these were the only interests in Harper shown of record at the date of cancellation of the entry, February 28, 1891. It is not in any way shown, nor is it alleged, that Harper acquired any other interest *in any manner*, in said claim prior to the cancellation of the entry. It does not therefore appear that Harper had acquired said Kelly's interest at the last mentioned date, nor that he was then an assignee, under the instructions given above, of more than a one-half interest in the claim. It is unnecessary, in view of the foregoing, to consider the requisites of a transfer of possessory right in a mining claim under the laws of Montana. Your office properly refused repayment of the whole amount of the purchase money to said Harper.

The Department does not concur, however, in the conclusion that all the interest in said claim must be represented in the application for repayment before return of any part of the purchase money can be made. In the case of Sparks (*supra*) it was held that return of purchase money in case of an entry erroneously allowed and canceled might be made upon the application of one who showed but a partial interest, according to the proportion of his interest. No reason is apparent why the rule followed in that case may not govern in this. Your office decision is modified accordingly.

ALABAMA LANDS—ACT OF MARCH 3, 1883.

JOHN R. L. BONNER.

The provisions of the act of March 3, 1883, with respect to the public offering of lands returned as containing coal or iron, must be followed, whether the land is properly or improperly so classified.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 28, 1896. (J. L. McC.)

John R. L. Bonner has appealed from the decision of your office of October 7, 1895, rejecting his application to enter under the homestead law the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, of Sec. 28, T. 12 S., R. 10 W., Huntsville land district, Alabama.

The ground of said rejection was that the land is specified on the original mineral list, on file in your office, as being valuable for coal; and that under the act of March 3, 1883 (22 Stat., 487), lands which had been reported to the General Land Office as containing coal and iron should be offered at public sale before being disposed of.

The appellant contends that if the land in question is classified as mineral, it was erroneously so classified; that the fact is shown, by the applicant's corroborated affidavit, that the land is not valuable for coal, but that it is strictly agricultural land, and unfit for any other purpose.

The requirement of the statute must be followed whether the land is properly or improperly reported as mineral (George H. Sherer, 15 L. D., 563).

The action of your office in rejecting Bonner's homestead application is therefore affirmed.

OKLAHOMA HOMESTEAD—QUALIFICATION OF ENTRYMAN—COSTS.

BUCKNAM v. BYRAM ET AL.

Under the statutes of Kansas the ownership of land is not divested by the execution of a mortgage thereon, hence a mortgagor of realty in that State is not entitled to plead that by reason of such mortgage he is not "seized in fee" of the land involved, and therefore is not disqualified as a homesteader under section 20, act of May 2, 1890.

A quitclaim deed of a small tract of land to township authorities for "road purposes," executed by one who previously owned one hundred and sixty acres, effectually divests the grantor of title to the land so conveyed, and he is consequently thereafter not the owner of one hundred and sixty acres within the meaning of section 20, act of May 2, 1890.

A contestant who seeks to secure the right of entry solely on the ground of priority of settlement is not required to pay the costs incurred by other parties to the suit.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(W. A. L.) August 28, 1896. (C. W. P.)

Benjamin F. Bucknam and Wyley R. Byram have appealed from your office decision of May 28, 1895, holding for cancellation Byram's

homestead entry, No. 7769, of the SE. $\frac{1}{4}$ of section 17, township 17 N., range 1 E., Guthrie land district, Oklahoma Territory, made on September 23, 1891, dismissing Bucknam's contest and awarding the right of entry to William Gilchrist.

The record shows that on September 23, 1891, Bucknam filed an application to enter the above described land, which the local officers rejected for conflict with homestead entry No. 7769.

On September 25, 1891, Gilchrist filed an application for the same land, which they also rejected because it conflicted with Byram's entry. On the same day Gilchrist filed an affidavit of contest, alleging that he settled on the land seven minutes after twelve o'clock noon of September 22, 1891, and has resided thereon ever since, and improved and cultivated the land.

On October 14, 1891, Bucknam filed an affidavit of contest, alleging that he settled on the land September 22, 1891, prior to the settlement made thereon by any other person, and that he has resided thereon ever since and has cultivated and improved the land. He also alleged that Byram was disqualified from entering, because he entered upon and occupied the land opened to settlement by the President's proclamation of September 18, 1891, during the prohibited period. The contests were consolidated, and went to hearing April 28, 1892.

On February 1, 1894, the local officers found that Byram had resided upon the land in contest from the middle of April, 1891, to the latter part of June, 1891, and that his occupation of the land during 1891 was under lease given by an Indian, who represented to Byram that he intended to take the land as an allotment; that about the latter part of June, 1891, the said Indian informed Byram that he would not take the land as an allotment, and that Byram then removed from the land to Old Oklahoma, and that since June, 1891, and prior to September 22, 1891, Byram had frequently passed over the land and in the vicinity of it. Upon this finding they held that Byram was disqualified to enter the land, and recommended the cancellation of his entry. They further found that Bucknam, when he made settlement, and at the time of the hearing, was the owner of one hundred and sixty acres of land in Chase county, Kansas, and that he was therefore disqualified to enter the land, and recommended that Gilchrist be allowed to make entry of the land.

Both Byram and Bucknam appealed.

Your office affirmed the judgment of the local officers.

The land in controversy is part of that opened to settlement and entry by the act of February 13, 1891 (26 Stat., 759), and the President's proclamation of September 18, 1891.

It is not necessary to consider the testimony in regard to the allegation that Byram is disqualified by reason of his having entered the Territory during the prohibited period, as I am of opinion that Bucknam made settlement prior to both Byram and Gilchrist. As to Byram—what is the testimony? Bucknam swore that he reached the land about

two minutes after twelve o'clock M. When asked if he saw any one on the land, he answered: "No." "When did you first see any one?" Answer: "I would think I had been there about two minutes, may be, a little more or a little less." "Who did you see?" Answer: "The first I saw, two colored men come up across the school claim northeast." "Who next?" "Mr. Wyley R. Byram and his father were two next men that I saw." "When was that time?" "Mr. Byram, the old gentleman, took out his watch, and, as near as I can recollect, said it was six or seven minutes, I wouldn't be positive which it was, past twelve." Byram was asked, "At what time and place did you first see Mr. Bucknam," and replied: "I first saw him on the land in dispute about forty rods east and about forty rods north of the south line;" then corrected his answer by saying, "About forty rods west of the east line and forty rods north of the south line, standing by a pole. I think about three minutes past twelve o'clock was when I first saw him, close to that." But he does not pretend that he reached the land before Bucknam. And in his appeal he relies solely upon the charge against Bucknam "that he was disqualified by reason of being the owner of one hundred and sixty acres of land in the State of Kansas." (See fourth specification of errors in Byram's appeal.)

Upon the claim of Bucknam:

In your office decision it is stated that:

During the progress of the trial, on May 7, 1892, a stipulation was entered into between Gilchrist and Bucknam, by which it was agreed that Bucknam settled on the land two minutes after twelve o'clock, noon, of September 22, 1891, and before any settlement made by Gilchrist, and that if Bucknam was qualified to enter, his rights were superior to those of Gilchrist.

This is an error.

The record does not show any agreement between Gilchrist and Bucknam. In pages 107-108 of the testimony, there is an agreement between Gilchrist and Byram, to which Bucknam was not a party.

Bucknam is charged with "soonerism." But the charge is not supported by the evidence. The evidence, in his behalf, shows that, at twelve o'clock M., on the 22d day of September, 1891, he started from the northeast side of the Cimarron river, crossed the river on foot, and went the balance of the way on horseback, traveling in a southwest direction from the river for some twenty or twenty-five rods, through some scattering trees, and crossing Soldier creek to an open prairie; thence to the southeast quarter of Sec. 17, Tp. 17 N., R. 1 E., about forty rods, or a little over from the south line, and about thirty-five or forty rods from the east line of the quarter. He then stuck up a stake in the ground about nine feet long, the forks of the stake ran up in a "V" shape; tied a small handkerchief to the end of the prongs of the stake; that he arrived on the land in dispute from one and a half to two minutes after twelve o'clock; plowed about four rods long and one rod wide that evening; that on the 28th, 29th and 30th of September he was hauling and preparing the lumber for a house; that he put frame up for the house on the 5th of October, and afterwards completed

it gradually. The house is a frame house, twelve by sixteen, about eight feet high, walls painted on outside with two coats of paint. He put in cultivation some thirty-two or thirty-three acres. The improvements are worth about \$200.00. Part of his family arrived on the place on the 12th day of October, part on Christmas day, and his wife and another child arrived on the 7th day of January, 1892.

On the other hand, Byram and Gilchrist attempted to prove by several witnesses that Bucknam started in the race a few minutes before twelve o'clock M. But the weight of evidence is decidedly in favor of Bucknam. It is not pretended that Gilchrist reached the land before Bucknam.

Upon a consideration of the whole testimony, the conclusion is irresistible that Bucknam was the prior settler on the land.

The question then occurs, is Bucknam disqualified by reason of the provision contained in the twentieth section of the act of May 2, 1890 (26 Stat., 81), that

no person who shall at the time be seized in fee simple of a hundred and sixty acres of land in any State or Territory shall hereafter be entitled to enter land in said Territory of Oklahoma.

It is admitted by Bucknam that at the time he settled on the land in controversy, he was the owner and in possession of one hundred and sixty acres of land in the State of Kansas, less sixty or eighty rods, which he by a quitclaim deed, dated the 12th day of February, 1889, conveyed to the township board of Cedar township, of Chase county, Kansas, "for road purposes." In his testimony he says that, when he purchased the said one hundred and sixty acres of land, he agreed to pay \$1,200 for it, and paid \$100 down in cash, but gave a mortgage on the land for the remaining \$1,100, and that he has been informed that a judgment has been rendered to foreclose the mortgage and sell the land to pay the \$1,100 and accrued interest, amounting to a sum much larger than the value of the land, and he therefore claimed no more interest in the land.

It is contended, in behalf of Bucknam, that he was not "seized in fee" of this Kansas land, because he had given a mortgage to the vendor to secure the payment of the part of the purchase money which was unpaid. Whatever force this contention might have, under the common law, it can have none under the laws of the State of Kansas, in which State the property is situated, and by whose laws Bucknam's rights in the property must be determined. In the case of *Chick et al. v. Willetts*, 2 Kansas, 384, it is said (p. 391):

Some of the States still adhere to the common law view, more or less modified by the real nature of the transaction; but in most of them, practically, all that remains of the old theories is their nomenclature. In this State, a clear sweep has been made by statute. The common law attributes of mortgages have been wholly set aside; the ancient theories have been demolished; and if we could consign to oblivion the terms and phrases—without meaning except in reference to those theories—with which our reflections are still embarrassed, the legal profession on the bench and at the bar would more readily understand and fully realize the new condition of things. The statute gives the mortgagor the right to the possession, even after

the money is due, and confines the remedy of the mortgagee to an ordinary action and sale of the mortgaged premises; thus negating any idea of title in the mortgagee. It is a mere security, although in the form of a conditional conveyance; creating a lien upon the property, but vesting no estate whatever, either before or after condition broken. It gives no right of possession, and does not limit the mortgagor's right to control it—except that the security shall not be impaired. He may sell it, and the title will pass by his conveyance—subject, of course, to the lien of the mortgagee.

And in the more recent case of *Robbins v. Sackett*, 23 Kansas, 301, it was held that, in the State of Kansas, a mortgage of real estate does not confer title; and hence a mortgagee of real estate cannot claim, by virtue of his mortgage, to own a house situated on the mortgaged property.

The only question, then, is, what is the effect of the quitclaim deed to the township board of Cedar township, of Chase county, Kansas, of a part of an acre of the land, "the same to be used for road purposes," which is in evidence.

A quitclaim deed, by the laws of Kansas, is as much a conveyance as any other kind of deed, and conveys whatever title the grantor has, unless otherwise specified in the deed itself. *Utey v. Fee*, 33 Kansas, 681; *Johnson v. Williams*, 37 Kansas, 179.

There are no words in this deed, except the words: "the same to be used for road purposes," from which it might be inferred that the grantor did not intend to convey the land in fee. In the case of *Kilmer v. Wilson*, 49 Barbour (N. Y.), 86, the land was conveyed to the grantee "for a private road," and it was contended that these words should be construed to limit the grant to a mere easement in the land. But the court held that to give the words the controlling effect claimed for them would be in conflict with the plain words of the grant, and the obvious intent of the parties thereto.

A careful consideration of the questions involved results in the conclusion that Bucknam, at the time he settled on the land in dispute, was not seized in fee simple of one hundred and sixty acres of land, and was not disqualified as a homestead entryman in the Oklahoma Territory.

On May 9, 1892, Bucknam filed a motion to tax all the costs of taking testimony in the case against him to Gilchrist. The local officers overruled this motion, and on April 15, 1893, Bucknam filed a motion to re-tax the costs, which motion they also overruled. Your office affirmed the rulings of the local officers. Bucknam in his appeal complains that your office erred in taxing the costs to him, and in overruling his motion to re-tax.

Bucknam's contention is that the allegation made by Gilchrist is prior settlement, and on that allegation he went to trial, and that if Gilchrist relied on the charge of Bucknam's disqualification to enter, he thereby claimed the preference right, and that under the statute he (Gilchrist) was legally bound to pay all the costs of taking the testimony.

But it does not appear that Gilchrist claimed a preference right by reason of Bucknam's alleged disqualification as a "sooner." In his contest affidavit he simply alleged priority of settlement, and claimed the land on that ground. I am, therefore, of opinion that there is no error in your office decision refusing to overrule the decision of the local officers on Bucknam's motions to tax the costs as against him to Gilchrist.

Bucknam will be allowed to enter the land, and Gilchrist's application rejected.

The decision of your office is modified as above indicated.

ASPEN CONSOLIDATED MINING CO. v. WILLIAMS.

Motion for review of departmental decision of July 7, 1896, 23 L. D., 34, denied by Secretary Smith August 28, 1896.

HOMESTEAD CONTEST—DEATH OF CONTESTANT—ENTRY.

MEAGHER v. CALDWELL.

A charge that a contest was begun under a speculative contract with a third party, if proven, will not affect the subsequent entry of the tract involved, after its restoration to the public domain, by the widow of the contestant in her own right, the contestant having died prior to the conclusion of the contest.

Assistant Secretary Reynolds to the Commissioner of the General Land
(W. A. L.) *Office, August 28, 1896.* (J. L.)

This case involves lots 2, 4, and 5, and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 3, T. 11 N., R. 3 W., Oklahoma land district, Oklahoma. On December 24, 1894, Mrs. Belle Caldwell made homestead entry No. 9429 of said land. On March 25, 1895, J. W. Meagher filed his affidavit of contest against said entry, and afterwards, on October 30, 1895, an amended and supplemental affidavit of contest, both based upon information and belief. He also filed a corroboratory affidavit of one Samuel Crocker based upon personal knowledge. From these three papers it appears that the ground of contest as alleged was:

That in the month of July, 1889, Robert Caldwell, whose residence at that time was Columbus Junction, Iowa, came to visit said Samuel Crocker at Oklahoma City. That Crocker suggested to Caldwell that he knew a person who he feared would lose her claim, and offered to bring him acquainted with the claim, and the evidence necessary to maintain a contest against the same, provided he (Caldwell) would pledge his word to Crocker, that if a successful contestant, he (Caldwell) would give the said party one half of the claim. That Caldwell gave said pledge to Crocker. That thereupon Crocker furnished Caldwell with the name of Rachel A. Haines and a description of her entry; and with the evidence necessary to maintain a contest against her. And that under that agreement with Crocker, Caldwell instituted and successfully prosecuted a contest against Rachel A. Haines's entry of the tracts herein involved.

On October 30, 1895, the register and receiver, on motion of Mrs.

Caldwell, and after hearing arguments by counsel, on both sides, dismissed Meagher's contest, upon the ground that the facts alleged, if true, were not sufficient in law.

Meagher appealed; and on April 17, 1896, your office affirmed the decision of the local officers, finding that "the charges found in the complaint are not sufficient to warrant an investigation."

Meagher has appealed to this Department.

It appears that the contest initiated by Robert Caldwell against Rachel A. Haines was finally closed in favor of the contestant on November 14, 1894, in accordance with the decision of this Department rendered therein on appeal. Robert Caldwell was then dead. He died on December 24, 1892, leaving surviving him a widow, Mrs. Belle Caldwell aforesaid, and two infant children, Robert C. and Catherine E. Caldwell. Mrs. Caldwell qualified as administratrix of her husband's estate on January 17, 1893.

On December 24, 1894, after Rachel A. Haines's entry had been canceled, and the land in contest had been restored to the public domain, Mrs. Belle Caldwell made homestead entry of said land as above stated.

The facts alleged in Meagher's affidavits of contest, if true, cannot affect the qualifications of Mrs. Belle Caldwell as a homestead entryman in her own right. She is a citizen of the United States, twenty-one years old, an unmarried woman, and the head of a family consisting of herself and two children. It is irrelevant to consider what would or would not have been the effect of Robert Caldwell's pledge to Samuel Crocker, as against Robert Caldwell, if he had survived the successful termination of his contest and had attempted to exercise his preference right of entry. His preference right of entry died with him. It was a personal privilege not assignable, not devisable, not transmissible by inheritance. Mrs. Belle Caldwell was, fortunately for her, the first legal applicant for the land in contest after its restoration. Her rights rest upon her personal qualification under the homestead laws; and the sin of her husband (if any) cannot be visited upon her.

Your office decision is hereby affirmed.

MINING CLAIM—ADVERSE PROCEEDINGS—ACT OF MARCH 3, 1881.

NEWMAN *v.* BARNES.

Under the act of March 3, 1881, the judgment of a court in adverse proceedings to the effect that neither party has shown title to the land involved, precludes subsequent favorable action by the Land Department on the claim of the applicant.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 28, 1896. (P. J. C.)

The record shows that Henrietta E. Barnes and a co-claimant made application for a patent for the Altura quartz mine, San Francisco

land district, California. During the period of publication Samuel Newman filed an adverse and protest against said entry, and in due time brought suit in the superior court of the county in which the land is situated, as provided for in section 2326 Revised Statutes. The judgment of the court on the issues presented was,—

We are unable to say that either of the parties to this action are entitled to the premises in controversy. The action will be dismissed.

Notwithstanding this judgment the defendant filed her application to purchase and the same was allowed by the local officers. Subsequently Samuel Newman filed a protest against said entry, setting forth the proceedings had in the court, and asking that the entry be recalled and canceled, and the proceeding in the matter of the application for patent be dismissed.

It appears that your office on receipt of this protest, by letter of June 12, 1894, directed that the protestant be allowed a hearing "to determine whether the law has been complied with in this case." A hearing was accordingly had and the protestant introduced two witnesses for the purpose of showing that the annual work was not done in said claim for the year 1893. The claimant did not offer any testimony. The local officers found that the claimant had made full compliance with the law and was entitled to the patent, and recommended the dismissal of the protest.

On appeal, your office by letter of September 3, 1895, reversed the action below and held the mineral entry for cancellation. Whereupon defendant prosecutes this appeal, assigning numerous grounds of error, which, however, it is not deemed necessary to consider at length, for the reason that there is but one proposition involved in this controversy and that is conclusive of the issue.

The act of March 3, 1881 (21 Stat., 505), provides:

That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land-office or be entitled to a patent for the ground in controversy until he shall have perfected his title.

The trial of the cause in the local court was without the intervention of a jury. The finding of the court was,

that neither the plaintiff, Samuel Newman, nor the defendants, Henrietta E. Barnes and Hiram B. Barnes, had on the 24th day of August, 1891, or at any time prior thereto, the possession of, or were they or either of them, entitled to the possession of the land or mining claim described in finding V.

The judgment rendered on the finding has been given above.

In view of the plain and unmistakable language of the statute, together with the finding of the court, and the facts, it would seem to be idle to argue that the claimant had any right to make entry after the rendition of this judgment. The statute provides for the submission of controversies between rival mining claimants to a court of

competent jurisdiction for the purpose of settling any dispute in regard to their possessory rights.

It is also wisely provided that where neither party is entitled to judgment, the court shall so find. It would seem that the last paragraph of the act of March 3, 1881, *supra*, was sufficient in itself to preclude the local office from entertaining the application to enter the land after judgment had been rendered by the court. So far as the record before me shows the proceeding was regular in every way, and there is no complaint made to the jurisdiction or otherwise, so far as the court proceeding is concerned. In view of this, it is difficult to conceive upon what hypothesis the claimant was allowed to make entry. In view of the judgment rendered, it became entirely immaterial whether the assessment work was done for the year 1893 under the former entry, or for any other year, as they had no right to the property.

Your office judgment is therefore affirmed.

TIMBER-CULTURE CONTEST—NOTICE OF CANCELLATION—APPLICATION TO ENTER.

MELLOY *v.* FAIRFIELD (ON REVIEW).

An intervening entry will not defeat the preferred right of a successful contestant who fails to receive notice of cancellation, if such failure is not due to want of diligence on his part.

An application to make timber-culture entry, filed with a timber-culture contest, prior to the repeal of the timber-culture law, if not returned to the local office on the successful termination of the contest, is a pending application that operates to exclude the land from the adverse appropriation of an intervening applicant.

Assistant Secretary Reynolds to the Commissioner of the General Land
(W. A. L.) *Office, August 28, 1896.* (G. C. R.)

Albert R. Melloy has filed a motion for review of departmental decision of October 31, 1895 (21 L. D., 347), rejecting his application to make timber-culture entry of the SW. $\frac{1}{4}$ of Sec. 1, T. 21 N., R. 54 W., Alliance, Nebraska.

Said departmental decision reversed the action of your office of January 10, 1894, which held for cancellation timber-culture entry made for said tract May 14, 1888, by Andrew M. Fairfield.

It appears that the land was entered on June 2, 1885, by one Frederick Plogue under the timber-culture laws, and that on August 17, 1886, Melloy filed a contest affidavit against said entry; with this contest affidavit he also filed his application to make timber-culture entry of the land.

A hearing was had at North Platte, October 22, 1896; Plogue made default. The local officers recommended that this entry be canceled, and your office, by letter ("H") of March 21, 1888, affirmed the action of the register and receiver and canceled the entry.

The contest affidavit was sworn to before one Lafferty, a notary public, on June 29, 1896. Lafferty appears to have written the affidavit, and in doing so wrote the contestant's name as "Albert Maloy." Contestant was then advised that he could sign his name to the affidavit spelled in the same way, and could correctly spell it when he came to enter. He accordingly signed his name as thus directed.

In the affidavit accompanying his application to enter, he wrote his name "Albert Malloy;" in the affidavit to secure service on Plogue by publication, executed also at the same time, he wrote his name "Albert Maloy." Service on Plogue by publication was secured in the name of "Albert Maloy;" and he signed his name in the same way in his affidavit, showing that he had mailed notice to Plogue at last known address, &c.

The decision of the register and receiver, dated November 23, 1886, recommending the entry for cancellation, was entitled "Albert Maloy v. Frederick Plogue."

On February 27, 1888, the contestant wrote from Minatare, Nebraska, to Mr. G. B. Blakely, then receiver of the Sidney, Nebraska, land office, as follows:

DR. SIR: I have been compelled to leave the country for a few months, and fearing the return on my contest might be made while absent, I have made out my papers and will remit you the money for entry. Hoping this may prove satisfactory, I am,

Yours very resp'y,

ALBERT R. MELLOY.

Please find enclosed \$14 —. If this is not satisfactory, notify me at Fort Laramie, Wyo., c/f, P. F. Ranch.

Accompanying this letter he also forwarded his application to make timber-culture entry of the land, with necessary affidavit, sworn to before one John Dyer, a notary public. In all these papers he signed his name "Albert R. Melloy."

The receiver promptly answered this letter, on March 3, 1888, and addressed the same to Albert R. Melloy, Fort Laramie, Wyoming, saying:

Enclosed find \$14 check amount sent by you, and your T. C. app. and aff., which are rejected for the reason that we have not received cancellation yet. You will be notified when same is canceled.

Resp'y,

G. B. BLAKELY,

Rec. S.

On May 14, 1888, Andrew M. Fairfield was allowed to make timber-culture entry of the land, and on June 19, 1888, Melloy's application was rejected, because of conflict with Fairfield's entry, and Melloy appealed.

Your office letter ("C") of October 30, 1888, ordered a hearing "to determine the priority between the parties."

Upon this hearing the local officers decided that Melloy was legally notified of the cancellation of Plogue's entry and had failed to avail

himself of the preference right of entry within the thirty days allowed by law, dismissed the contest, and allowed Fairfield's entry to remain intact.

Melloy appealed, and your office letter ("H") of September 19, 1891, reversed the action of the register and receiver, and held Fairfield's entry for cancellation.

Fairfield filed a motion for review, which your office sustained on February 12, 1892, and a hearing was ordered "to determine whether Melloy received legal notice of the cancellation of Plogue's entry."

Hearing was ordered for May 16, 1892; but on March 7, 1892, Melloy filed a motion for review of your office decision of February 12, 1892, ordering the hearing. Your office letter of April 30, 1892, denied Melloy's motion for review, and he appealed.

Your office, by letter of May 31, 1892, declined to forward the appeal, and on June 15, 1892, Melloy filed his petition for certiorari. The Department, on October 5, 1892, denied said petition, and your office directed the hearing to proceed, as per order of February 12, 1892.

Hearing was accordingly had at the local office, testimony, oral and by deposition, was submitted, and case closed May 29, 1893.

On August 10, 1893, the register and receiver recommended that Melloy's contest be dismissed and Fairfield's entry held intact.

On appeal, your office, by decision dated January 10, 1894, reversed that action, and held that Melloy is entitled to his preference right, and that Fairfield's entry is subject thereto.

The Department, in the decision sought to be reviewed (21 L. D., 347), reversed your office decision, and held Fairfield's entry intact.

Practically, two questions are raised by this motion:

1. Did Melloy receive notice of the cancellation of Plogue's entry, or, failing to receive such notice, was the failure attributable to his own carelessness or neglect in the premises?

2. Was Melloy entitled to have his entry placed of record on the cancellation of Plogue's entry under his application made at the time he filed his contest against Plogue's entry?

Melloy was certainly entitled to a preference right of entry on the cancellation of Plogue's entry. It will be noticed above that twenty-two days before your office canceled Plogue's entry, Melloy mailed to the local office his second application to make entry of the land, enclosed a check for \$14, and directed the local officers to notify him at Fort Laramie, Wyoming, care of P. F. Ranch. He signed his name "Albert R. Melloy," thus corresponding with his application then transmitted. The receiver notified him that his application was rejected, and in doing so addressed him as directed, in name and place.

Your office decision canceling Plogue's entry was promptly received at the local office, and on April 2, 1888, the register wrote the notice advising Melloy that he was "allowed" thirty days' preference right of entry. This letter, as shown on the envelope, was mailed at Sidney,

Nebraska, April 3, 1888, and addressed to "Albert Maloy, Ft. Laramie, Wyo." The instructions which Melloy gave the local officers, and which, as above seen, were received by the office, were thus not carried out; the name was not written as he had directed, and the register failed to place on the envelope "c'f P. F. Ranch," meaning Pratt and Ferris ranch.

It appears that this ranch was owned by Messrs. Pratt and Ferris; that it is about thirty-five miles from Fort Laramie, Wyoming, and several hands were employed by the company to attend to stock, etc. Among the persons so employed was Melloy, and he was so engaged during April and May, 1888.

Melloy swears that about April 10, 1888, he went from Pratt and Ferris ranch to the post-office at Fort Laramie; that he was then expecting a registered letter from the land office notifying him of his preference right to enter the land; that the postmaster informed him there was no letter for him, but there was a registered letter there for "A. Maley;" "I told him it might be for me; he said, no, it belonged to, it was for Maley that lived east of the post office, pointing his finger in that direction;" that he was thus led to believe that the postmaster knew the person to whom the letter belonged; that it was, perhaps, six weeks before he next inquired for mail at Fort Laramie; that his mail was regularly sent down to him with the Pratt and Ferris mail; that about the first of May, 1888, he wrote a letter of inquiry to the land office.

The record contains such a letter of inquiry, dated May 21, 1888, and addressed to the receiver. In this letter, signed "A. R. Melloy," he says:

I am compelled to write again for information regarding my contest on T. C. entry No. 6750. . . . I am led to believe there is some crooked work about the contest, as there was another contest the same as mine and it was decided last winter; can't see why it takes mine so much longer.

It will be noticed that this letter was written seven days after Fairfield entered the land.

As tending to corroborate Melloy's statement that he went to Fort Laramie post-office about April 10, 1888, one Yorick Nichols swears that he lived near the Pratt and Ferris ranch in April and May, 1888, and knew Melloy; that he got his leg broken and was sent to the hospital at Fort Laramie; that while in the hospital, and about April 11, or 12, 1888, Melloy visited him; that he remained in the hospital four and a half weeks, and on his return to Pratt and Ferris ranch, about May 5, he found Melloy there.

B. H. Hart, who was postmaster at Fort Laramie in April, 1888, testified that on May 4, 1888, he received a letter registered at Sidney, Nebraska, addressed to "A. Maley." "Can't say at what time it was called for, or whether it was called for at all;" that Melloy did call for a letter, but affiant was unable to state when; that the records of the

post-office show that the exact spelling on the registered letter, received about April 4, 1888, is "A. M-a-l-e-y."

In a deposition subsequently sworn to by Mr. Hart (February 23, 1893), he stated that Melloy resided at the Pratt and Ferris ranch, and in April and May, 1888, received his mail at Fort Laramie; he repeated his testimony as to receiving the letter addressed to "A. Maley," and swore that no one called for the letter by that name; he modified his former testimony by saying that, to the best of his knowledge and recollection, Albert R. Melloy called for a registered letter at Fort Laramie in April, 1888; that mail was received at the Pratt and Ferris ranch from the post-office at Fort Laramie once and frequently twice a week; that he returned the registered letter to the sender July 1, 1888. He further stated: "I believe if said letter had been addressed to Albert R. Melloy, he would have received it."

That the postmaster incorrectly recorded the name as addressed on said letter is evidenced by the envelope itself. The letter was addressed as follows: "Albert Maloy, Ft. Laramie, Wyo." It was mailed April 3, 1888, from Sidney, Nebraska.

The records of the Fort Laramie office thus corroborate Melloy's statement; the postmaster told him there was a registered letter for "A. Maley," when as a fact it was addressed to Albert Maloy. He had instructed the local office to address him by the name he employed in his second application to enter, namely: Albert R. Melloy. This was done by the local office when they notified him at Fort Laramie, on March 3, 1888, that his application was rejected; but one month later the register failed to obey said instructions in two particulars: first, as to the name; second, as to the specific instructions to send the letter "c'f P. F. Ranch."

It is true, Melloy spelled his name differently in his contest with Plogne and in his application to enter, but it sufficiently appears that he was at all times anxious to receive the notice advising him of his right to enter; and his correspondence with the local office shows he was diligent. There can be little doubt that he went to Fort Laramie on or about April 10, 1888, and made inquiry for the letter then awaiting him, and that its delivery to him was refused by the postmaster. It is reasonably certain, also, that if the notice had been addressed as per his own instructions, he would have received it. His failure, therefore, to receive the letter can in no manner be attributed to his own carelessness or neglect.

Thomas C. Patterson, of North Platte, Nebraska, was Melloy's attorney, and the records show that he was so noted on the records. He swears that he received notice of the cancellation of Plogne's entry on May 29, 1888 (fifteen days after Fairfield made entry), and on same day wrote Melloy at Fort Laramie.

The depositions of one Harry Mosler, William Walker and Charles Amerman were read in evidence, for the purpose of discrediting the

testimony of Melloy as to his calling for the letter at the time and place sworn to by him. It is sufficient to say that the testimony of these witnesses is directly impeached by the post-office records. To illustrate: Mosler swore that he was at Fort Laramie in the latter part of May, 1888, when Melloy had a conversation with the postmaster about the registered letter; that the postmaster told him there had been a registered letter there for him, but that the same had been returned; that they looked at the post-office records. Mr. Hart swore that the registered letter was returned July 1, 1888, and Melloy swore he never knew Mosler. The testimony of Walker and Amerman is equally unsatisfactory and fails entirely to impeach Melloy's testimony.

In ordinary contests, where the preference right is awarded under the act of May 14, 1880, it is presumed that notice thereof sent to the contestant at his post-office address reached him; and, if in due time he fails to apply for the land, the same is subject to the first legal applicant, whose entry would be *prima facie* valid. But if after such entry it should be made to appear, affirmatively, that the contestant, without any fault of his own, failed to receive the notice sent to him, it would be proper, after due notice, to cancel the intervening entry and allow contestant the privilege of exercising his preference right under his contest. *Robertson v. Ball et al.*, 10 L. D., 41.

Second. It is alleged in the motion that the application to make timber-culture entry, filed by Melloy on the date the contest was initiated, was never returned to the local officers for allowance, but is still pending, among the papers in this case, and was a bar to the entry of Fairfield.

The timber-culture laws having been repealed by the act approved March 3, 1891 (26 Stat., 1095), it is clear that Melloy could not now be permitted to make a new timber-culture entry, but if his applications, made June 2, and February 27, 1888, were in fact not returned to the local office on the cancellation of Plogue's entry, so as to enable him to perfect the entry, his right still exists under his first application.

The circular of August 16, 1887, referred to in *Smith v. Fitts* (13 L. D., 670), provides for the rejection, without formal notice, of these applications to enter, filed with contests, which are returned to the local office, and are not perfected into entries within thirty days from notice; but, as said in *Zacariah T. Bush* (22 L. D., 182), the circular "does not cover or affect those applications which for any reason are not returned."

It follows, therefore, that if Melloy's application was not returned to the local office, it could not have been acted upon, and was in that condition a bar to the allowance of Fairfield's entry. There is no proof that the application was in fact returned, or ever considered, before Fairfield was allowed to enter. On the contrary, the application of February 27, 1888, was rejected June 19, 1888, more than a month after Fairfield's entry, and then only for "conflict."

For the reasons above given, the motion herein is allowed. Melloy will be notified that he will be allowed thirty days in which to perfect his timber-culture entry of the land. Should he apply within the time given, Fairfield's entry will be canceled; otherwise it will remain intact.

Departmental decision of October 31, 1895, in *Melloy v. Fairfield*, is set aside and revoked.

RAILROAD GRANT—JOINT RESOLUTION OF MAY 31, 1870.

CORLIS v. NORTHERN PACIFIC R. R. CO.

In determining what lands were passed to the altered main, or branch line, as provided for by the joint resolution of May 31, 1870, said resolution must be considered as in the nature of a new grant, and that only such lands as were public lands at the date of the passage of said resolution were intended to be granted thereby.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(W. A. L.) August 28, 1896. (F. W. C.)

John H. Corlis has appealed from the decision of your office, dated September 5, 1894, rejecting his homestead application covering the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and Lots 3 and 4 of Sec. 5, T. 23 N., R. 5 E., Seattle land district, Washington, for conflict with the grant to the Northern Pacific Railroad Company.

This tract was within the limits of the withdrawal upon the map of general route of the main line of said road, filed August 13, 1870, for that portion of the road extending from Portland, Oregon, to Puget Sound. It fell north of the terminal established at this part of the road at Takoma, so that a further consideration of any claim the company may make of this land on account of the main line of its road is unnecessary. It is, however, also within the limits of the company's grant for the Cascade branch, as shown by the map of definite location filed March 26, 1884.

The records show that one Amos Hurst made homestead entry of this land June 26, 1869, which entry was canceled February 11, 1871. In his appeal Corlis urges that said entry, being of record at the date of the passage of the joint resolution of May 31, 1870 (16 Stat., 378), served to defeat the grant on account of said branch line.

By the act of July 2, 1864, a grant was made to aid in the construction of a continuous line of railroad

beginning at a point on Lake Superior in the State of Minnesota or Wisconsin, thence westerly by the most eligible route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget Sound, with a branch via the valley of the Columbia River to a point at or near Portland in the State of Oregon, leaving the main trunk line at the most suitable place not more than three hundred miles from its western terminus.

By the resolution of May 31, 1870 (*supra*), the designation of the lines of road were changed. That which by the granting act was known as the branch line (*via* the valley of the Columbia River to a point at or near Portland in the State of Oregon) was changed to main line, and that which had been designated as main line (across the Cascade mountains to Puget Sound) was changed to branch line.

In the case of the United States *v.* Northern Pacific Railroad Company (152 U. S., 284), in referring to the joint resolution of May 31, 1870, it was stated that:

By the resolution of 1870 it was declared that if at the time of the final location of the company's main line or branch there were not enough lands per mile within the prescribed limits, the deficiency could be supplied from lands within ten miles beyond those limits, other than mineral and other lands as excepted in the charter of the company "to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of subsequent to the passage of the act of July 2, 1864." It is therefore clear that no public land disposed of after the passage of the act of July, 1864, was intended to be embraced in the grant of May 31, 1870.

It is true that in the case pending before the court the lands involved were upon the portion of the road extending northward from Portland to Puget Sound, and that the grant for this portion of the road depended solely upon the resolution of 1870, but when it is remembered that no location had been made of the grant under the act of 1864 prior to the resolution of 1870, and that by said resolution the location of the road, at least in the then Territory of Washington, was changed, and the further fact that in providing for this additional right to indemnity both the main and branch lines are referred to, I am of opinion that under the language before quoted, taken with the resolution of 1870, any lands disposed of along the branch line provided for in said resolution, prior to the passage of said resolution, were excepted from the grant for the said branch line. In other words, that in determining what lands were passed to the altered main or branch line as provided for by the resolution of 1870, said resolution must be considered as in the nature of a new grant and that only such lands as were public lands at the date of the passage of said resolution were intended to be granted thereby.

As before stated, the records show that the tract here involved was entered under the homestead law June 26, 1869, which entry was of record, uncanceled, at the date of the passage of the joint resolution of May 31, 1870, and as against the grant made by said resolution was an appropriation of the land. I must therefore reverse your office decision and hold that the tract here in question was excepted from the company's grant on account of its branch line and is subject to the application by Corlis.

MINING CLAIM—ANNUAL EXPENDITURE—RELOCATION.

DOLLES *v.* HAMBERG CONSOLIDATED MINES CO.

Compliance with law on the part of a mineral claimant, who is at such time holding under color of title, will accrue to his benefit on the acquirement of the legal title.

Where a mineral claimant owns adjoining claims the annual work may be done on one of said claims, if such work is designed for the improvement or development of the group. In such case, however, the burden of proof is upon the owner to show that the work done, or improvement made, does as a matter of fact tend to the development of the property as a whole, and that such work is a part of a general scheme of improvement.

The failure of a mineral claimant to perform the requisite amount of annual work on his claim renders the same subject to relocation.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(W. A. L.) August 28, 1896. (P. J. C.)

The Lowland Chief Consolidated Silver Mining Company on June 20, 1881, made application for patent for the Chemung lode mining claim, survey No. 901, Leadville, Colorado, land district. By the field notes of the survey the conflict with surveys No. 449, 542, 473, and 539, were excluded, leaving the net area applied for 5.09 acres. By a map in evidence it is shown that the names of these claims excluded are, respectively, Curran, Little Alice, Grand Prize and Highland Mary.

On June 20, 1894, the Hamberg Consolidated Mines Company, the successor of the applicant, made entry, No. 3869, of said Chemung claim, with the exclusions noted above.

On June 24, following, Mary A. Dolles filed a protest against said entry, on the grounds that the Hamberg Company and its grantors had failed to do any annual work since the year 1881 on the Chemung, and thereby forfeited all rights to the same; that on July 17, 1886, the said claim was relocated as the Medium, and is now owned by the protestant.

Your office ordered a hearing, and as a result thereof, the local officers found,

that an abandonment of the said Chemung lode has not been proven for the years 1883, 1884, 1885 and 1886; that the protestant has failed to sustain her protest, and we accordingly recommend the dismissal of the same.

On April 18, 1895, your office affirmed the action below, and subsequently overruled a motion for review, whereupon protestant prosecutes this appeal, assigning error as follows:

I. Error in holding that the officers of the Hamberg Consolidated Mines Company, through their lessees, performed actual mining work on the drifts from the shafts on the Curran lode claim in 1885, of the value of more than \$400, and that the work was intended to develop and improve both the Chemung and Curran claims.

II. Error in holding that the contestant has failed to show, by clear and convincing evidence, that the Chemung lode claim, on July 17, 1886, had been abandoned

and forfeited by the owners of the claim, and that the said Chemung lode claim was not, at that time, subject to relocation by reason of such abandonment.

III. Error in holding that any work which might have been done upon the Chemung lode, or upon or for the development of said Chemung lode claim by contestee or its lessees, could be considered as having been done by the owner of the claim.

IV. Error in holding that the Hamberg Consolidation Mines Company was in possession of the Chemung and Curran mining claims during the years 1884, 1885, and 1886, *under color of title*.

V. Error in not holding that during the years 1884, 1885 and 1886, contestee or its grantors had failed to comply with the law in the matter of annual expenditures during each and every one of the years mentioned.

VI. Error in not holding that the ground covered by the Chemung lode claim was subject to relocation during the years 1884, 1885, and 1886, and was properly relocated by the Medium claimants.

VII. Error in not holding the Chemung entry for cancellation on the record evidence in the case.

It is shown by the extended abstract of title that the Chemung claim was sold by the sheriff of Lake county to one C. W. Tankersley, who, in December, 1883, transferred it to one Ellery C. Ford. This deed was recorded January 2, 1884. The heirs of Ford transferred it to the Hamberg Company June 2, 1894.

The Hamberg Company, however, claim to have owned the Chemung during all this time. The testimony shows that Tankersley and others organized this company in July, 1883; that Tankersley made a proposition to convey to the company, the Chemung, Curran and Grand Prize claims in consideration of seventy-five thousand shares of the stock, which was issued to him; that in 1883, Tankersley did make a deed to George Huston as trustee, and that the deed recited that it was made in trust for the benefit of the Hamberg Company; that the company had recently come into possession of this deed, but it has never been recorded. In addition to this, it is stated by witnesses that the officers of the Hamberg Company had given leases on the property in 1883, 1884 and 1885, and there is exhibited a copy of a lease given in April, 1886, by the company. The Hamberg Company claims to have exercised all rights of ownership over the property and has had possession of the same. The apparent indifference of the Hamberg Company as to the condition of its title to the property would seem to indicate that it paid but little attention to matters of detail. It is stated that it had no knowledge of the transfer by Tankersley to Ford, and that this transfer was in fraud of the company. If it were material to the issue here, the company would be charged with notice that the county records disclosed of this transfer and would be estopped from pleading lack of knowledge of the same. As the record stands, it is clear that neither Ford or any one for him ever made any attempt to comply with the requirements of the law in regard to annual work, and so far as he is concerned, or his heirs, the ground was surely subject to relocation.

The possession of the company and its acts of ownership, however,

was under color of title, and now that it has whatever rights the Ford heirs inherited, it would appear that if there was a compliance with the law by the company, although without the legal title, that, under the circumstances surrounding this particular case, it should accrue to its benefit (White Extension West Lode, 22 L. D., 677).

Sec. 2324 (R. S.) provides,—

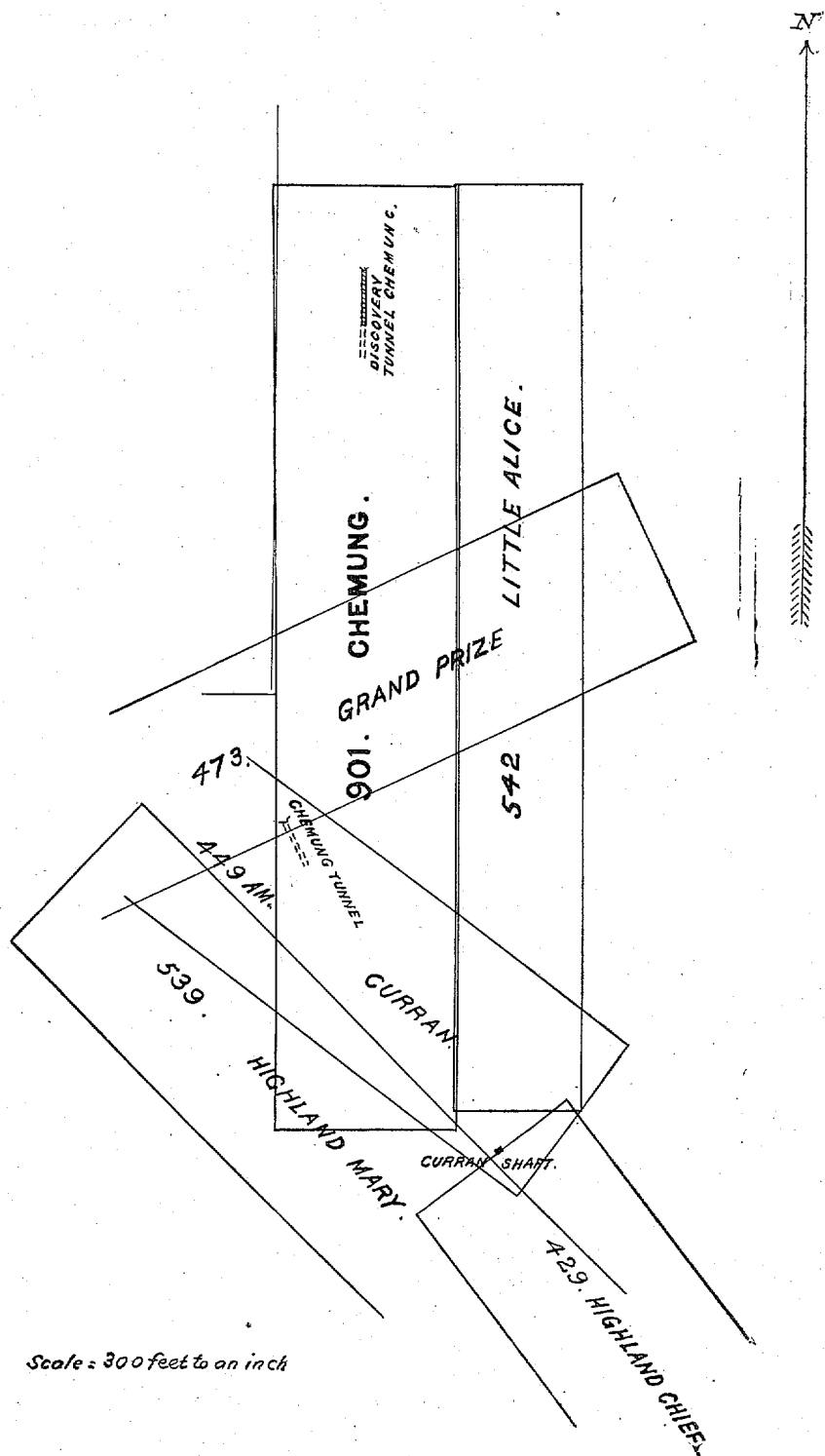
On each claim located . . . and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year . . . and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided the original locators, their heirs, assigns or legal representatives have not resumed work upon the claim after failure and before such location.

Sec. 26, Chapter LXXIV., General Statutes of Colorado, provides that within six months after the time set for annual labor on any lode claim, "the person in whose behalf such outlay was made, or some person for him, shall make and record an affidavit" that at least one hundred dollars' worth of work or improvements were performed or made upon the claim, at the expense of the owners, and for the purpose of holding said claim; "and such signature shall be *prima facie* evidence of the performance of such labor."

The testimony upon the question as to whether the annual work was done on the Chemung for the years 1884, 1885 and 1886 is rather conflicting. The accompanying plat gives a correct representation of this claim and those excluded from the application for patent, together with the Highland Chief, which cuts an important figure in this controversy. It will be seen by this plat that the only territory claimed now as the Chemung is that part of it lying north of the north side line of the Grand Prize and a little triangle, the lines of which are formed by the east side line of the Chemung, the north side line of the Curran and the south side line of the Grand Prize. It is not claimed by the Hamberg Company that any annual work was done for the years mentioned on any part of the ground entered as the Chemung, as described above, but that the work was done in the Chemung tunnel and the Curran shaft, the former on the ground excluded, and the latter is entirely off the Chemung on the Curran ground, and on the northwest end line of the Highland Chief.

There are two questions of fact presented here for determination; first, was there any annual work as contemplated by the statute done during the years mentioned, and, second, if there was, was it such a part of a general scheme for development of the Curran, Grand Prize and the Chemung, as to be credited to the last named.

It is a well-settled rule that where parties own adjoining claims the annual work may be done on one of them, if such work is designed for the improvement or development of the group. But the burden of proof is on the owner to show that the work done or improvement made does as a matter of fact tend to the development of the property



as a whole, and that such work is a part of the general scheme of improvement.

The burden of proof is upon the protestant to show that the annual work was not done, as the presumption is that the owner of a mining claim has complied with the requirements of the law. No certificates of annual work, as provided by the Colorado statute, were offered in evidence by the Hamberg Company. Neither did the company make any showing whatever in this regard when it made its entry.

Dwyer, one of the locators of the Medium lode, but owning no interest in it at the time of the hearing, testified that all the work done on the Chemung from 1879 to 1883, inclusive, was done under his personal direction; that he quit work in March, 1883; that he was thoroughly familiar with all the work done on the claims at that time and subsequently; that there was no work done on the Chemung in 1884, 1885, or in 1886, prior to his relocation, July 24; that he examined all the workings on the Chemung, just before making the relocation, and they were in the same condition as to development as they were when he left them in 1883.

The witness Gardner was engaged in hauling ore from the vicinity of the claim in controversy during the years mentioned. The plat offered in evidence by the claimant shows a road running the entire length of the Curran over the Chemung tunnel and within a few feet of its mouth. He testified that he hauled ore over this road, and was over it nearly every day in 1884 and 1886. He does not know whether there was any work done or not on the Chemung during those years, but testifies that he saw no evidence of any having been done; that if there had been anyone working there for any length of time he would have seen them. He was over this road less frequently in 1885, but saw no signs of any work having been done.

The witness Poos was working about one-quarter of a mile away during the years mentioned. He kept watch of the Chemung during 1884, with the intention of relocating it himself, if the annual work was not done. He saw no work done; examined the Chemung tunnel in the fall of 1884, and again in 1885, and found it in the same condition as the year previous. The same is true of 1886.

Hensley, one of the locators of the Medium, but not interested in it now, testified that he was well-acquainted with the Chemung ground from 1881; he "was there quite a number of times in the fall (of 1881) looking through the tunnel and prospecting it a little," with the view of taking a lease on it; was there again in 1885, and just before the relocation in 1886. He says there was no work done on the Chemung, since Dwyer quit in 1883. About a month before he relocated the ground he tried to get into the Chemung tunnel, "and it was caved in and filled in with ice and broken timbers so that he could not get in."

On behalf of the claimant, the witness Reed testified, in chief, that there was work done on the Chemung tunnel during January, February and March, 1884. He says that this work was done by one Coombs,

who had a lease on the property; that he did seventy-five feet in the tunnel; that he "was there a number of times;" that there was one man and sometimes two working. He does not say that he was in the workings at all during this period, but does say that he was not in the tunnel in 1885. He says that he had a lease on the Curran, Chemung and Highland Chief and worked in the Curran shaft; extended a drift toward the Chemung, which if extended would penetrate it; that the Curran shaft would be a part of the system for the development of both claims. On cross-examination, this witness claims to have had two leases on the Curran and Chemung,—one in 1883, and the other in 1884; one from Dr. Law, and the other from the Hamberg Company; one of them was written the other verbal, but he cannot state which one was written; that the one in the "Chemung tunnel" was in December, 1884, and he quit work there in June, 1885. He says, "I know it was in 1883 or 1884." Finally he admits that he is not sure he had a lease on the Chemung tunnel in 1884. The one on the "Curran shaft" he thinks he took in November or December, 1884, and went to work "in 1885, I think it was." He cannot tell what day or month it was. He drifted a little south of west from the shaft seventy-five or one hundred feet; was working the Highland Chief from the Curran shaft; made connection with the Highland Chief from this shaft. Says he got the lease for the purpose of working the Highland Chief, and all the ore he got was from its territory; that he spent from \$400 to \$600 "on the Curran shaft and all the drifts from it."

Kenens was interested with Reed in the lease in 1884 and 1885. He says he knows they worked through the Curran shaft, "and that is about all I know about it." He did not see any lease; his understanding was that it was a lease on the Curran shaft, and not on any other ground; they worked the Highland Chief through the drift. He did not hear the Chemung mentioned as being in the lease.

Dr. Law, who is vice-president of the Hamberg Company, says the annual work was done on the Chemung by Coombs in 1884 in the Chemung tunnel; that he made arrangements to have the work done "upon the claims" in 1885, "and I investigated and satisfied myself that it was done, and made an affidavit for the annual labor being performed." He says that the work was done also in 1886 by one Morrison to the amount of \$100 for each claim. "I do not know what amount of work was done," but he satisfied himself that it had been performed; that the work in the Curran shaft as sunk and the drifts extended from it was a part of a system for the development of all three of those claims. Says he does not think he saw anyone working on the Chemung lode in 1885; "I was up there, and I saw where there had been work done; it looked to be recent;"—this was near the mouth of the tunnel. He gave a lease to Morrison in April, 1886; they went to work on the Chemung tunnel "soon after they got the lease," . . . don't know how long they worked. "I do not know only what they told me;" was in the Chemung tunnel before the relocation in 1886. He says,—“I

think every lease that has been made there, but there might be one or two exceptions, required them, as part of the consideration as having the lease, to do sufficient work to cover the annual assessment on all claims." Reed testified that his lease did not require him to do the annual work. Dr. Law thinks he was mistaken in this statement.

Morrison testified that he had a lease on the "Chemung claim" in 1886; he won't be certain as to when he began work, but is "pretty sure it was in April," when he cleared out the mouth of Chemung tunnel and did some work inside; thinks he worked "the best part of the week." Cannot tell whether it was a few days after he got the lease that he began work, or a few weeks, and it is not sure that it was in the month of April. He worked in one of the drifts in the Curran shaft; does not know which direction it ran, but thinks it was southeast; it connected with the Highland Chief workings; thinks he worked there two or three days in April, 1886.

A certified copy of the lease from the Hamberg Company to Morrison is exhibited. It is dated April 14, 1886, and it is for "that portion of the property of said company known as the "Chemung tunnel," together with a space of two hundred feet on each side of the same. Also that part of said property known as the "Curran shaft" "with a space of two hundred feet on each side of the same." There is no condition in this lease requiring annual work, as such, to be done on the claims.

In rebuttal, it is shown by Mr. Dwyer, that there could not have been any work done in the Chemung tunnel, either in 1885 or 1886, because it was caved in and it was impossible to get into it. The road had broken down and filled it up. "They cut up the road, but the tunnel was filled with debris, ice and snow." The witness and a Mr. Thompson cleared out the tunnel in July, after the relocation.

It is not at all clear from this evidence that there was any work done on the Chemung tunnel during the years referred to. In his examination in chief, Reed says it was done by Coombs, who had a lease on the property. On his cross-examination, he says he had two leases,—one in 1883 and the other in 1884; that the one on the Chemung tunnel was given in December, 1884, and he quit work in June the following year. He is in doubt, evidently, as to the year he had this lease on the Chemung tunnel, whether in 1883 or 1884. But inasmuch as in his direct testimony he says positively that Coombs did work there in January, February and March, 1884, under a lease, and that he (Reed) was only there a few times, it is not unlikely that he may be mistaken in fixing his lease in 1894. His evidence on this point is not sufficient to overcome the *prima facie* case made by the protestant. It is simply an assertion. No facts are given from which a conclusion can be arrived at. He says they went seventy-five feet, yet he did not examine it to see. To do this in three months, one man and sometimes two were employed. There is much doubt and uncertainty in the mind of this witness as to his connection with this property, both as to the leases he

claims to have had and the work he did. On his cross-examination, much time was spent by counsel, in trying to get him to fix the year in which he claimed to have done work in the tunnel, but without avail. He seems to be able to remember with a reasonable degree of accuracy other events, in which he was interested at the period, but is utterly unable to fix the time with any degree of certainty when he did this work. He is equally uncertain as to whether this was under the written or verbal lease. It is to be remarked that no explanation is offered on behalf of the claimant, as to the failure to produce the written lease, or, in the event of its loss, a certified copy, as was done with the Morrison lease.

The only other testimony on the work for 1884, is that of Dr. Law, and it is subject to the same criticism as Mr. Reed's. He says he satisfied himself that the annual work had been done, but he does not say of what it consisted, or give any details by which it can be determined that he was right in his conclusion.

It is not claimed that any work was done in this tunnel on the original Chemung ground in 1885, or in 1886, except that testified to by Morrison and Law. The testimony on this point is not, in my judgment, conclusive. All Law knows about it is what some one told him. Morrison does not pretend to fix the date when he began work there. He will not say whether it was a few days or a few weeks after the execution of the lease. On the other hand, both Dwyer and Hensley testify positively that no work was done there that year, and give as their reasons for so asserting that the tunnel was inaccessible by reason of its having caved at the mouth, and was filled with debris, ice and snow until Dwyer and another cleared it out after the relocation.

I cannot escape the conviction that there was no work done or improvement made in the Chemung tunnel by the alleged owner for the years 1884, 1885 and 1886. It occurs to me that the testimony of the witnesses for the protestant, given as it was in a frank and candid way; their knowledge of the conditions that existed being the subject of rigid cross-examination, that in no wise broke the force of their statements, has not been overcome by the rather dogmatical assertions of the claimant's witnesses, accompanied as they were by doubt and uncertainty upon every important or material question that was testified to.

It is conceded that work was done in the Curran shaft in 1885 and 1886, but it is not shown by any convincing evidence that this would in any wise tend to the development of the Chemung, or, in fact, even the Curran itself. It is indisputably shown that this shaft was used only for the convenient working of the Highland Chief, upon which the parties had a lease, and not for the development of the Chemung group, or for the purpose of extracting ore therefrom. The only testimony in the record that asserts that this work would in any wise tend to the development of the group, is the naked assertion of the witnesses for the claimant, that it is a part of the general scheme for its development.

But it is not stated what that general scheme is. It is difficult to conceive how a drift, run from the bottom of this shaft in a southwesterly direction, which took it into the Highland Chief territory, tends to develop ground north and northwest of the shaft. At all events, it is not shown by competent evidence that this would be the result, and the Department cannot assume that it would do so upon the mere assertion of interested witnesses.

The Department is not unmindful of the fact that the rule is that "a forfeiture cannot be established except upon clear and convincing proof of failure of the former owner to have work performed or improvements made to the amount required by law (*Hammer v. Garfield*, M. D. M. Co., 130 U. S., 201-301).

The evidence in the case at bar, however, is as nearly clear and convincing as will ordinarily be presented on such a question. The protestant's witnesses, who are shown to have great familiarity with the ground are positive in their statements that the work was not done. This is met with mere general statements,—nothing specific or definite. If there were any affidavits made of annual labor, which under the State law are *prima facie* evidence of the fact, they are not offered in evidence. It would seem as if self-interest would prompt miners to have these made while the fact is fresh in their minds, and recorded, so as to be a perpetual memorial of their compliance with the requirements of the law. The protestants familiar with the conditions relocated the ground in 1886. The claimant allowed the matter to rest for about eight years, without making any effort to settle the controversy. It would seem as if it would have been to its interest to have tested the matter while the facts were fresh in the memory of persons familiar with them.

It seems to me that the preponderance of the evidence fairly establishes the fact that there was no work done in the Chemung tunnel during the years 1884, 1885 and 1886, and that that done in the Curran shaft did not tend in any wise to the development of the Chemung claim. The ground was, therefore, subject to relocation.

Your office judgment is reversed, and the entry by the Hamberg Company of the Chemung claim will be canceled.

RIGHT OF WAY—ACT OF MARCH 3, 1891—RESERVOIR SITE.

BLUE WATER LAND AND IRRIGATION CO.*

The provisions of the act of March 3, 1891, conferring right of way privileges for irrigation purposes over the public domain and reservations of the United States, do not contemplate the allowance of such rights over lands reserved by the government for reservoir sites.

Secretary Smith to the Commissioner of the General Land Office, June 9, 1896. (F. W. C.)

In your office letter of November 23, 1895, were presented the facts relative to a certain application pending in your office, filed by the

* Omitted from Vol. XXII.

Blue Water Land and Irrigation Company, for right-of-way under the provisions of sections 18 to 21, act of March 3, 1891 (26 Stat., 1095).

From the presentation made it would appear that said application, if approved, will amount to an appropriation of reservoir site No. 33, New Mexico, recommended for segregation under the act of August 30, 1890 (26 Stat., 371-391), by the Director of the Geological Survey, on February 27, 1891, and approved by the Secretary of the Interior August, 1894.

Your office letter states:

It has been the practice of this office to refuse to receive application for right-of-way upon these sites, and several have been rejected under this ruling. But the question having been raised whether such ruling was in accordance with the law, it has been considered best to submit the question for your decision before rejecting the present application.

By the act of Congress approved October 2, 1888 (25 Stat., 526), \$100,000 was appropriated—

For the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation, and the segregation of the irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows.

and it was provided that—

All the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches or canals are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act, to entry, settlement or occupation until further provided by law.

Under this legislation great bodies of land were reserved.

Your letter further states that—

On February 14, 1889, a resolution was adopted by the Senate providing for the appointment of a select committee of seven Senators to consider the subject of irrigation and the best mode of reclaiming the arid lands of the United States and to report at the next meeting of Congress thereafter what legislation is necessary for such irrigation and reclamation. A majority and a minority report were submitted by this committee on May 8, 1890, and with each report was a proposed bill to carry out the views respectively embodied in said reports. The bill submitted by the majority of the committee contemplated the reclamation of the arid lands and the construction of hydraulic works necessary for such reclamation by the inhabitants of irrigation districts to be formed in each State and Territory in the arid land region, under the supervision of a bureau of irrigation, which was to be established. The report of the minority stated that the effect of the bill proposed by them "was to reserve the sites for irrigating works until Congress should finally decide upon some method of disposing of them to the people." Both bills contemplated that works constructed in the irrigation districts should occupy the sites designated by the irrigation survey for the purpose of protecting the water rights in the several irrigation districts.

In his statement before this committee the Director of the Geological Survey, who was evidently the author of the bill proposed by the minority of the committee, said: "The reservoir and canal sites should remain in public possession in trust for the

people who will need them. The statutes already provide for their discovery, segregation and reservation, but some provision must be made for their utilization. It is manifestly not the purpose to reserve them from use, but to reserve them for use, and to prevent them from falling into the hands of individuals or corporations for speculative purposes. But to whom they shall be turned over for use, and under what conditions their utilization shall be permitted, is the problem to be solved." (Powell's statement, page 64, volume 4.)

It might further be stated, that in reply dated July 30, 1890, to the resolution of the Senate dated July 10, 1890, in relation to the selection of sites for reservoirs, the then Secretary (Mr. Noble) stated that the general purpose and plan of the Department under the law of October 2, 1888, was—

To do no more than to recognize the effect of the statute that imperatively reserves the reservoirs, ditches, and lands therein expressly named; and by appropriate executive action to let it operate distinctively upon the vast territories to which it applies by its own terms; preserving now as rapidly as possible the sources of water supply from the possession or appropriation by individuals or corporations that could thereby dominate all the people dependent for the fertility of their farms and the preservation of their homes upon the element of water. It is believed to be the duty of this Department so long as this statute remains to enforce it, that its fruits, at least in the preservation of the sources and reservoirs of water, may be kept under either National or State governmental control.

It must be clear from this recitation that all the reports on this subject were as a unit on one proposition, viz., the continued reservation of the advantageous *sites* for public good, as against private appropriation for gain, but the matter at issue was the means of utilization to accomplish the desired results.

With these reports before them, Congress by the act approved August 30, 1890 (26 Stat., 391), provided that—

So much of the act of October second, eighteen hundred and eighty-eight, entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes," as provides for the withdrawal of the public lands from entry, occupation and settlement, is hereby repealed, and all entries made or claims initiated in good faith and valid but for said act, shall be recognized and may be perfected in the same manner as if said law had not been enacted, except that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by said act, until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof.

It will thus be seen that the plan of reserving the arid lands, rendered subject to irrigation from the sites selected was abandoned, but the reservation of the sites was continued "until otherwise provided by law."

The Secretary of the Interior in his report dated November 1, 1890, for the fiscal year ending June 3, 1890, states as follows upon the subject of the utilization of these reservoir sites:

The act, it will be perceived, reserves from all lands west of the one hundredth meridian a right of way thereon for ditches or canals constructed by authority of the United States.

It needs but a moment's reflection to recognize that these reservoir sites must be upon very high ground for the most part to gain those natural depressions in the mountains or foothills where the water can be garnered in vast volume; that this water will be gathered in the season when the streams are full and overflowing, so that the amount caught in the reservoirs will not deprive any one of his own abundant supply at that time, and were it not so reserved this overflow would go to waste; that both to conduct the water to the reservoir in the flood season, and thence back into the bed of the stream in the dry season, ditches must exist under the same control as that which commands the reservoirs.

In this connection it is also to be recognized that when these reservoirs exist they will be, with the water they contain, the absolute property of the United States on its own soil and not in any degree dependent upon the stream, which they are rather to supply than to exhaust.

Many of the streams also upon which these reservoirs will be, will run not only between States or between Territories or between Territories and States, but one or more also between Mexico and the United States; and thus the rapid expansion of the system of irrigation now already in progress and to be greatly increased both in extent and completeness, will be apt to exhaust the small supply of the summer stream and leave its bed quite dry before it reaches its ordinary mouth, and even at points near the reservoir, as well as at a distance, the tillers of these arid lands will be dependent for water upon these basins. Whatever authority, therefore, commands this water, the time of accumulation, of its supply and its use, will have control not only of the prosperity, peace and even liberty of the people there, but possibly of the friendship of neighboring States and Territories, and also that between ourselves and the Republic south of us.

It will be an immense expense to make dams of such solidity and skillful construction as will assure safety to valleys and lands below, and appropriate ditches to and from the basins, or through lands, and Congress may not deem it best to build them, but may consider that the use of the lands segregated for reservoirs should be placed under local control for proper use in irrigation.

Therefore, in view of the facts and ideas already mentioned, the Secretary would urge that Congress should without delay enact comprehensive laws, determining the national policy in this business, and, if the reservoirs are subject to local control particularly guarding against such misuse of the powers granted as would either allow the upper lands to absorb the water continuously through the dry season, or the authorities to require any but the cheapest and most liberal terms for its transportation to the inhabitants and farmers.

The act should sanction its provisions and reservations to these ends by the most severe penalties of forfeiture of the privileges conferred, and of all improvements, with absolute and immediate resumption by national control to preserve and effect its original purposes.

It is believed that if this is done there will never be any occasion for the exercise of the reserved powers, but that with less than this the national government will abdicate its authority in a matter of vast importance to great areas of its lands and millions of its people, and find itself impotent to legitimately control affairs in emergencies that by foresight and wise legislation may now be prevented.

After referring to the report above quoted your office letter concludes:

It is therefore clearly shown that both the legislative and executive departments contemplated that some practical and systematic plan would be adopted for the reclamation of the arid lands under the direction of the general government or by the inhabitants of irrigation districts to be established in the several States and Territories, and that the sites reserved under the act of 1888 would remain segregated for such use and not for private ownership. But Congress failed to pass either

bill, or to provide a plan for the utilization of these sites by the general government, or by the public, but by the act of March 3, 1891, granted the right of way through the public lands and reservations of the United States to any canal or ditch company formed for the purpose of irrigation and the right to appropriate the public lands for the construction of reservoirs to the extent of the grounds occupied by the water of such reservoirs and of the canal and its laterals and fifty feet on each side of the marginal lands thereof.

It being evident that the reservation of these sites was for the sole purpose of preventing their appropriation under the general land laws in order that they might be used in the construction of reservoirs for the purpose of reclaiming the arid lands made susceptible of irrigation thereby, and that Congress failed to make any provision for their use by the general government or the public, after its attention had been called to the pressing necessity of immediate legislation providing for the use of such sites, would it not appear that the act of March 3, 1891, passed at the close of the Congress was intended to provide the means for the utilization of those sites and that it fulfilled the purposes contemplated by their segregation?

Two objects controlled in the selection of these sites by the Geological Survey: 1. The availability of the site itself, and 2, the desirability of the particular lands to be irrigated from the body of lands made susceptible of irrigation by the storage of water in such reservoirs. But these are not the only locations that can be successfully used to store water for the irrigation of these same lands, and if these sites cannot be appropriated under the act of March 3, 1891, other sites will be selected for the storage and distribution of the water for the irrigation of the same lands under less economical conditions which will result in rendering the selection by the Geological Survey absolutely valueless for the reason that all the available supply of water in that particular region is stored and utilized by the constructed reservoir. In fact, locations for reservoirs have been selected and approved under the act of March 3, 1891, either because the site was supposed to be more advantageous than the site selected by the government, or because the appropriation of such sites was denied under the right-of-way act, which has resulted in rendering the site selected by the Geological Survey of no practical use for the purpose contemplated by its segregation.

After a most careful review of the entire matter, I am unable to agree with the suggestion covered by your report, to the effect that the purpose of the 18th section of the act of March 3, 1891 (26 Stat., 1095), was to provide a means of utilization, of the sites selected under the acts of October 2, 1888 (*supra*) and August 30, 1890 (*supra*).

By the 17th section of said act reservation of these sites was specifically declared, but was restricted to the land actually necessary for the construction and maintenance of the reservoirs.

Said section reads—"That reservoir sites located or selected and to be located and selected," etc., thus evidencing not an abandonment of the original purpose of reserving the sites but their continuation.

For what purpose? surely, not that they might be held for individual appropriation, as would be possible if sections 18, 19 and 20, were held to embrace them within its scope.

It is true the 18th section grants "the right of way through the public lands and reservations of the United States" to any canal or ditch company organized under the laws of any State or Territory, which shall comply with its conditions, but the word "reservation" as here used, is limited by the proviso to the section which provides—

That no such right-of-way shall be so located as to interfere with the proper occupation by the government of any such reservation.

For the reasons before given, it must be held that the occupation by the government here referred to includes future, as well as present, occupation, and to permit the appropriation of these sites by private corporations and individuals, and at the same time retain the occupation of them by the government, would be impossible.

I am, therefore, of the opinion that the practice which has prevailed since the passage of the act of 1891, is proper and that the scope of the privileges granted by said act does not include these reservoir sites.

ALASKAN LANDS—OCCUPANCY—SURVEY.

W. H. H. HART.

The evident intendment of section 12, act of March 3, 1891, is that claimants must be in possession and occupying the tracts sought to be entered by them for the purpose of trade or manufactures, at the date of application to have the survey made, with such trade or manufactures in actual operation at such time.

The land taken under said section must be as nearly as practicable in a square form.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 28, 1896. (W. M. B.)

This is an appeal by W. H. H. Hart from your office decision of May 14, 1895, wherein was rejected survey No. 105, executed by Albert Lasey, U. S. deputy surveyor, under provision of sections 12, 13 and 14 of the act of March 3, 1891 (26 Stat., 1095), of a tract of land comprising 159.61 acres, situate on Coal Point, Kachemak Bay, Cook's Inlet, district of Alaska, and claimed by Hart; the survey being rejected upon the ground that the said claimant was a non-resident, and that the tract was not occupied for any purpose—there being no business in operation thereon, the particular business which the claimant proposed to engage in and conduct upon the land being entirely prospective.

Hart's location which is marked off by this (No. 105) survey, which appears from the record submitted to be a mere location of a body of land without occupancy, includes within the limits thereof a tract something over one mile in length, with an average width less than one fourth of a mile, and adjoins the location of H. M. Witherbee described by survey No. 106 to the northwest. That the tract, being in the above described shape fails to conform to the statutory requirement as to "square form," will be noticed later on herein.

It also appears that the only effort made by the claimant in the way of making any improvement upon the tract consists of an unfinished log cabin eighteen by fifteen feet square, and about twelve feet high, there being in close proximity thereto valuable improvements erected

by the Cooper Coal and Commercial Company, and the Alaska Coal Company, containing stocks of general merchandise, valued at several thousand dollars each, and placed there by the said companies for the purpose of conducting a general trade in connection with the shipping of coal from their mines in process of development and near at hand.

As stated in your office letter of May 12, 1895, protests have been filed against the approval of this survey by the said companies and certain individuals therein named, based upon a statement of facts made under oath. The said protestants themselves assert actual possession and occupancy of, and a superior right to, the land involved.

As disclosed by the record it would seem that claimant seeks to enter this tract for the purpose of erecting in the future coal bunkers and wharves on the southeast extremity thereof for the shipment of coal, no work as yet having been done on the contemplated improvements. For a non-resident, as claimant is shown to be in the case at bar, to partially complete a log cabin of the description given above on a tract of land preparatory to engaging in a business or trade thereon subsequent to the application for, and execution of, the survey, without actual occupancy of any portion of such tract at said time, would not warrant or justify the approval or acceptance of the survey.

It is unnecessary to refer more at length to the grounds upon which the protests above alluded to are founded, or to consider the materiality thereof, since, aside from and independent of any rights which the protestants may be supposed to have in this tract, appellant's claim to have the survey accepted is not protected by the provision of section 12 of said act of March 3, 1891, the evident intendment thereof being that claimants must be "in possession and occupying" tracts sought to be entered by them for the "purpose of trade or manufactures" at the date of application to have such survey made, with such trade or manufactures in actual operation at such time. Appellant alleges no such state of fact in connection with this survey.

Furthermore, the tract is more than four times as long as it is broad and therefore does not conform in that respect to the statutory provision, and the rules and regulations formulated in accordance therewith, requiring the lines of the survey to be so run as to embrace a tract of land as "near as practicable in a square form." By an examination of the survey under consideration, and the plat thereof, it will be readily observed that the tract surveyed, as indicated on the said plat, is not essential in its unnecessary elongated and existing form for the transaction of the ostensible business—yet to be put in operation and therefore *prospective*—which the claimant Hart alleges he has in view.

For the foregoing reasons your office decision rejecting survey No. 105 is hereby affirmed.

REPAYMENT—PAYMENT TO RECEIVER.

FRANCIS J. DYSART.

The payment of the purchase price of land to the receiver before the acceptance of final proof is at the risk of the purchaser, and if said proof is rejected and the receiver fails to account for the money so paid, the right to repayment from the government cannot be recognized.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 28, 1896. (E. B., JR.)

On October 25, 1895, Francis J. Dysart filed his application claiming a right to repayment by the United States, under the act of February 15, 1893 (27 Stat., 456), of three hundred and twenty dollars which he alleges he paid Fred W. Smith, then receiver of the land office at Tucson, Arizona, as final payment or purchase money for the SW. $\frac{1}{4}$ of section 13, T. 7 S., R. 26 W., for which tract he made desert land entry No. 450 April 15, 1885. Your office denied his application November 12, 1895, on the ground that the case he presented did not come within the provisions of said act, and that there was no law authorizing repayment in such a case. He appeals, contending that both the act aforesaid and the act of June 16, 1880 (21 Stat., 287), authorize the repayment sought.

The records of the local office show that Dysart submitted final proof in the matter of his said entry, and that the same was rejected by the local office February 22, 1887,

on the ground that the land, or a portion of it, had been occupied, cultivated and reclaimed prior to entry, and that you (he) failed to prove entire reclamation of the tract,

and that the letter of rejection contained the usual notice of the right of appeal; but neither they nor the records of your office afford any evidence of the payment of purchase money as alleged. The records of your office show that said entry was canceled April 30, 1887, upon the voluntary relinquishment of Dysart dated March 2, 1887; Dysart further alleges that he handed the sum specified above to said receiver, at the time he offered his final proof, to be applied in payment for the land, and that he received the said letter of rejection, but that the said sum, nor any part thereof was ever returned to him.

It would appear from the record and Dysart's allegations that the said sum was probably handed to the officer named to be applied by the latter as purchase money for the land (which was double minimum land being then within the limits of the grant to the Texas Pacific Railroad) in the event of the acceptance of the final proof. Until such acceptance there could be no sale or final entry of the land under Dysart's entry, and the money was the private property of Dysart.

Not having ever become public funds no responsibility for its return could legally attach to the government.

The arrangement by which the receiver was its custodian until it should be applied as purchase money for the land, subject necessarily to the acceptance of the final proof, was for the convenience of himself and Dysart. His failure to return it upon the rejection of the final proof was a private wrong or tort against Dysart for which the receiver only, and not the government, was legally responsible (Am. and Eng. Ency. of Law, Vol. 19, p. 514, and authorities there cited). As was said by the supreme court in *Gibbons v. United States* (8 Wall., 269),

No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents.

And again, in the same decision, concerning the question of the government's responsibility:

It does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it, in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests.

The acts of February 15, 1893, and June 16, 1880, (*supra*), provide for the return only of money which has actually been received by the government, under certain specified conditions. The money which Dysart asks that the government shall restore to him was never received by it. Said acts clearly can have no application to his case.

The denial of his application is therefore affirmed.

ALASKAN LANDS—AREA OF CLAIM—SURVEY.

CHARLES A. JOHNSON ET AL.

The right to purchase lands in Alaska for purposes of trade or manufactures does not extend unconditionally to one hundred and sixty acres, but only to so much as may be actually occupied for the purposes named, in no case to exceed one hundred and sixty acres.

The requirement that such land shall be taken in "square form" means that the tract claimed should be surveyed and laid off in the form of a rectangular equilateral parallelogram, as nearly as the configuration of the land will permit.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 28, 1896. (W. M. B.)

This is an appeal by Charles A. Johnson and William H. Metson from your office decision of May 9, 1895, wherein was suspended survey No. 71, executed by Clinton Gurnee, Jr., U. S. deputy surveyor, under provision of sections 12, 13 and 14, act of March 3, 1891 (26 Stat., 1095), and regulations thereunder (12 L. D., 583), of a tract of land containing 109.08 acres, situate on Ugashek river on the western coast of the Alaskan Peninsula, a portion of which tract is occupied and used for a salting and fishing station; said survey being suspended

for the reason that more land is claimed than is occupied and used by claimants for the purposes of their business, and also because the regulation as to square form has not been complied with.

In your said office decision you state:

It is suggested that if the survey was amended by beginning at a point on the line of ordinary high water 4.40 chs. S. $2^{\circ} 15'$ W. of corner No. 1 of the original survey; thence S. $87^{\circ} 45'$ E. 10 chs.; thence S. $2^{\circ} 15'$ W. 10 chs.; thence N. $87^{\circ} 45'$ W. to line of ordinary high water mark; thence along said line to point of beginning, final action by this (your) office would be greatly facilitated. Such an amended survey would include all the land occupied by the claimants for their business, an area of ten acres.

In appealing from said decision claimants file assignments of error as follows:

1. That under the act of March 3, 1891, the claimants are entitled to one hundred and sixty acres of land.
2. That the survey as returned by the deputy covers the tract claimed according or within the monuments of the claimant's location.
3. That the square form alluded to in said act relates not to technical measurement, but substantially to conform to the system of government surveys, so as to include the lands occupied by the claimants and adjoining thereto, to the extent of one hundred and sixty acres.

Under provision of the act of March 3, 1891, the claimants are not entitled, unconditionally, to one hundred and sixty acres of land, but only to so much as may be in their possession and actually *occupied* by them for the purpose of conducting the trade in which they are engaged; in no case to exceed one hundred and sixty acres; and to be "as near as practicable in a square form."

With respect to such square form, the regulations (12 L. D., 587, par. 4) issued under the act of March 3, 1891, for the purpose of carrying out the provisions thereof, respecting the survey and purchase of non-mineral public lands in Alaska, require that such lands must be surveyed so as to be laid off "in one compact body, and as nearly in square form as the circumstances and the configuration of the land will admit." Such requirement can mean nothing more nor less than that lands claimed and sought to be purchased under said act and regulations should be surveyed and laid off in a shape similar to that of a *rectangular equilateral parallelogram* as near as the configuration of the land will allow. The tract embraced in this survey was not laid off in square form as near as practicable, it, being about six times as long, from north to south, as its average width, from east to west, and the survey appears to have been made with a view of covering as extended a shore line as possible.

The land laws, with respect to the non-mineral public lands, are not in force in the district of Alaska, nor has any general system, as yet, been put on foot for the survey of such lands, hence there is no force in the contention of appellants that these special surveys made under the provision of the cited sections of the referred to act should conform

to the system of government surveys of the public lands so as to include lands occupied by claimants, as well as those *adjoining* thereto, according to the monuments of the claimants' location; to the extent of one hundred and sixty acres. Such contention would evidently imply that occupancy of a part of a tract was occupancy of the whole tract, and that claimants are entitled to purchase one hundred and sixty acres, in other shape than square form, where there was occupancy of a very small portion of the tract for which application to enter is made. Such is not the case. The survey of lands in the district of Alaska will only be recognized and accepted when made in conformity with special statutory provision, relating thereto, and the rules and regulations formulated thereunder.

The quantity of land, to be taken in the form suggested in your office letter as an emendation of the original survey, would give to appellants, it would appear, all the land which they actually occupy and therefore to which they are entitled under the law.

For the foregoing reasons your said office decision suspending survey No. 71 is hereby affirmed.

CONTEST—INFORMATION—CORROBORATION—AMENDMENT.

LOWENSTEIN *v.* ORNE.

After a hearing has been directed by the Department on the charge set forth in an affidavit of contest, the subsequent retraction of the statements in the corroboratory affidavit, does not warrant the General Land Office in revoking the order for the hearing issued under departmental direction.

The right to amend an affidavit of contest should be recognized where no new ground of attack is introduced thereby.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 28, 1896. (J. L. McC.)

On August 10, 1893, Orne made homestead entry for Lots 3 and 4 and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 4, T. 11 N., R. 3 W., Oklahoma land district, Oklahoma Territory.

On the same day Isaac Lowenstein filed affidavit of contest against said entry, in which he alleged that defendant entered upon and occupied a portion of the lands opened to settlement by the proclamation of the President of the 23d of March, 1889, prior to 12 o'clock, noon, of April 22, and subsequent to the 2d day of March, 1889, and that said entry was not made in good faith, but the same is fraudulent and void, in that the said entryman had theretofore entered into a collusive arrangement and understanding with divers other persons, including one Argo, whereby the said parties were and are to receive title to a part and portion of said above described tract, by and through said homestead entry and claim of the said Edward Orne.

The defendant Orne filed a motion to dismiss the contest because the first charge had been tried and determined in the case of *South Oklahoma v. Couch et al.* (16 L. D., 132), and because the second charge, of fraud, collusion etc., did not state facts sufficient to constitute a cause of action, in that no specific charge was made. The local officers sustained the motion as to the first charge, and as to the second charge also unless plaintiff amended it, leave to do which was granted. The plaintiff did not avail himself of the privilege and the case was dismissed.

On June 18, 1894, the plaintiff appealed from the action of the local officers, assigning as error their action in sustaining said motion. On December 13, 1894, your office considered said appeal and sustained the action of the local officers, as to the first charge in the plaintiff's affidavit, but overruled them as to the second charge, holding that a cause of action was therein stated, and directing that a hearing be had thereon.

From this decision both plaintiff and defendant appealed to the Department, plaintiff alleging that your office erred in not overruling the action of the local officer in reference to the first charge in the affidavit of contest, and defendant alleging that it was error to order a hearing on the second charge in said affidavit, because of its vagueness and insufficiency.

The Department upon consideration of the case found that the qualifications of Orne had been put in issue by the proceedings in the Couch case (*supra*), and held that a second hearing on that charge should not be allowed; but as to the second charge—that of having entered into a speculative contract—the Department held the contest affidavit to be sufficient to warrant a hearing, and therefore affirmed your decision. Your office thereupon ordered the hearing to proceed.

Said contest affidavit was corroborated by one Thomas Wright. On March 21, 1896, said Wright made affidavit that—

He did not intend to corroborate in his said affidavit any charge of an illegal contract on the part of defendant Edward Orne; that if said affidavit contains such charge he did not know it at the time, and did not mean to corroborate the same; that your affiant can not read, or write except his own name, and that it was explained to him that he was simply swearing to the charge of soonerism; . . . and that, for the reasons above given, and that justice may be done to all concerned, he does now desire to withdraw and retract all of the said affidavit and asks that it be not considered.

The above affidavit was transmitted to your office, which thereupon, April 16, 1896, revoked its order for a hearing, and dismissed the contest.

Lowenstein has appealed from said decision, alleging, in substance, that after a hearing has been formally ordered, all questions as to the sufficiency of the information upon which it was ordered are removed from the case.

In this he is unquestionably correct. See departmental decisions in

cases of *Houston v. Coyle* (2 L. D., 58); *Koons v. Elsner* (2 L. D., 65); *Edward F. Fritzsche* (3 L. D., 208); and many others since.

He contends further that it was error to hold that,

after a hearing had been ordered by the Department upon the information as filed herein, the procurement and filing of a withdrawal of the corroborating witness upon said information operated to rescind the said order of hearing, and was cause for dismissing the contest of appellant.

It would have been proper for your office to have forwarded the corroborating witness' retraction of his affidavit and his request to be allowed to withdraw the same, to the Department for its information and consideration, with request for instruction what course to pursue in view thereof; but the revocation of the order for a hearing amounted practically to nullifying the decision rendered by the Department in the case, and therefore was erroneous.

Appellant applies for leave to amend his said contest

by filing other and further corroboration of the charge therein, and by rendering the charge more specific, in that said entryman had actually conveyed a part and parcel of said tract by instrument in writing, contrary to law, and prior to the date of contest herein, and had actually delivered possession of said parcel of land, which said possession has at all times since remained in the grantee named in said conveyance, and further asks leave to file as corroboration of said amended charges certified copies of said instrument of conveyance and affidavits showing such delivery of possession; and appellant asks that such charge so rendered more specific under said leave to amend be held to relate back so as to cut off intervening contests.

The Department has held in the case of *Grant v. Rutledge* (23 L. D., 49):

The manifest trend of departmental decisions is to allow amendments, even in the face of an intervening claim unless they introduce a substantially new ground of contest, or else differ essentially from the original affidavit, so as to prejudice the right of the intervening claimant.

In the case at bar the amendment suggested is not substantially a new ground of contest; it is simply an offer to supplement the charge of speculative intent heretofore made by proof that it had been actually carried into effect.

In the case of *Wallace v. Woodruff* (19 L. D., 309)—*syllabus*—the Department held:

The amendment of an affidavit of contest relates back to the original, and excludes intervening contests, where the said amendment does not introduce a new ground of contest, but merely makes more specific and definite the original charge.

I am of opinion that it was an error on the part of your office, under the circumstances set forth, to revoke the order for a hearing and dismiss the contest.

The decision of your office is, therefore, reversed; contestant will be permitted to amend his contest affidavit as prayed for; and a hearing will be had, with due notice to all parties interested, at which he will be afforded an opportunity to prove the allegations contained in said contest affidavit as amended.

RAILROAD LANDS—ACTS OF 1887 AND 1890.

KENDRICH ET AL. *v.* PERDIDO LAND CO.

The agreement of a transferee of the Mobile and Girard R. R. Co. to accept, under section 8, act of September 29, 1890, a *pro rata* share of the lands earned by said company, and the consummation of such agreement, do not operate as a waiver or abandonment of the right on the part of said transferee to subsequently apply for relief under section 4, act of March 3, 1887, as to lands purchased from said company but not secured through said *pro rata* adjustment.

An application for patent under section 4, act of March 3, 1887, to lands erroneously certified on account of a railroad grant must be denied, where the want of good faith, both on the part of the original purchaser and the subsequent transferees is apparent.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(W. A. L.) August 28, 1896. (G. B. G.)

The case of Alonzo Kendrick *et al. v.* The Perdido Land Company is before the Department on the appeal of the company from your office decision of February 12, 1895, rejecting said company's application for patent for certain lands therein described, under the act of March 3, 1887 (24 Stat., 566).

The history of this case and the legislation affecting the same is as follows:

Congress by the act of June 3, 1856, (11 Stat., 17) made a grant to the State of Alabama to aid in the construction, among others, of a railroad from Girard to Mobile in said State. June 1, 1858, the Mobile and Girard Railroad Company, grantee of said State, filed its map of definite location, which was approved. In 1860 and 1861, prior to the construction of any part of the road, there were certified to the State, under said grant, 504,167.11 acres, and by appropriate legislation the lands herein applied for were by the State conveyed to the Mobile and Girard Railroad Company. In 1872, and subsequently, the company sold the lands applied for to Josiah V. Thompson, and by mesne deeds the lands were conveyed to the applicant. The railroad company built its road from Girard to Troy, a distance of eighty-four miles. By the forfeiture act of September 29, 1890 (26 Stat., 496), said grant opposite unconstructed road was forfeited, but by the 8th section thereof the railroad company was entitled to an amount of lands equal to that earned by the construction of the eighty-four miles of road, and the act directs the Secretary of the Interior in making settlement with the railroad company to include all the lands sold or disposed of by said company, not to exceed the total amount earned. By direction of the Secretary of the Interior the applicant, with all other purchasers and claimants, filed its claim under its purchase in the General Land Office, and on October 25, 1892, the Commissioner, in submitting an adjustment of the grant under said 8th section to the Department, passed upon all of said claims, holding that inasmuch as the railroad company

had sold all the lands certified to it before the passage of said act, amounting, as before stated, to 504,167.11 acres, and said company having earned only 302,233.97 acres, that, therefore, said purchasers should receive their *pro rata* share of the lands so purchased, excepting the heirs of one Abraham Edwards, whose claim was rejected.

On December 22, 1892, the "large purchasers" entered into an agreement to *pro-rate*, allowing the heirs of Abraham Edwards to participate, and on April 24, 1893, the Secretary passed upon the report and recommendation of the Commissioner aforesaid, and awarded and allotted to each purchaser his *pro rata* share of the lands, amounting to 58 per cent of their respective purchases.

On May 4, 1892, the residue of the lands were ordered to be restored to the public domain on July 19, 1893, after due notice by publication.

On June 29, 1893, the Perdido land company filed its application in the local land office at Montgomery, Alabama, under the 4th section of the act of March 3, 1887, for patents to the residue of its lands under its purchase, and this application is now before the Department on appeal from your office decision of February 12, 1895, rejecting said application as aforesaid.

There are a number of errors assigned by the appellant, but there are only two questions of controlling importance in the case.

1st. Had the lands herein applied for been sold by the grantee company to a qualified person or persons, purchasing in good faith, prior to the passage of the act of March 3, 1887?

2d. Has the Perdido Land Company, by reason of its agreement to *pro rata* under Sec. 8 of the forfeiture act of September 29, 1890, waived, abandoned, forfeited or exhausted its right to patents for the lands applied for under the 4th section of the act of March 3, 1887?

The last question involves the consideration of two acts of Congress, which do not appear to have been passed upon by the Department in their relation to each other and the issue presented, and will be considered first.

By the 8th section of said act of September 29, 1890, it was provided,

That the Mobile and Girard Railroad company of Alabama shall be entitled to the quantity of land earned by the construction of its road from Girard to Troy, a distance of eighty-four miles, and the Secretary of the Interior in making settlement and certifying to or for the benefit of said company the lands earned thereby shall include therein all the lands sold, conveyed or otherwise disposed of by said company, not to exceed the total amount earned by said company as aforesaid, and the titles of the purchasers to all such lands are hereby confirmed so far as the United States are concerned.

When the General Land Office came to the adjustment of this grant under the section quoted, it became apparent that the company had not earned sufficient land to satisfy the claims for "lands sold, conveyed, or otherwise disposed of" by said company, and, as has been seen, the Perdido Land Company, with other large purchasers, agreed to *pro-rate* its claims.

I do not understand by this agreement that the participants thereunder had any intention of abandoning any rights they may have had under the act of 1887 (*supra*). The third section of the said act of September 29, 1890, provided among other things,

That nothing in this act contained shall be construed as limiting the rights granted to purchasers or settlers by "an act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes," approved March 3, 1887, or as repealing, altering, or amending said act, nor as in any manner affecting any cause of action existing in favor of any purchaser against his grantors for breach of any covenants of title.

It would appear then that it was not the intention of Congress by the 8th section of the act of 1890, to take away or limit any rights of purchasers granted by the 4th section of the act of 1887 (*supra*). The object of said section 8 was to confirm to the Mobile and Girard Railroad Company's grantees, a number of acres of land earned by said company. The lands sold by the company were directed to be included in the list of lands directed to be certified thereunder,—lands that had been sold, without regard to the fact whether these lands were opposite to and coterminous with, the constructed portion of the road. In other words, lands anywhere within the limits of the grant were to be certified to the company to the extent of the number of acres earned, if they had been sold by the company. It is worthy of notice too, that this section does not limit the certification provided for to lands that have been purchased in good faith from the railroad company. It is sufficient if they "had been conveyed, or otherwise disposed of by said company."

It would seem, therefore, that this section was an absolute confirmation of all sales to the extent of the number of acres earned without regard to the good faith of the purchasers. It is not surprising then that those applicants should have invoked the benefits of this act, or that they should have agreed to a pro-rating of lands thereunder. Such pro-rating made an early adjustment possible, and until such adjustment there was no authority of law for the assertion of any right under the act of 1887, that act providing for making the proof required by the 4th section thereof only "after the grants respectively shall have been adjusted." After the adjustment of the grant, and before the lands applied for were restored to the public domain the Perdido Land Company filed its application for the residue of lands under its purchase. It is unfair and altogether unreasonable to suppose that the applicant company had any intention of abandoning its claim under the act of 1887 by accepting a pro-rating under the act of 1890. Such is not the necessary or reasonable effect of the legislation affecting those rights, and the applicants will not be presumed to have abandoned a substantial right guaranteed by law in the absence of any apparent advantage gained thereby.

The company had a right to rely on the express provision of the act of 1890, that no rights guaranteed to purchasers by the act of 1887

should be taken away or limited by the act of 1890; and I am clearly of opinion that if the applicants had any rights under the act of 1887, that they are not affected by the act of 1890, or the proceedings had thereunder.

This brings us to the question of good faith in the purchasers. The act of March 3, 1887, *supra*, provides in the fourth section thereof:

That as to all lands . . . which have been erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States . . . the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land office within such time and under such rules, as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting.

The lands applied for herein were erroneously certified to the State of Alabama for the use and benefit of the Mobile and Girard Railroad company. The railroad company sold to one Josiah V. Thompson prior to the passage of the act above quoted.

The record shows that the Perdido Land Company is the remote assignee of Thompson. The facts connected with Thompson's purchase from the railroad company are substantially as follows—

The lands were certified to the railroad company in 1860. After the civil war the State of Alabama levied tax on the lands, including back years, and they were finally sold by the State for these taxes, and bid in by the State. By a resolution of the board of directors, W. J. Van Kirk, then agent for the railroad company, was instructed to sell the equity of redemption in the lands at a price fixed by the board. Van Kirk went to Pennsylvania and induced Thompson to buy them, he paying at that time and subsequently about \$10,000.00 to the railroad company, and about the same amount to the State to redeem the lands, making the consideration in all about seventeen cents per acre. Van Kirk represented to Thompson that it was a good investment, and gave his personal pledge that should he (Thompson) become dissatisfied with his purchase, that he (Van Kirk) would take it off his hands and repay him the purchase money. Some years later, when Congress began to agitate the question of the forfeiture of the grant, Thompson sold the land to Van Kirk and others, the consideration expressed in the deed being \$25,000.00. Then followed the organization of the Perdido Land Company, the applicant, and the lands were conveyed to it, and stock issued to each one of the purchasers, according to his respective interest.

It appears further that Van Kirk was a kinsman of Thompson, and he admits that he is the present owner of nine-tenths of the stock of the Perdido Land Company.

The following questions and answers appear in his testimony on cross-examination.

Q. How much money was furnished you by Josiah V. Thompson to buy the lands

from the M. & G. R. R. Co., as shown by deeds, when you went to Pennsylvania for the purpose of interesting him in this purchase?

A. Forty-eight hundred dollars (\$4,800.00).

Q. Have you at any time—subsequent to the sales by the H. & G. R. R. Co. to Josiah V. Thompson—returned to said Thompson any part of the original purchase price paid by him for said lands?

A. Thompson never would admit that he owned any of these lands, but held them as trustee, because he thought the title doubtful, his lawyers told him that he would never get the title. I paid him back the money that he paid.

In one view of the law, I might easily rest the case here on the admission of Van Kirk that "Thompson never would admit that he owned any of these lands." There was no purchaser in good faith from the railroad company, and it might be argued with force that assigns would take the land charged with the bad faith of the original purchaser. But assuming that the statute intended to confirm the title of these lands in the hands of good-faith purchasers, regardless of the character of the original purchase from the company, the record does not show the Perdido Land Company to be a good-faith purchaser. On the contrary, the evidences of bad faith are abundant. It is apparent that it was from the beginning Van Kirk's scheme of self-aggrandizement which was paramount. He furnished much at the beginning and eventually all of the money paid for these lands. Instead of having Thompson convey direct to him, the conveyance was made to A. C. Blount, Jr., as trustee for W. J. Van Kirk and others, without consideration. At this time Van Kirk was sole owner of the lands. Blount conveyed to the Perdido Land Company, it appears, without consideration, although \$25,000.00 is the consideration named in the deed. This last conveyance was made, it is admitted by Van Kirk, in anticipation of a legal fight, on the advice of counsel.

I must, therefore, hold that the Perdido Land Company is neither a purchaser in good faith nor an assign in good faith, and, therefore, in any view of the statute, has no rights under the fourth section of the act of 1887. A knowledge of the conditions of the grant, its liability to forfeiture, which the purchasers had, and were charged with, rendered impossible a purchase in good faith.

As further persuasive of this view it appears that the Committee on Public Lands of the House of Representatives (48th Congress, 2d Session; Report 2501), presented and recommended for passage a bill to declare a forfeiture of this grant and took the same ground.

It appears further from your office decision herein, and is not explained on appeal, that Mr. M. D. Brainard, who was attorney for Thompson and the Perdido Land Company before this Department in the matter of the adjustment of the grant, declared "that there are no *bona fide* purchasers or innocent purchasers for value of any of the Mobile & Girard Railroad lands."

The fact that the company has been allowed to take part of the lands purchased under the act of 1890 is no argument in support of its

present contention. That act did not prescribe as a prerequisite condition good faith in the purchase, and even if it had, the pro-rating made thereunder was by agreement of purchasers with conflicting claims, and the then Secretary disclaimed any intention of passing on the good faith of the purchase.

The decision appealed from is modified to meet the views hereinbefore expressed. The company's application is dismissed.

DESERT LAND CONTEST—EXTENSION OF STATUTORY LIFE OF ENTRY.

HODGSON v. EPLEY.

A motion to dismiss an appeal taken from an action lying within the discretion of the Commissioner will not be considered, where the appeal has been duly allowed, and the case presents a new question for departmental adjudication.

The effect of the act of July 26, 1894, on desert land entries, was to extend the time for making proof and payment for one year beyond the time at which the same were due, or would thereafter become due under the law as then existing. Said act is not limited to entries alone which were alive at that date, but is also applicable to old entries which remained of record uncanceled at the date of its passage.

A desert entryman under the act of 1877 who, after the expiration of his entry, and prior to the passage of the act of July 26, 1894, elects to proceed under the amendatory act of 1891, takes by way of the extension of time under said act of 1894, the same privilege as though his entry had been originally made under said act of 1891.

By the act of August 4, 1894, extending the time for compliance with the desert land laws, Congress intended to relieve all desert entrymen from both expenditure and proof for one year, and the entry year, not the calendar year, was meant. In the application of said remedial provisions to particular cases, if the entryman was in default for a year ending in 1894 the act should be applied to cure the default for that year; if not in default for the year ending in 1894, he should be excused for the entry year beginning in 1894.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
(W. A. L.) August 28, 1896. (G. B. G.)

This case involves the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, lot 7, of Sec. 6, the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and lot 1, Sec. 7, T. 2 S., R. 7 W., Salt Lake City, Utah.

The record shows that on January 8, 1891, Solomon Epley made desert land entry for the above described tract, together with the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 6, as to which latter tract his relinquishment was filed March 21, 1894.

March 21, 1894, the defendant filed his affidavit, stating that he elected to proceed under the amendatory desert land act of March 3, 1891 (26 Stat., 1095). The affidavit set forth that he "has constructed a ditch over a portion of this land and made other improvements."

By your office letter of April 12, 1894, this election was held to be sufficient, and the local officers were directed to instruct the claimant to furnish final proof by January 8, 1895.

January 14, 1895, John H. Hodgson filed his affidavit of contest,

alleging that the entryman had not conducted water upon the land, and that it was in its wild and uncultivated state.

Subsequently, on March 18, 1895, the plaintiff filed his supplemental affidavit, in which he further alleged that the defendant had not during the fourth year of his entry—that is, after the 6th day of January, 1894, and prior to the 8th day of January, 1895—made any expenditures upon his said entry, as required by the desert land law.

At the hearing had at the local office, the defendant moved the dismissal of the contest for the reason that he was not required to have any improvements upon the land at the time of his election to proceed under the amendatory act of 1891, March 21, 1894, and that he was relieved from making any expenditure upon the land from January 8, 1894, to January 8, 1895, by the act of August 4, 1894 (28 Stat., 226).

The local officers ruled the point well taken, and dismissed the contest as premature. Upon appeal, your office decision of May 28, 1895, reversed the action of the local officers and ordered the hearing to proceed upon its merits. Further appeal brings the case before the Department.

There is contained in the record a motion to dismiss the appeal addressed to you, on the ground that—

the decision of the Honorable Commissioner herein, holding the affidavit of contest sufficient and directing hearing to proceed thereon, is interlocutory in character and not appealable.

Unquestionably, the order of a hearing lies within the discretion of the Commissioner of the General Land Office, and will not be interfered with save where there is a clear abuse of such discretion. The regular course to be pursued in such cases, is for the Commissioner to refuse to forward the appeal and for the party aggrieved to apply for a writ of *certiorari*, in which event the Department will consider whether there has been an abuse of his discretion. But the initiative in the matter of rejecting an appeal under facts similar to the cause at bar, primarily lies with your office, and where such action is not taken, and the case involves a new question for departmental adjudication, the motion to dismiss will not be considered.

To hold that the appeal would not be considered because no appeal lay, would be in effect putting the appellant in a worse condition than if your office had ruled that no appeal would lie, for the reason that if this had been done he could have applied for the issuance of a writ of *certiorari*, and in that way raised the question before the Department, whereas to dismiss the appeal now, would leave him without remedy.

This entry was made under the act of 1877, under the terms of which the life-time of the entry was three years. Under this act the entry in question, having been made on January 8, 1891, expired on January 8, 1894. There was, however, no declaration of forfeiture by the land department, and on July 26, 1894, Congress passed an act, section one of which is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the time for making final proof and payment for all lands

located under the homestead and desert land laws of the United States, proof and payment of which has not yet been made, be, and the same is hereby, extended for the period of one year from the time proof and payment would become due under existing laws (28 Stat., 123).

The effect of this act was to extend the time for making proof and payment on all desert land entries for one year beyond the time at which proof and payment were due or would thereafter fall due under the then existing law. It is not limited to entries alone which were alive at that date, but is alike applicable to old entries which remained of record and uncanceled at the date of the passage of that act. Its effect on this particular entry was therefore to extend the time for proof and payment thereon to the 8th day of January, 1895.

The entryman's election, therefore, on March 21, 1894, to proceed under the amendatory desert land act of March 3, 1891 (*supra*), was, by virtue of the remedial and retroactive operation of the act of July 26, 1894 (*supra*), made within the life-time of the entry, and the question of regularity in the election on account of the old entry having otherwise expired, does not arise.

The case then should be treated just as though the entry had been made on January 8, 1891, under a law which gave the entryman until January 8, 1895, to make proof and payment.

The effect then of the entryman's election to proceed under the act of March 3, 1891, was not, in this view, to give him any additional time. The election, however, had an important bearing in one respect. It imposed upon the entryman the burden of yearly proof required by that act. In the absence of further legislation, this would have been, under the peculiar circumstances of this case, of no practical importance; since his annual proof and final proof would have fallen due on the same date, to-wit, January 8, 1895. Before this time had arrived, however, Congress passed the act, August 4, 1894, entitled "An act for the relief of persons who have filed declarations of intention to enter desert lands" (28 Stat., 226), which is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where declarations of intention to enter desert lands have been filed, and the four years' limit within which final proof may be made had not expired prior to January first, eighteen hundred and ninety-four, the time within which such proof may be made in each such case is hereby extended to five years from the date of filing the declaration; and the requirement that the persons filing such declarations shall expend the full sum of one dollar per acre during each year toward the reclamation of the land is hereby suspended for the year eighteen hundred and ninety-four, and such annual expenditure for that year, and the proof thereof, is hereby dispensed with: *Provided,* That within the period of five years from filing the declaration satisfactory proof be made to the register and receiver of the reclamation and cultivation of such land to the extent and cost and in the manner provided by existing law, except as to said year eighteen hundred and ninety-four, and upon the payment to the receiver of the additional sum of one dollar per acre, as provided in existing law, a patent shall issue as therein provided.

It will be seen that the entry under consideration comes within the descriptive clause of this act. It therefore remains to be ascertained

what effect it may have. It is evident, in the first place, that inasmuch as it extends the time within which final proof may be made to five years, that final proof on this entry is not due until January 8, 1896. This narrows the case down to the one vital question, When, in view of the provisions of the act last above quoted, was the entryman's first yearly proof due under his election and the act of 1891 (*supra*), and, specifically, was this contest, filed on January 14, 1895, and amended on March 18, 1895, charging that the entryman had not during the fourth year of his entry made any expenditures upon his said entry, as required by law, premature?

The language of this act, subjected to legitimate analysis, would seem to defeat its avowed purpose. Construed strictly, or even liberally, without extraneous aids, the calendar year 1894 would seem to be meant; but so construed it results that desert land entrymen get no benefit from the act unless proof falls due in 1894 before the passage of the act, and the entryman is in default at that date, or after the passage of the act in that year. In the latter class of cases no benefit would be derived unless the entryman was in default in the matter of expenditures, except to excuse him from making proof, whereas the act provides relief both in the matter of expenditures and proof.

I am of opinion that Congress intended to relieve all desert land entrymen from both expenditure and proof for one year. It is a matter of history that at the time this act was passed financial conditions were such that all business enterprises were at a standstill. The country had not yet begun to recover from the panic of 1893, loans could not be negotiated on the ordinary securities, and money was phenomenally scarce.

If this act is to be interpreted so as to carry out its avowed purpose, to give relief to all desert land entrymen, and to all alike, then it must be held that the entry year and not the calendar year was meant.

In this view a difficulty arises which must be dealt with arbitrarily—Was the entry year *ending* in 1894 or *beginning* in 1894 meant? This, that the act may be administered so as to confer an equal benefit on all who come within its provisions, will depend on the circumstances of each case. If the entryman was in default for any year ending in 1894 the act should be applied to cure the default for that year. If not in default for the year ending in 1894 he should be excused for the entry year beginning in 1894.

Applying this rule to the case at bar, it follows that the contest herein is premature. The entryman was not in default for the entry year ending January 8, 1894. His default had been cured by the act of July 26, 1894 (*supra*). He is therefore excused by the act of August 4, 1894 (*supra*), from making expenditures and proof for the entry year beginning January 8, 1894, and ending January 8, 1895. His first annual proof would not, therefore, fall due until January 8, 1896.

Your office decision is reversed, and the papers in the case herewith returned for proceedings consistent with this opinion.

CLEAVES *v.* SMITH.

Motion for review of departmental decision of April 24, 1896, 22 L. D., 486, denied by Acting Secretary Reynolds, August 28, 1896.

DOWMAN *v.* MOSS.

Motion for reconsideration of departmental decisions of December 19, 1894, 19 L. D., 526, and February 23, 1895, 20 L. D., 122, overruled by Secretary Smith August 28, 1896.

TIMBER CULTURE ENTRY—HEIRS—RELINQUISHMENT.

MORGAN *v.* GREEN.

By the law of descents in the State of Kansas, the father and mother inherit jointly the estate of a son who dies intestate, leaving no wife nor issue, and it therefore follows in the case of a timber culture entryman who thus dies, having an entry in said State, that if the father subsequently dies before the entry is carried to patent, a valid relinquishment of said entry can not be executed, except by the joint action of the mother and the heirs of the deceased father.

Secretary Smith to the Commissioner of the General Land Office, August
(W. A. L.) 29, 1896. (P. J. C.)

This is an appeal by Walter L. Green from your office decision of November 14, 1893, holding for cancellation his homestead entry made February 9, 1892, and re-instating the timber-culture entry of W. A. Ferguson made August 10, 1885. The land involved is the NW. $\frac{1}{4}$ of Sec. 24, T. 3 S., R. 20 W., Kirwin, Kansas.

The record shows that Ferguson, who was unmarried, died, on March 20, 1889, leaving a father, mother, three brothers and a sister. On July 7, 1890, the father died. On May 14, 1891, Green filed a contest against the entry, charging, substantially, failure to comply with the law on the part of the entryman and his heirs. Dart A. Morgan's contest was filed November 20, 1891, subject to that of Green.

On February 4, 1892, the contest of Green was dismissed for failure to prosecute. On February 9, 1892, Green filed the individual relinquishment of Ferguson's mother, and on same date was allowed to make homestead entry of the land.

After a hearing ordered by your office to determine whether the filing of the relinquishment was voluntary or the result of Morgan's contest, the local office, on April 13, 1893, found it was not the result of the contest, and therefore Green's entry should remain and Morgan's contest be dismissed.

From this Morgan appealed.

On November 24, 1893, your office held that the right of Ferguson ascended to his mother and father, jointly, that on the death of the father his children became parties in interest in his estate, and in order to execute a valid relinquishment they should join therein with their mother. Your office therefore decreed that Green's entry should be held for cancellation and that of Ferguson reinstated, Morgan being allowed to contest under his affidavit filed November 20, 1891, as aforesaid.

From this Green has appealed to this Department.

Section 2 of the timber-culture act (20 Stat., 113) provides that if the entryman be dead, his heirs or legal representatives may make proof, etc. The heirs of the entryman, therefore, have an inheritable interest in the land. (*Rabuck v. Cass*, 5 L. D., 398; *Ewart v. Carey's Heirs*, 20 id., 214.)

Section 2611 of the General Statutes, 1889, of Kansas, provides:

If the intestate leave no issue, the whole of his estate shall go to his wife; and if he leaves no wife nor issue, the whole of his estate shall go to his parents.

Section 2599 provides that on the death of the husband intestate one-half of all his real estate not necessary for the payment of debts shall go to the wife if she survive him, and by section 2609 the remainder of the estate, subject to the same conditions, descend in equal shares to his children.

Whatever estate Ferguson had in the land descended, by operation of law, to his father and mother. The question arises as to what was the character of the estate they had in the land—that is, whether they took it as an estate in entirety, or as tenants in common. If there is no statute in derogation thereof, the common rule prevails in Kansas as to these classes of estates. (*Baker v. Stewart*, 40 Kansas, 442; *Shinn v. Shinn*, 42 id., 7.) In the latter case the court said, on page 9:

The statutes (of Kansas) do not attempt to abolish or affect tenancies by the entirety any more than they attempt to abolish or affect tenancies in common. Both kinds of tenancies still exist and both are alike affected as between husband and wife by the foregoing statutes.

The "foregoing statutes" referred to by the court is a reference to section 3752, which reads:

The property, real or personal, which any married woman in this state may own at the time of her marriage, and the rents, issues, profits or proceeds thereof, and any real, personal or mixed property which shall come to her by descent, devise or bequest, or the gift of any person except her husband, shall remain her sole and separate property, notwithstanding her marriage, and not be subject to the disposal of her husband, or liable for his debts.

An estate in entirety, arose at common law, as a direct result of the incidents with which that law invested the marriage relation; it would not have existed at all if the common law could have recognized in such relation, two persons with equal, similar or distinct civil existence.

It was by that law the logical result of a conveyance made to a man and a woman who were married.

In the case of *Stuckey v. Keef's Executors* (26 Pa., 397), the grounds which alone would sustain such an estate are very clearly put. There it is said: "The intention of the parties to the conveyance is entirely immaterial," and it was held that under a conveyance to a man and his wife "as tenants in common and not as joint tenants," both became seized of the entirety and on the death of either, the whole estate goes to the survivor, irrespective of the intention of the parties to the conveyance.

This conclusion of the court was the logical result, flowing from the causes, which created this estate.

"There can be no moieties between husband and wife." Co. Lit., 187, b. Littleton says that the reason is that they are one person in law (id.). Blackstone tells us, that for that reason, they can not take the estate by moieties; but both are seized of the entirety. 2d Bl. Com., 182; 4th Kent Com., 362. Now it must be admitted that the oneness of the marriage relation refers to the civil state of the parties, the natural persons were recognized and protected by the law, the civil existence of the wife being merged into that of the husband, was the method by which the unity existed.

Then, if under different circumstances, the civil existence of the parties to the contract of marriage was that of two persons, so far as the right to take, hold, sell and convey property was concerned, the reason of the rule would have ceased, and a different estate would vest.

There can be no question but that the origin of these estates was the unity of husband and wife civilly. The authorities cited in the various cases show that both text-writers and adjudicated cases sustain their creation and the incidents attached, alone on this basic proposition. (26 Pa., 402; Washburn on Real Property, page 332).

In Kansas there is no such civil unity. Section 3752, G. S., *supra*.

It would seem that the express purpose of this statute was to change many of the common law rules which subjected either the corpus or profits of estates which a wife owned, to the control of the husband; it was also to vest in her as her sole and *separate* property, such estates as might come to her by descent.

It was competent for the legislature of Kansas to do this, and if the rule has been established that the wife takes in her own right by descent, and uses the property acquired as a *feme sole*, then why is the rule not universal and why should it not be applied when her husband having the same rights, but no more, is a co-heir. It can not be replied that the statutory rule must lose its effect in that case, because of the fact that the marriage relation exists, for the statute itself, so far as descents are concerned, changed the restrictions and limitations of the common law. To illustrate:

At common law, a woman could not be an heir while there was a male in line.

Under the Kansas statute, before referred to, as one of the parents she is a co-heir on perfect equality.

At common law a husband and wife could not inherit, because only the male would take. Under the statute, property may come to her by descent, and when it vests she shall hold as a separate estate. This right of separate holding is, in my opinion, fatal to the theory that an estate of entirety vests—because there are no moieties in such estates.

But it is urged that in the case of *Baker v. Stewart* (40th Kan., 442), negatives this view. I am free to admit that it goes a considerable length in that direction. Attention is called, however, to the fact that the question in that case arose on a deed of conveyance to husband and wife. It is undeniably true that under this deed the court held that an estate of entirety vested, but the text of the decision does not, in my opinion, rule that an estate of entirety can be created under the Kansas statute of descents. It must be remembered that the application of the rules of descent under the statute, were made on the question as to what estate the survivor of an estate in entirety held as against the co-heirs of the deceased wife, and in discussing this question, it is true that the *dicta* of the court would authorize the construction that estates in entirety can be created, notwithstanding the statute of descents and distributions, but the language used is that—

Nearly all the courts hold that estates in entirety may still exist and may be created by an ordinary deed of general warranty to the husband and wife, and such estates are no more against our present laws in Kansas relating to descents and distributions than such estates have always been against all other laws concerning descents and distributions in this and other States.

As I read the case, it is not to be held as authority that in Kansas with its present laws affecting the rights of married women to take property by descent for their sole and separate use, that when the parents being man and wife are co-heirs of a deceased son, that because of the common law incidents of marriage an estate of entirety vests.

The opinion deals with the question under a conveyance. At common law it could only be created by a conveyance, and I am of the opinion that the policy of the law of Kansas, as drawn from the statutes, would indicate that these estates would not be favored.

If there were in my opinion any doubt as to the correctness of this determination it would be removed by the act of the legislature of Kansas, approved March 10, 1891 (Laws of Kansas 1891, p. 349), which reads:

SEC. 1. If partition be not made between joint tenants or joint owners of estates in entirety, whether they be such as might have been compelled to make partition or not, or whatever kind the estate or thing holden or possessed be, the parts of those who die first shall not accrue to the survivors, but shall descend or pass by devise, and shall be subject to debts or charges and be considered to every other intent and purpose as if such joint tenants or tenants of estate in entirety had been or were tenants in common; but nothing in this act shall be taken to affect any trust estate.

Your office judgment is therefore affirmed.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

GRANDIN ET AL. v. LA BAR.

The purpose of section 5, act of March 3, 1887, was to protect all persons who had parted with a valuable consideration, whether in money or other property, in payment for lands to which the company could give no valid title.

The right of a purchaser from a railroad company, to acquire title under the provisions of said section, is not in any degree dependent upon the good faith of the company in making the sale. The question of good faith in the transaction relates solely to the purchaser's connection therewith.

There is nothing in the fact that a purchaser of land from a railroad company is a stockholder therein to affect the good faith of such purchaser; nor does the further fact that preferred stock of the company, that was convertible into lands, was given in exchange for the land, open the transaction to objection on the ground that there was no consideration for sale.

Secretary Smith to the Commissioner of the General Land Office, August 29, 1896. (W. F. M.)

On October 14, 1893, in a controversy between Edward G. La Bar and the Northern Pacific Railroad Company, this Department held that the SW. $\frac{1}{4}$ of section 7, township 146 N., range 50 W., in the land district of Fargo, North Dakota, which lies within the indemnity limits of the company's grant, did not pass to the company by virtue of any valid selection before the date of La Bar's settlement on October 1, 1887, that it was, therefore, excepted from the grant, and it was ordered that La Bar be permitted to make entry of the land, (17 L. D., 406). He gave notice of his intention to submit final proof on December 30, 1893, and on December 29, 1893, John L. and William J. Grandin made application to purchase the land under section 5 of the act of March 3, 1887, alleging purchase from the company on September 15, 1876. On December 30, 1893, they filed a protest against the acceptance and allowance of Le Bar's proof. The register and receiver rejected the application to purchase and dismissed the protest, and the Grandins appealed to your office. La Bar made his proof and paid for the land on the day advertised and on January 2, 1894, final certificate was issued to him.

Your office, by letter of May 4, 1894, directed that the Grandins be given an opportunity to submit proof in support of their application to purchase and that La Bar be specially cited to appear at the hearing, which was held on August 22, 1894, both parties appearing with their attorneys.

The register and receiver found for the Grandins, recommending the cancellation of La Bar's entry, and the latter has now appealed from the decision of your office in affirmance thereof.

The facts, as developed at the hearing, are that the Grandins, being holders and owners of preferred stock of the Northern Pacific Railroad Company exchanged the same, on September 15, 1876, for extensive

tracts of land, including that in controversy, on the basis of three dollars in stock, at its face or nominal value, for one acre of land.

The case has been argued elaborately and with signal ability, both orally and by brief, but the questions involved, after all, must be narrowed to an inquiry as to the good faith of the applicants in their transaction with the company, and as to the character of that transaction; whether they are purchasers in contemplation of the statute. The contentions of counsel, however, have introduced collateral and incidental questions, and these will be stated and disposed of in their order.

In the first place it is contended that the transaction "is precisely what is defined by the authorities as a 'barter' as contradistinguished from a 'purchase,' and is therefore entirely outside of the purview of the act of March 3, 1887." Purchase, in its broad and technical sense, includes every mode of acquisition save that of descent, and in the most narrow sense in which it is ever employed it means acquisition by the payment of a price in money. But neither of these is the popular sense. In common use, and generally in statutes, as the Supreme Court says, "the word is employed in a sense not technical, only as meaning acquisition by contract between the parties." (91 U. S., 374.) In the remedial act of March 3, 1887, it is inconceivable that the word was used in the restricted sense contended for by counsel, but on the contrary it can not be doubted that the object was to protect all persons who had parted with a valuable consideration, whether in money or other property, in consideration of the transfer of lands for which the company could not and did not pass valid title. This construction gives effect to the undoubted purpose of the congress, and is not inconsistent with any canon of interpretation. It may be added that there is no longer any substantial distinction, in law, between the acquisition of property by purchase, and by exchange or barter.

In attacking the good faith of the Grandins it is charged that the transaction between them and the company was *ultra vires*, and therefore void, in that the charter conferred no authority upon the company to issue preferred stock, that it could not legally deal in its own shares, that it had no authority to retire and extinguish its shares and thus reduce its capital stock, that the reorganization of the company under the scheme of which the preferred as well as the common stock was issued, was unauthorized by its charter, that the sale to a stockholder invests the transaction with suspicion, and finally it is said, that there was no consideration for the sale, it not being shown that the stock given in exchange had any value.

The attitude of the company, either legally or morally, is not before the Department in this case. It might be admitted that all of the acts of the company complained of as being without its charter powers were unauthorized, and still the status of the Grandins would not be touched. The company is not on trial and its good faith is not in question. It

would avail La Bar nothing even if it should be held here that the stock was illegally issued and illegally received in exchange for lands, and subsequently extinguished without warrant. In short, this Department has nothing to do, in such cases, with the conduct of the company, whether that conduct be proper or improper. Our sole business is with the purchaser's connection with the transaction through which he claims the land, whether or not he was in good faith. Attorney General Garland, on November 17, 1887, advised this Department that "it is not required that the sale by the railroad company shall have been made on its part in good faith, but only that the purchaser shall have bought in good faith," and his construction of the act has since been authoritative in the administration of the laws here. 6 L. D., 272.

It is elementary that "there is no rule of law which prohibits a shareholder from dealing with the company" and that "it is competent for a corporation to contract with its stockholders." 61 Ill., 472, and 97 Ill., 537. The Grandins, therefore, were not only within the law when they bought lands of the company, but the fact that they were holders of stock in the company was not a suspicious circumstance affecting their good faith in the transaction.

With respect to the consideration passed, there is no testimony in the record showing its value, or, indeed, that it had any value whatever. It was preferred stock issued under the plan of the re-organization of 1875. Its holders were entitled to dividends of eight per centum before the common stockholders should receive anything, but its principal and immediate value, as it seems to me, arose out of the fact that it was convertible into lands of the company situated within certain prescribed limits. Those lands were in an unsettled country, but they had some present and much prospective value, and that value, whatever it was, inhered in the stock that was convertible into them. It is charged that the stock had no market value, but that fact, if true, does not affect the question. It was unquestionably valuable to any one who might desire to invest in western lands, and there were many such persons at that time, but the company had but recently been in great financial distress and had just emerged from a species of bankruptcy proceedings, and it is not surprising, therefore, that its stocks were not in demand in Wall street. The market value of railroad stocks is based upon the earning capacity of the road, but the preferred stock of the Northern Pacific Railroad Company possessed a feature that gave it an independent value, not to investors generally, perhaps, but to certain classes of persons, namely, such as might desire to buy lands in the great undeveloped west.

Upon careful consideration of all the issues in the case I have reached the conclusion that the Grandins are bona fide purchasers from the company and that they are entitled to the protection afforded by section 5 of the act of March 3, 1887.

The decision appealed from is, therefore, affirmed.

EXTENSION OF TIME FOR PAYMENT—COMMUTED HOMESTEAD.

STILLMAN B. MOULTON.

The joint resolution of September 30, 1890, with respect to the extension of time for payment is not applicable to a commuted homestead entry.

Assistant Secretary Reynolds to the Commissioner of the General Land
(W. A. L.) *Office, August 31, 1896.* (E. B., JR.)

On August 22, 1895, your office refused to extend the time for the payment of purchase money on the application of Stillman B. Moulton, in the matter of the commutation of his homestead entry No. 177, made October 18, 1893, for the SW. $\frac{1}{4}$ of section 28, T. 107 N., R. 68 W., Chamberlain, South Dakota, land district, for which he made final proof July 20, 1895, on the ground that the evidence as to failure of crops did not bring his case within the provisions of the joint resolution of September 30, 1890 (26 Stat., 684), which authorizes such extension under conditions set forth therein. He appeals from such refusal, contending that the evidence submitted by him brings his case within the terms of the said resolution.

The said resolution provides:

That whenever it shall appear by the filing of such evidence in the office of any register and receiver as shall be prescribed by the Secretary of the Interior that any settler on the public lands, by reason of a failure of crops for which he is in no wise responsible, is unable to make the payment on his homestead or pre-emption claim required by law, the Commissioner of the General Land Office is hereby authorized to extend the time for such payment for not exceeding one year from the date when the same becomes due.

It is unnecessary, as will more clearly appear hereinafter, to consider the evidence submitted by Moulton in support of his said application. The Department is well convinced from an examination of the said resolution and the homestead law, generally, that the resolution has no application to the case at bar, and can not have to any case of commutation of a homestead. The purpose of said resolution as applied to a homestead is evidently to defer for the period of one year, subject to certain conditions therein specified, the time when, by operation of law alone, the settler would otherwise be required to make the usual final payment of fees and commissions. These the law does not permit him to make, except in cases of soldier's homesteads, until the expiration of five years from date of entry or the establishment of residence on the land, and does not require of him until within two, and, in certain cases, three years thereafter (Section 2291 R. S., and section 1, act of July 26, 1894, 28 Stat., 123). The period within which Moulton would be required by law to pay the final homestead fees and commissions does not begin to run until October 18, 1898, and does not end until three years thereafter, his entry having been in existence at the date of the last mentioned act.

The commutation of a homestead authorized by section 2301, as amended by section six of the act of March 3, 1891 (26 Stat., 1095), is the privilege of making final proof and paying the minimum price of the land at any time after fourteen months' residence and cultivation subsequent to entry. If he does this he does it at his own election. The law does not require but permits it to be done. He may thus substitute payment of the minimum price of the land for the remaining years of residence and cultivation, otherwise required, if he prefers to do so. To hold that said resolution was intended to apply to Moulton's or to any other case of homestead commutation, would be to impute to Congress the doing of a vain thing. Such legislation would confer no benefit, would be wholly superfluous and unnecessary in any such case. In case of failure of crops the intending commutator could simply abandon his purpose to commute—for the time being at least. The extension of the day of payment would lie in his own hands.

The paragraph on page 25 of circular instructions issued October 30, 1895, which refers to said resolution and declares that it

may be taken advantage of in proper cases for obtaining an extension of time of payment of purchase money by parties commuting their homestead entries by proceeding as hereinbefore pointed out under the head "Extension of payment," is error and is hereby abrogated.

The decision of your office is modified in accordance with the foregoing. Moulton's application will be denied upon the ground herein indicated, and his final proof canceled without prejudice to his rights under the homestead law.

SWAMP LAND—FIELD NOTES OF SURVEY—SELECTION.

STATE OF MINNESOTA *v.* CRAIG.

In the absence of an affirmative showing that a tract of land was swamp in character at the date of the grant, the Department will not order a hearing to determine its character, where by the field notes of survey it is returned as agricultural land.

The failure of the State to select a tract as swamp land, that is returned as agricultural, within the two years after survey as prescribed by the statute, will be held sufficient to preclude the subsequent assertion of such right by the State in the presence of an intervening bona fide adverse claim.

Secretary Smith to the Commissioner of the General Land Office, August 31, 1896. (E. M. R.)

This case involves the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 30, T. 63 N., R. 11 W., Duluth land district, Minnesota, and is before the Department upon appeal by the State of Minnesota from your office decision of February 4, 1896, denying its application for a hearing to determine the character of this land.

The record shows that on September 23, 1895, William Craig filed Porterfield scrip for this land and on November 18, 1895, John C. Judge,

as agent and attorney of the State of Minnesota, filed his application for a hearing to determine the character of the land.

The act of March 12, 1860 (12 Stat., 3), extends to the States of Minnesota and Oregon the provisions of the act of September 28, 1850 (9 Stat., 519).

The township plat was filed in the local office on July 20, 1885, and according to the field notes and the plats of that survey, this land is returned as agricultural and not as swamp land.

In the application for a hearing various affidavits are submitted on the part of the State as a basis for ordering the hearing petitioned for. These affidavits are to the effect that in 1881 and at various dates subsequently, this tract was on the date of such survey or examination, of a swamp-land character. Your office decision held that the showing made was insufficient upon which to order a hearing.

On April 10, 1888, Dr. L. J. Woollen, chief of the swamp land division, as special agent, reported to your office the result of his investigation as to the character of certain lands in the Duluth land district, which had been selected and reported to your office as inuring to the State under the swamp land act of March 12, 1860. In his report he stated that from the evidence presented therewith the fraudulent character of the survey is clearly shown and made out in the following townships:

Township 63 north, 11 west;

"	62	"	11	"
"	63	"	10	"
"	62	"	10	"
"	62	"	22	"
"	61	"	21	"

In particularizing his report he says:

The numerous cases of conflict arising in said township against the swamp claim wherein the dry character of the different tracts claimed as swamp is clearly shown by sworn evidence, indicates that the survey of said township was made in a fraudulent manner. . . . There is one tract of fifty acres that was patented to the State of Minnesota in 1883 as swamp land which was shown to be swamp by the field notes of survey which was high, dry, and hilly land. . . . This tract is specially valuable for iron ore and I was informed by a party living near it that the tract was probably worth one hundred thousand dollars. From all the information I could gather I came to the conclusion that surveys made prior to 1880 and 1881 are in the main correct, but that surveys made since that date are mostly fraudulent and unreliable in those townships where there is valuable timber and iron ore.

He therefore recommended that in those townships in the Duluth district where the surveys had been made since the date above mentioned, that the State be required to take her swamp land by agents in the field instead of by the field notes as theretofore and

that all approvals of swamp land heretofore made for said townships, which have not been patented, be revoked and cancelled . . . To continue patenting lands to the State by the field note readings in such townships would be a great wrong to the government and to those settlers who wish to make homesteads on agricultural land that, under the present system, is erroneously shown by the field notes to be swamp and overflowed.

Your office letter of April 28, 1888, transmitted Dr. Woollen's report to this Department and concurred in his recommendation that all approvals of swamp lands which have been selected under surveys made since 1880 and not patented, be revoked and that the State be required to make swamp land selections by agents in the field instead of in the manner previously followed, and acting upon this report the then Secretary on March 2, 1889 (L. and R. 174, page 438), said:

I am of opinion that the affidavit accompanying the report of Dr. Woollen furnished sufficient evidence that the surveys upon which the selections of swamp lands were approved were wholly unreliable, if not false and fraudulent, and that such unreliability could only have been due either to fraud or palpable mistake.

The recommendation of your office was accordingly approved, the approvals of the selections of swamp lands, based on the field notes of the alleged fraudulent surveys made since 1880 were revoked, and the State was required to make future selections by agents in the field.

This tract of land is situated within one of the townships mentioned by Dr. Woollen. It is apparent from reading the report of Dr. Woollen that the fraud of which he complains was in representing dry land to be swamp land and that this fraud was brought about by certain corporations having become interested by reason of purchase from the State. In this particular, only, in so far as I have been able to learn, was the survey of this township now under consideration, deemed fraudulent. There is no allegation that this survey was not actually run; on the contrary, so far as this tract is concerned, the exact opposite appears to be the case.

In the affidavit of Reuben F. McClellan, who testified that in the month of December, 1895, he was detailed by the land commissioner of the State of Minnesota to make a careful and correct survey and examination of the tract of land, he avers that

on and during the 13th, 14th and 15th days of December, 1895, he made a careful and correct survey and examination of said land, and that the plat attached is a correct plat of said survey of said land as made by deponent, and that the memoranda attached to said plat are correct notes of said survey, and that part or portions of said lands marked and indicated on said plat as dry land, was, at the time of such examination and survey, in fact dry land and that every part and portion of said tract of land other than said part and portion marked as dry land on said plat was, at the time of such examination and survey, wet and overflowed land.

The following appears in his field notes: "Found all trees standing noted in the United States survey."

The other element entering into the survey being that of the character of the land as represented by the field notes, it has already been noted that the only objection to the correctness of such representation lies in the return of land actually dry in fact, as being of a swampy nature.

The rights of the State of Minnesota attached to this land in 1860, on the 12th day of March, or not at all, and it was the character of the land upon that date which determined the question as to whether the rights of the State of Minnesota vested.

There is no affirmative showing in this record whatever that the land was of the character contemplated by the act *supra*, at the date of its passage.

The approval of a government map of survey which represents land to be of any specific character is the making of a *prima facie* case which has to be overcome and rebutted by the affirmative showing of the petitioners. It is true that the correctness of the survey has been questioned, but two facts are apparent in so far as they apply to the tract involved, and those are that the survey was actually made upon the face of the earth, and that the only objection to the survey of these townships was that land was returned as swamp which was, in fact, of an agricultural character. There has never been, so far as I have been able to ascertain, any question that lands reported as agricultural were in fact now of such character. From plats furnished by the petitioners, it appears that there is a creek running through this forty acre tract, which has ten feet of mud in it. Possibly, in the lapse of time since 1860, now exceeding one-third of a century, that stream may have become filled up, overflowing its banks and has changed the character of this land. However that may be, it is sufficient to say that in the absence of an affirmative showing that the tract was of the character contemplated in the acts of 1850 and 1860, at the date of the passage of the latter act, the Department would not be justified in ordering a hearing to determine this question.

The act of March 12, 1860 (12 Stat., *supra*), which was substantially re-enacted in section 2490 Revised Statutes, provides that selection of lands by the States shall be made within two years from the adjournment of the State legislature, after notice by the Secretary of the Interior to the governor of the State, that the surveys have been completed and confirmed. This survey was made in 1885. The State asked for a hearing to determine the character of the land in 1895. What was the effect of the requirement that the selection should be made within two years after notice? Was it mandatory and imperative, or simply directory?

Endlich on the Interpretation of Statutes (612, Sec. 433), says:

It has indeed been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience, and that where an act requires a thing to be done in a particular manner, that manner alone must be adopted.

And again in Section 436, in speaking of intervening adverse rights whose standing is being injured by the wrongful conduct of public officials, it is said:

In a word, where a statute fixes a time within which public officers are to perform some act touching the rights of others, and there is no substantial reason apparent

from the statute itself, from other statutes, or from the consequences of delay—*e. g.*, a wrong to the intervening rights of third parties—why the act might not be as well done after the expiration of the period limited as during the same, or indicating that the legislature intended it should not be done at all if not within that period, the latter will, as regards third persons, be treated as directory, and the fixing of it will not invalidate or prevent official acts, under the statute, after the expiration of the prescribed period.

It is not necessary in this case to pass upon the question of whether the failure to select or attempt to select within the two years prescribed by the statute determines the rights of the State of Minnesota. The only question here to be considered is, that intervening adverse rights having attached, whether the application for a hearing by the State looking toward selection, shall be considered.

I am of opinion that the clear intent and meaning of the act requiring the selection to be made within two years after notice of the survey, was a requirement inserted by the legislative will in order to protect citizens of the United States from just such annoyances as that presented by this proceeding in behalf of the State of Minnesota.

This tract of land was returned by the public survey as agricultural; the citizens of the United States had a right to act upon the faith of that return and especially when the two years within which the State of Minnesota was entitled to select the tract had passed with no attempt upon its part to make any claim under the act of 1860 in its behalf, any citizen of the United States had a right to assume that no such claim would in fact be made, and without in this decision holding that the State of Minnesota could not thereafter make a claim under the swamp act to this tract of land, it is sufficient to say that having failed to do so within the time prescribed by the statute, its deferring such an attempt at selection until this time was at its own risk, and that in the presence of an intervening *bona fide* adverse claim this Department will not now entertain that contention.

It is not enough to say that the grant in behalf of the States of Oregon and Minnesota contained in the act of 1860, was a present grant, and therefore conveyed the title to all lands which were in fact of a swampy character on the date of the passage of that act March 12, 1860.

A grant must have definiteness and precision, and there is and could be no definiteness and precision until selection. To say that thirty-five years after a grant of swamp lands had passed within its domain, that a State can assert title to a particular tract of land, is to say that there is actually no bar of time within which such selection can be made, and there would be no such thing as quiet, peaceable possession of real estate inside the State of Minnesota, for fear that now or hereafter, the State of Minnesota might undertake to prove any given tract unpatented, was in fact swamp, and inured under its grant.

The State denies the reception of notice of the making and confirmation of the survey but your office decision states:

The State accepted in 1885, the list of selections of lands in this township made by the United States surveyor-general and known as list No. 54. Whether any actual selection list was filed by the State authorities as the basis of this list by the surveyor-general, or whether the surveyor general upon return of the field notes simply listed to the State, as swamp, all lands so shown, does not appear. But however that may be it is admitted that a copy of the said list of selections was furnished the proper officer of the State having charge of its land matters. The State by accepting the list tendered, adopted it as her own and made it on her part a segregation in said township of the swamp from the dry lands.

This would appear to be sufficient to dispose of the question of notice.

In consideration, therefore, of the failure of the petitioners in this case to make out any showing whatever of the character of the land in 1860, the date at which the rights of the State attached, or failed to attach, and of the fact that this survey was actually made and its correctness in reference to its returns of dry land has never been questioned by this Department, or any one else so far as the Department is aware, and the fact that the survey as run has been identified by the petitioners themselves as a correct survey of the tract, and in consideration of the long lapse of time between the period at which the rights of the State of Minnesota attached, or did not attach, in consideration of this silence of the State and the intervention of *bona fide* adverse rights, for the above reasons and those so forcibly and logically set out in the opinion of the Commissioner, I affirm his decision.

RAILROAD LANDS—SECTION 4, ACT OF MARCH 3, 1887.

DAILY *v.* MARQUETTE, HOUGHTON AND ONTONAGON R. R. CO. ET AL. (ON REVIEW).

By the certification of lands under this grant they are as fully separated from the public domain and removed from departmental control as though patent had issued therefor.

A congressional declaration of the forfeiture of lands granted to aid in the construction of a railroad, for failure to construct the road in accordance with the grant, is also, in effect, a declaration by Congress that certified lands so forfeited, were "erroneously certified," and the Department will not question such declaration in construing the provisions of section 4, act of March 3, 1887.

A declaration of forfeiture as to the unearned lands within a railroad grant requires an adjustment of the grant in order to determine what lands were restored to the public domain by the act of forfeiture, and the determination of such matter is an "adjustment" within the meaning of section 4, act of March 3, 1887.

Assistant Secretary Reynolds to the Commissioner of the General Land
(W. A. L.) *Office, September 2, 1896.* (V. B.)

On September 5, 1894 (19 L. D., 148), this Department decided the case of Daily *v.* Marquette, Houghton and Ontonagon Railroad Company and the Michigan Land and Iron Company, wherein it was held that the application of Amasa Daily, to make entry of the S. $\frac{1}{2}$ of the

NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 17, T. 50 N., R. 34 W., Marquette land office, should be rejected; and that the Michigan Land and Iron Company, vendees of said railroad company, should be allowed, at the proper time, to make purchase and entry of the land in question, under the provisions of Sec. 4 of the adjustment act of March 3, 1887 (24 Stat., 556).

A motion for review and reversal of that decision is now before me.

A number of specifications of error accompany the motion; but they are all subordinate to what counsel for movant, in their first brief, say are "the clear cut" and only questions presented by the motion, viz: "Is this alleged purchase from the Marquette, Houghton and Ontonagon Railroad Company, and are these lands, within the purview of Sec. 4 of the act of March 3, 1887?"

The question as to the character and condition of the land which could be purchased under the provisions of the adjustment act of 1887 was carefully and fully discussed in the case of *Pierce v. Musser-Sauntry Company* (19 L. D., 136), and the right of a corporation to purchase, as a citizen, under the provisions of said act, was also discussed and determined in the case of *Telford v. Keystone Lumber Company* (ib., 141). A careful consideration of the arguments on these questions presented anew, and of the authorities cited to sustain them, on this motion, fails to persuade me that there was error in the decisions referred to, or in the former decision in this case, on the same points. Both of the questions presented in this motion must therefore be answered in the affirmative.

And having so recently discussed and determined the questions involved, it is not deemed necessary to say more in relation to them at this time.

Whilst, because of the full discussion already had of the two principal questions involved, it may not be desirable to say anything more in relation thereto, there are minor points presented in the briefs of Daily's counsel which it may be well to refer to.

(1) It is said that the lands in question were never certified to the State for the benefit of said railroad, and therefore cannot have been "erroneously certified;" that the only certification made was by what was then known as "information lists," which did not and were not intended to convey title.

The answer to this may be found in the case of the *Lake Superior, &c., Company v. Cunningham* (155 U. S., 354, 375), where, in passing upon a like certification under the same act, made about the same time and under very similar circumstances—definite location of a road, which was never built—the supreme court says that such certification "identified and set apart" the lands granted to the railroad company by the act. Continuing, the court says—

By that identification and certification those lands were absolutely separated from the public domain and as fully removed from the control of the Land Department as though they had been already patented to the State.

(2) Counsel urge that, if, however, it should be held there was a certification of the lands to the State which passed title, said lands, being of the granted lands, then they were properly and not "erroneously certified," and are not therefore within the terms of the adjustment act.

There might be some force in this contention if the road had been built opposite to the lands prior to the passage of the forfeiture act of March 2, 1889 (25 Stat., 1008). The grant was a present one, subject to forfeiture for failure to build a road within a specified time. The road not having been thus built, Congress declared the forfeiture of the lands opposite the unconstructed portions of the road, among which lands thus forfeited are those in controversy here. It therefore necessarily results, in view of this forfeiture, that Congress declared that said lands were "erroneously certified;" and this Department may not question that declaration.

Section 4 of the adjustment act declares that, as to lands so erroneously certified, which have been sold by the grantee company, qualified parties, who purchased them, shall be entitled thereto, upon making proof of the fact of purchase, within such time, and under such rules, as may be prescribed by the Secretary of the Interior, "after the grants respectively shall have been adjusted." And counsel for Daily insist that, the lands involved having been forfeited and restored to the public domain, by the act of Congress, the adjustment of the grant, required by section 4 of the act of 1887, previous to entry thereof by the purchaser, is not necessary or possible, and therefore the lands in question are not in the category of lands which may be purchased under said section 4.

I do not concur in this view. On the contrary, it is my opinion that, in order to ascertain what lands were forfeited and what were not forfeited by Congress, an adjustment of the railroad grant was necessary. To the extent of this ascertainment this adjustment was made, when the terminal or end lines of the grant were established at L'Anse by departmental decision. To that extent, and so far as the lands in controversy are concerned, that adjustment is final and conclusive, and the want of it is no longer an obstacle in the way of the consummation of purchase by the Michigan Land and Iron Company within a reasonable time after the promulgation of this decision.

It is alleged by counsel for Daily that the purchase from the railroad company by the Michigan Land and Iron Company was not made in good faith, and that the stockholders of said company are aliens and non-residents, and therefore the purchase should not be permitted.

It is a well settled rule that the judgment of this Department is not to be delayed by mere allegations of this general character, and especially where there has been an abundance of time to sustain them by affidavits or other testimony.

Reviewing the whole case, and all the arguments presented, the motion for review is denied, and the papers are sent to you.

You will notify the parties in interest hereof; and inform the Michigan Land and Iron Company that, the grant having been adjusted, as to the land in question, that company will be allowed thirty days thereafter within which to present proper proof and make entry of the land in controversy, in accordance with the provisions of the circular of February 13, 1889 (8 L. D., 348), so far as the same is applicable to their case; a duly certified copy of their act of incorporation, under the laws of the State of Michigan, will be accepted by you, as the proof of citizenship required by the circular.

Instead of rejecting at once the application of Daily the same may be held in abeyance for the present. If the Michigan Land and Iron Company make the necessary proof and entry within the time required, then Daily's application will be finally rejected; otherwise he may be allowed to make entry of the tract applied for.

Upon entry being made of the lands by the Michigan Land and Iron Company, payment therefor will be required of the Marquette, Houghton and Ontonagon Railroad Company, and you will demand of said railroad company the payment of an amount equal to the government price of similar lands, as provided for in section 4 of the act of 1887, *supra*.

In case of the refusal or neglect of the railroad company to make the payment as above specified, within ninety days after the demand, you will report their action to this Department, transmitting a sufficient record to be sent to the Attorney-General, that he may cause suit to be brought against said company for the amount.

Thus modified, the former decision of the Department is adhered to.

ROMAINE v. NORTHERN PACIFIC R. R. CO.

On motion for review of departmental decision of June 9, 1896 (22 L. D., 662) the new question raised thereby, as to the validity of the company's selection, is referred to the General Land Office, for consideration and decision.

PRACTICE—PROTEST—SCHOOL LAND—MINING CLAIM.

STATE OF MONTANA v. SILVER STAR MINING CO.

A protest filed by a State against the allowance of an entry should be corroborated in accordance with the rules of practice.

In the exercise of its proper supervision over the disposition of the public lands the Department may waive questions affecting the regularity of proceedings below, and render such judgment as seems just and proper in the case.

Where a mineral entry has been allowed on a school section the protest of the State will not be considered with a view to a hearing, in the absence of a definite allegation that the land was in fact not mineral land, or known to be such at the date the school grant attached.

Assistant Secretary Reynolds to the Commissioner of the General Land Office, September 11, 1896. (W. M. W.)

The State of Montana by its attorney general has appealed from your office decision of April 5, 1895, rejecting the protest of said State against the issuance of a patent upon mineral entry No. 84, Bozeman, Montana, land district.

The record shows that on October 8, 1891, the Silver Star Mining Company made entry No. 84 of the Silver Star lode, which was situated almost wholly within Sec. 16, T. 4 N., R. 1 W., Bozeman land district.

By your office letter of October 27, 1892, the State of Montana was allowed thirty days in which to show cause why said mineral entry should not be passed to patent.

On March 8, 1895, your office again directed the register and receiver of the local land office at Bozeman to give notice by registered mail to the State of Montana of your office decision of October 27, 1892.

On March 13, 1895, the receipt of notice of the aforementioned decision was acknowledged by the State Board of Land Commissioners of the State of Montana, and the matter was referred by said board to the attorney general of said State for appropriate action.

On April 18, 1895, the State through its attorney general filed in the local office the following:

1. The State elects to contest the application made by James W. Prouard, for a portion of section 16, Tp. 4 N., R. 1 W., upon the grounds that said James W. Prouard has not complied with the law in filing and posting his original notice of location of the land in controversy.

2. That the notice was not posted in the manner provided by law.

3. That no vein or lode has been discovered upon said land.

4. That the claimants and locators of said Silver Star Lode Claim have not expended upon said claim the amount required by the statute for development and representation.

5. That the claim has not been represented by the said claimant, or by any person for him, in accordance with the laws of Congress and the law of the State of Montana.

6. That said land is more valuable for agricultural purposes than for mineral purposes.

By letter of March 19, 1895, the local officers transmitted to your office the paper filed by said State.

On April 5, 1895, your office dismissed said protest for the reason that it is not sworn to nor corroborated, as required by Rules 1, 2 and 3 of the Rules of Practice.

The State of Montana appeals.

The appellant assigns the following errors in the decision appealed from:

- (a). That the action of the Commissioner in this case is prejudicial to the best interests of the State of Montana.

- (b). That the Commissioner erred in holding that the State of Montana is required to verify a protest filed in cases like the one under consideration.

(c). The Commissioner erred in holding that it is necessary for the State of Montana to corroborate its protest.

(d). The Commissioner erred in holding that Rules one, two, and three (1, 2 and 3) of the Rules of Practice are applicable to, or control, the State of Montana in cases of this character.

The first question to be determined is, whether Rules of Practice one, two and three properly apply to a proceeding initiated by a State.

The Rules of Practice were made for the purpose of aiding the land department in the orderly disposition of the public lands under the laws of Congress. Their requirements are reasonable and tend to aid the department in arriving at just conclusions in controversies arising between adverse claimants for the public lands. Wherever a State seeks to become a party litigant there seems to be no just reason why it should not be required to place itself in the same position as other litigants in order to have its rights determined. The State necessarily must act through its officers and agents. While its chief law officer may not be in possession of the facts to such an extent that he can of his personal knowledge verify the State's protest, he surely can procure the corroboration from parties who are conversant with the facts, and who can verify the facts set forth in the State's protest from personal knowledge.

In the case of the *State of Montana v. Bayliss* (22 L. D., 629) the Department held that a protest filed by a State against the allowance of an entry should be corroborated according to the Rules of Practice. There is no sufficient reason presented in the case at bar to call for any change in the holding in that case.

It was held in *Pike's Peak Lode* (14 L. D., 47), that in the exercise of its proper supervision over the disposition of the public lands, the Department may waive questions affecting the regularity of proceedings below, and render such judgment as seems just and proper in the case. Under this authority the sufficiency of the allegations of the State's protest against said mineral entry will be considered.

The only ground upon which the State appears to make any claim adverse to the mineral entry must arise out of the fact that the land involved is situated in section sixteen.

By section 10 of the act admitting Montana into the Union (25 Stat., 676-679), sections sixteen and thirty-six in every township were granted to said State for the support of common schools.

Section 18 of said act provides:

That all mineral lands shall be exempted from the grants made by this act. But if sections sixteen and thirty-six, or any subdivision or portion of any smallest subdivision thereof in any township shall be found by the Department of the Interior to be mineral lands, said States are hereby authorized and empowered to select, in legal subdivisions, an equal quantity of other unappropriated lands, in said States, in lieu thereof, for the use and benefit of the common schools of said States.

By act of February 28, 1891 (26 Stat., 796), Congress amended sections 2275 and 2276 of the Revised Statutes providing for the selection

of lands for educational purposes in lieu of those appropriated for other purposes. The Department issued instructions under this act on April 22, 1891, in which it was held that said amendatory act superseded the provisions of the act of February 22, 1889 (25 Stat., 676, enabling the people of North Dakota, South Dakota, Montana and Washington to form constitutions, etc.), in so far as they are in conflict with said amendatory act of 1891, and that school lands provided for in the act of 1889 should be administered and adjusted in accordance with the later legislation. See 12 L. D., 400. In so far as the right of the State to select lands in lieu of mineral lands in sections sixteen and thirty-six there is no conflict between the act of 1889, *supra*, and the act of 1891.

It must be remembered that the entry was allowed and the money paid to the government for the land embraced in it in 1891; that this controversy arises on the application for a patent.

In the absence of objections by the State, the proofs preceding the entry and its allowance by the land department would be a sufficient finding of the Interior Department that the land embraced in such entry is mineral land and would form a proper basis for selecting other lands in lieu thereof. If the State insists that the land in question was in fact not mineral land and known to be such at the date the school grant to the State attached, then a hearing should be ordered to determine the fact as to the character of the land at that time.

As to the sufficiency of the State's protest, if the land in question was mineral in character, the allegation that notice was not posted in the manner required by law would be wholly immaterial as far as the State is concerned.

This disposes of the first and second grounds of the protest, for if the land was in fact mineral and known to be so at the time the grant to the State took effect, it is immaterial to the State whether the entryman complied with the mining laws of the United States or not. This question is solely one between the claimant and the United States.

The third ground is insufficient, for the reason that the land may in fact have been known to be mineral, and still no vein or lode been discovered thereon.

As to the fourth and fifth grounds, their allegations are not sufficient to raise any question that concerns the State or could in any way affect its claim to the land. The sixth and last ground is that the "land is more valuable for agricultural purposes than for mineral purposes." This language is too indefinite to properly be construed in such a manner as to embody the claim that the land was in fact not mineral land and known to be such at the date the school grant to the State attached.

For these reasons the State's protest must be dismissed.

However, if the State so elect it may, within thirty days from notice of this decision, file a new protest, duly corroborated, specifically alleging facts showing its claim to the land in question, and in case

it does so, then your office will direct that a hearing be had to determine the rights of the State to the land in question. If the State fails to file its claim within the time named, and there is no other objection, the entry will be passed to patent.

The judgment appealed from is accordingly modified.

LOUISE MINING COMPANY.

Motion for review of departmental decision of June 9, 1896 (22 L. D., 663), denied by Assistant Secretary Reynolds, September 11, 1896.

SECOND CONTEST—COMPLIANCE WITH LAW DURING PENDING CONTEST.

JOHNSON ET AL. v. SMITH ET AL.

A second contest may be properly entertained on a charge that the entryman has failed to comply with the law since the hearing in the former suit.

Assistant Secretary Reynolds to the Commissioner of the General Land Office, September 11, 1896. (E. M. R.)

This case involves the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of section 7, T. 48 N., R. 8 W., Ashland land district, Wisconsin. The record shows that on February 23, 1891, Abraham Johnson made homestead entry of the NW. $\frac{1}{4}$ of the above described land, and on February 24, 1891, Owen R. Tracey made homestead entry for the remaining quarter section.

Henry M. Smith and Thomas Lowe filed affidavits of contest alleging prior settlement under the act of September 29, 1890 (26 Stat., 496), which gave preference rights of entry to settlers upon these lands, and thereupon such proceedings were had which culminated in departmental decision of October 18, 1893 (17 L. D., 454), canceling the entries of Johnson and Tracey, which action was affirmed on April 16, 1894 (18 L. D., 409).

May 30, 1894, Lowe and Smith made homestead entries, the former of the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the latter of the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section, township and range.

On June 6, 1894, Johnson and Tracey filed affidavits of contest against the entries of Lowe and Smith, in addition to affidavits made in the latter part of May, 1894. The register and receiver denied the applications, and upon appeal your office decision affirmed their action, which action was affirmed by the Department on February 4, 1896. A motion for review having been filed, and having been entertained, the case is before the Department for final adjudication.

In the decision complained of it was said:

This Department has decided that Smith and Lowe were entitled to enter the lands in controversy within six months after September 29, 1890, the date of the act. That

question is no longer an open one. It is *res judicata*. But when they offered to exercise their right, they found that the lands had been entered by other parties, and being thus segregated from the public domain were beyond their present reach. While they remained so segregated, the lands were no longer public. They were not available either for settlement or entry, and Lowe and Smith could not rightfully maintain residence thereon. To have done so would have made them trespassers upon the rights of Johnson and Tracey, who were entitled to sole possession and occupancy so long as their entries remained of record.

An examination of the affidavits of contest discloses that those filed on June 4, 1894, are, when taken by themselves, insufficient upon which to base a judgment ordering a hearing, but when coupled with those made on the 24th or 25th of May, 1894, it appears that they contain a charge which justifies the Department in taking such action. The affidavits when so considered together are equivalent to stating that since the former contest the entrymen have not complied with the law with reference to the maintenance of residence and cultivation as required, nor can it be said that this matter is *res judicata*, for the reason that the only matter adjudicated was up to the former hearing, and nothing that may have transpired showing non-compliance with the law since, has been, or could have been, adjudicated by that decision.

It is a familiar doctrine of this Department that he who claims a right of entry by reason of prior settlement can not defer the establishment and maintenance of residence until the allowance of his application to enter. This doctrine was laid down in *Hall v. Stone* (16 L. D., 199), where the Department held, *inter alia*:

A homesteader who claims priority of right by virtue of an alleged settlement, must comply with the settlement law and can not defer the establishment and maintenance of residence until the allowance of his application to enter.

This was again asserted in *McInnes et al. v. Cotter* (21 L. D., 97), where it was held (syllabus):

One who claims the right to make a homestead entry on account of priority of settlement must show that the alleged settlement was followed by the establishment and maintenance of residence.

See also, to the same effect, *Foote v. McMillan* (22 L. D., 280).

There is contained in the answer of the defendants to this action a prayer for the dismissal of the appeal taken from the Commissioner's decision prior to the rendition of the judgment now sought to be reviewed. In view of the apparent sufficiency of the causes of action alleged by the petitioners, and the allowance of the appeal by the Commissioner at the time, for reasons that appeared just and proper to him, that question will not now be passed upon.

The petitioners will bear the expenses of this hearing, and it is better that the defendants be put to the annoyance of another trial than that these petitioners, who appear to be residents upon the land, should lose this opportunity of proving what may be their valuable rights.

The petition is therefore granted, and you will direct that a hearing be had to determine the matters presented by the affidavits of contest.

GOWDY ET AL. v. KISMET GOLD MINING CO.

Motion for review of departmental decision of May 23, 1896, 22 L. D., 624, denied by Assistant Secretary Reynolds, September 11, 1896.

PORTERFIELD SCRIP—UNSURVEYED LAND.

HOSMER v. DENNY ET AL.

Porterfield scrip is locatable only upon lands that have been surveyed under authority of the government.

Assistant Secretary Reynolds to the Commissioner of the General Land Office, September 11, 1896. (W. M. W.)

The case of A. A. Hosmer against A. A. Denny *et al.* has been considered, on appeal of the former from your office decision of December 13, 1894, rejecting his application to locate Porterfield scrip upon a certain tract of land alleged to be located between the meander line of donation claim No. 40 patented to Arthur A. Denny and the township meander line of Elliott's Bay, as shown by the survey of township 25 N., range 4 E., Seattle, Washington, land district.

On July 1, 1889, Hosmer, the claimant, made his application to be allowed to locate Porterfield scrip warrant No. 23 upon the land in controversy, describing it as follows:

Beginning at the government meander corner or evidence post on the 6th standard parallel 2.96 chs. west of the standard corner to Secs. 31 and 32, town 25 N., range 4 east, Will. Mer. in the Territory of Washington; thence along government meander line north 42° west 25 chains; thence north 49° 30' west, 29.53 chains (here intersecting west boundary line A. A. Denny's donation claim No. 40); thence along the west boundary of the A. A. Denny donation claim No. 40, south 50° 45' E., 34.14 chains; thence south 38° 15' east, 17.68 chs. to southwest fractional corner of the A. A. Denny's claim No. 40; thence S. 38° 22' east, 2.89 chs., to place of beginning in section No. 31, township No. 25 north of range 4 E., . . . containing 3.02 acres.

On July 19, 1889, the local officers rejected Hosmer's application, on the following grounds:

1. There is no such tract of land shown on the records of this office as public lands of the United States.
2. That if there [is] such a tract of land it is not surveyed public land of the United States and therefore not subject to location of the class of scrip known as Porterfield scrip.
3. Said tract is occupied land within the corporate limits of the city of Seattle, and therefore not subject to the location of the class of scrip described.

The applicant appealed to your office.

On June 28, 1890, your office affirmed the judgment of the register and receiver.

Hosmer appealed to the Department.

On July 23, 1892, the Department found that "there are interested parties in possession" of the land in controversy "who have had no

notice of Hosmer's said application," and thereupon directed that a hearing be ordered "to determine the true status of the land applied for," with notice to Denny and all parties in interest and in possession of said land.

The hearing was held before the register and receiver, after notice to the several parties claiming an interest in the land in controversy.

A. A. Denny, in his answer to Hosmer's application, alleges that:

He is the same person who located, made proof upon and received the patent to donation entry No. 40, and that said donation claim includes the land in controversy.

2. He alleges that there is no such tract of land shown on the records in the office of the register and receiver of the United States Land Office at Seattle, Washington, as public land of the United States.

3. He alleges that if there be such a tract of land that it is not surveyed public land of the United States.

4. He alleges that said tract described is within the corporate limits of the city of Seattle, and it is occupied, and extensive improvements have been made thereon in aid of commerce and navigation.

He further alleges ownership in fee in certain lots in the city of Seattle, which are included in a portion of the tract covered by Hosmer's application.

These issues are substantially pleaded by divers other parties to the record.

The register and receiver rejected Hosmer's application, and he appealed to your office.

On December 13, 1894, your office affirmed the judgment of the local officers.

Hosmer appeals.

The assignment of errors contains seventeen specifications of alleged errors in your office decision; therefore it is impracticable to set them out in full in this opinion.

The testimony in the case is voluminous, covering over six hundred pages of typewritten matter. It has been carefully examined and duly considered in connection with oral and written arguments submitted by counsel representing the respective parties.

The land in controversy lies between the meander line of the town-ship survey and the meander line of the Denny donation claim on Elliott's Bay, an arm of Puget Sound. It is located in the limits of the city of Seattle, and has on it very valuable buildings.

The rights of Denny under his patented donation claim and those holding under him, the rights of the State of Washington to tide lands on its borders, the effect of meander lines as affecting boundaries under the system of public surveys, and other kindred questions, have all been presented and argued by the respective parties. In view of the conclusion I reach in the case, it is wholly unnecessary to discuss or pass upon any of these questions. The only real, material, question to be determined is, whether under the law and facts disclosed in the record Hosmer has the right to locate his Porterfield scrip upon the land described in his application.

The act of Congress under which the Porterfield scrip was issued (12 Stat., 836), required the Secretary of the Interior to issue to the executors of Robert Porterfield a number of warrants equal to 6,133 acres of land, according:

to the usual subdivisions of the public surveys, in quantities not less than forty acres; to be by them located on any of the public lands which may have been or may be surveyed, and which have not been otherwise appropriated at the time of such location within any of the States or Territories of the United States, where the minimum price for the same shall not exceed the sum of one dollar and twenty-five cents per acre; to be selected and located in conformity with the legal subdivisions of such surveys.

These provisions are plain and unambiguous. The scrip, or warrants, provided for can only be located on public lands that have been surveyed; that is, surveyed under the authority of the government of the United States. The act specifically and clearly limits the selection and location of such scrip to surveyed lands in conformity with the legal subdivisions of the United States public surveys.

Whether lands have been surveyed by the authority of the United States is a question of fact that must be conclusively determined from the records of your office.

The Commissioner of the General Land Office is charged under the law and surveying manual, under the direction of the Secretary of the Interior, with the performance of all executive duties appertaining "to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands." See Manual of Surveying, page 9, sec. 32.

It is claimed by counsel for applicant that the discrepancies between the original survey of the township in 1856 and the survey of Denny's donation claim of 1860, as shown on the respective plats, amount to a government survey of the land in question. This contention is not well taken. No such tract, lot, parcel, or other legal subdivision of land, appears on the original township plat, and it does not appear on the Denny survey as such lot or other legal subdivision of public lands. In fact, it could not properly so appear on the plat of the survey of the Denny claim, for the official authority for such survey was confined to marking the boundaries of Denny's donation claim and conforming his lines as nearly as practicable to the then existing township surveys.

Your office held in the decision appealed from that the land applied for is not public land; that it occupied the position of tide lands on Elliott's Bay and passed to the State of Washington under the doctrine announced in *Hardin v. Jordan*, 140 U. S., 380, and other authorities, as well as under *Frank Burns*, 10 L. D., 365.

I concur in your reasoning, but at the same time prefer to rest my decision upon the fact that the land applied for is not surveyed public land, and therefore under the law Hosmer can not be permitted to locate Porterfield scrip thereon. His application is dismissed, and your office decision appealed from is affirmed.

LAND VALUABLE FOR BUILDING STONE—ACT OF AUGUST 4, 1892.

INSTRUCTIONS.

In the exercise of the right conferred by section 1, act of August 4, 1892, a discovery preceding the entry is necessary, and no right attaches in favor of the entryman until he makes application to enter.

Secretary Smith to the Commissioner of the General Land Office, August 29, 1896. (W. M. W.)

By your office letter of May 29, 1894, you submitted to the Department for consideration three questions respecting the status of lands chiefly valuable for building stone under the act of August 4, 1892 (27 Stat., 348), and request such instructions as the Department may see proper to give under said act.

The purpose of your office communication is to secure a departmental construction of section one of the above named act, and such construction will be given without attempting to answer *seriatim* the questions submitted.

The act of August 4, 1892, *supra*, is as follows:

AN ACT to authorize the entry of lands chiefly valuable for building stone under the placer mining laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims: *Provided*, That lands reserved for the benefit of the public schools or donated to any State shall not be subject to entry under this act.

SEC. 2. That an act entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and Washington Territory," approved June third, eighteen hundred and seventy-eight, be, and the same is hereby, amended by striking out the words "States of California, Oregon, Nevada, and Washington Territory" where the same occur in the second and third lines of said act, and insert in lieu thereof the words, "public-land States," the purpose of this act being to make said act of June third, eighteen hundred and seventy-eight, applicable to all the public-land States.

SEC. 3. That nothing in this act shall be construed to repeal section twenty-four of the act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one.

In construing statutes, it is a well settled rule that when divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them. *United States v. Freeman*, 3 Howard, 556; *Ryan v. Carter*, 93 U. S., 78; *Cooper M'f'g Co. v. Ferguson*, 113 U. S., 727.

Applying this rule to the matter in hand, the material thing to be considered is building stone and the disposal thereof by the United States.

By the timber and stone act of June 3, 1878 (20 Stat., 89), Congress provided for the disposition of public lands chiefly valuable for timber or stone and unfit for cultivation. There can be no doubt but what land chiefly valuable for building stone could have been purchased

under said act, if the applicant could have shown himself qualified, and shown that the land was unfit for cultivation and otherwise in such condition as to bring it within the purview of the act. Congress in passing the act of 1892 was directly dealing with the subject of the act of 1878; the second section of the act of 1892 extended the act of 1878 to "the public land States." The language used in section 1 of the act of 1892 fails to show, either expressly or by implication, that Congress intended to repeal any part of the act of 1878. It is equally clear that Congress did not intend by said section for all purposes to place lands chiefly valuable for building stone in the same category as lands containing such minerals as gold, silver, cinnabar, copper, and the like. Lands valuable for such minerals are expressly "reserved from sale except as otherwise expressly directed by law" (Revised Statutes, Sec. 2318), and there is nothing in the section under consideration to show that Congress intended to place building stone on the same general plane with gold, silver, and other minerals. In other words, said section neither takes building stone out of the act of 1878, nor does it add such land to such as contain minerals. It in no way affects the status of land containing building stone. It simply opens up an additional and a new avenue whereby properly qualified persons may acquire title to such lands as contain this particular kind of stone, by permitting such lands to be entered under the placer mining law. The language used is:

That any person authorized to enter lands under the mining laws . . . may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims.

It is not material to inquire for, or ascertain the reasons Congress may have had for extending to these persons the right to *make entry* of building stone lands under the placer mining laws. It is sufficient to know the extension has been made in clear, explicit language. It is equally clear that the extension is limited to the right to "enter" such lands. The language used shows that the right so given can only attach by the *entry*. Under the mineral laws a discovery and a location are both necessary, and in cases where title is sought they both must precede the entry. Mineral claimants who conform to the laws and regulations are protected in their possessory rights to their claims, whether they seek to make entry or not, so long as they comply with the law and regulations. The matter of entry is left optional with them. They secure their rights by discovery, location, performance of the required amount of labor on their claims. Under section 1 of the act under consideration a claimant for lands chiefly valuable for building stone can only secure a right to the land by making an *entry* thereof and the payment of the government price of the land.

It follows that, in order to the exercise of the right of entry under section 1 of the act under consideration, and preceding the entry, a discovery will be necessary, and no right will attach in favor of the

entryman until he makes an application to enter, describing it by legal subdivisions if on surveyed land.

It does not follow that because the mere right of entry under the placer laws is extended to claimants of lands that are chiefly valuable for building stone, that such claimant is thereby invested with all the rights of claimants under the mineral laws. The building stone claimant is only invested with such rights as the statute gives to him, which can only become vested at the time he makes entry.

The views herein expressed find more or less support on principle in the departmental expressions heretofore given, as will appear from a brief reference thereto.

On the 12th day of October, 1892, instructions were issued under said act (see 15 L. D., 360), in which it was said, *inter alia*:

It is not the understanding of this office that the first section of said act of August 4, 1892, withdraws land chiefly valuable for building stone from entry under existing law applicable thereto.

Prior to the passage of the act of August 4, *supra*, the Department held that stone that is useful only for general building purposes does not render land containing the same subject to appropriation under the mining laws, or except it from pre-emption entry. See *Conlin v. Kelley*, 12 L. D., 1. In *Clarke et al. v. Erwin*, 16 L. D., 122, it was held that:

Land chiefly valuable for the building stone it contains is not by such fact excluded from entry under the settlement laws.

In *Hayden v. Jamison*, 14 L. D., 537, the same conclusion was reached.

Your office letter is returned herewith, with the direction that in dealing with building stone applicants under the act of August 4, 1892, *supra*, your office pursue a course in harmony with the views herein expressed.

RAILROAD GRANT—INDEMNITY—SPECIFICATIONS OF LOSS.

NORTHERN PACIFIC R. R. CO. *v.* OWEN ET AL.*

In the re-arrangement of specifications of loss in bulk, so as to show a specific loss for each tract selected, the correction of a clerical error in the description of a tract included in the original assignment of losses, will not be regarded as the substitution of a new basis in support of the list, nor be held to invalidate such list as against the subsequent acquisition of adverse rights.

Secretary Smith to the Commissioner of the General Land Office, February 17, 1896.
(F. W. C.)

I have considered the appeal filed by the Northern Pacific Railroad Company from your office decision of July 31, 1894, holding for cancellation its indemnity list No. 27, filed October 25, 1887, for certain lands in Seattle land district, Washington, on account of pre-emption filings made after the date of such selection.

* Omitted from Vol. 22.

Said list of October 25, 1887, contained a specification of losses as bases for the land selected, but the same were not arranged tract for tract with the selected land.

On September 6, 1892, subsequent to the filings made by J. M. Owen *et al.*, covering the greater portion of the lands embraced in said list No. 27, the company filed its re arranged list. Your office decision recognized these pre-emption filings as against the company's selection, and in referring to the action of the Department in the case of La Bar v. said company (17 L. D., 406) states:

As said ruling is to the effect that the substitution of an amended list of indemnity selections on a specification of losses different from that assigned in the first, as in the present instance, must be treated as an abandonment of the first, and hence, that a settlement made on a tract released from indemnity withdrawal, but subject to a pending selection takes effect at once upon the abandonment of said selection, and precludes the subsequent selection of said land on account of the grant.

In its appeal the company urged that the bases assigned in the original list were merely re-arranged to meet the requirement of this Department, and that different tracts were not specified in the second list as the bases for the selections. As it was intimated in your office decision that the bases assigned in the re-arranged list were different from those used in the list as originally filed, you were requested to make report of the matter in departmental letter of December 16, 1895. In reply thereto your office letter of July 16, 1896, states as follows:

I have to report that a re-examination of the said lists discloses that although the tracts given as a basis in the original list are not arranged tract for tract with the selections, they are nevertheless the identical tracts specified as a basis in the re-arranged list, with one exception, which is that lot 6, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and N. $\frac{1}{4}$ "NW. $\frac{1}{4}$," Sec. 1, T. 27 N., R. 8 E., (159.25 acres) are given as a basis in the original list for the selection of the SW. $\frac{1}{4}$, Sec. 5, T. 28 N., R. 8 E., while in the re-arranged list the basis for the same selection is specified as lot 6, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and N. $\frac{1}{4}$ "SW. $\frac{1}{4}$," Sec. 1, T. 27 N., R. 8 E., (159.25 acres). As the "Remarks" after both bases state the three tracts forming the same to be embraced in homestead entry (No. 8497) of John S. Goodrich, and an inspection of said entry shows that the three tracts given as bases in the second list are the tracts actually covered by the entry, it is evident that the slight variance as above in the basis of the two lists arose through a clerical error.

From said record it appears that there was no intention on the part of the company to substitute new bases for the tracts selected in list No. 27, and I do not think that the mere clerical mistake in one instance in misdescribing the land embraced in the entry by John S. Goodrich, which had been lost to the company's grant under which indemnity was claimed, should be held to avoid the list filed prior to the allowance of the pre-emption filings before referred to.

Said list No. 27, met the requirements of this Department in the matter of the specification of lost lands when filed, and the subsequent re-arrangement of the losses, as required, so as to show a specific loss for each tract selected, in nowise avoided the selection, or subjected the lands to other disposition.

The company having complied with all requirements in the matter of the presentation of its indemnity list, no rights were acquired as against the grant by the allowance of the filings by J. M. Owen *et al.*

Your office decision is therefore reversed; the company's list will remain intact, and the conflicting filings will be canceled, unless, after due notice, other and sufficient cause is shown to avoid the effect of the company's selection.

RAILROAD GRANT—COMMON TERMINUS—ACT OF MAY 6, 1870.

BRAMWELL *v.* CENTRAL AND UNION PACIFIC RAILROAD COMPANIES.

An entry of land embraced within the act of May 6, 1870, granting certain lands for a common terminus of the Central and Union Pacific Railroad Companies, may be permitted to stand as against the protest of one of said companies, it appearing from the status of the lands covered by said act that the purposes of the grant made thereby cannot be accomplished.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 3, 1896. (F. W. C.)

With your office letter of August 9, 1893, was forwarded a record of the proceedings had upon an application filed by George Bramwell for the reinstatement of his homestead entry covering the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 26, T. 7 N., R. 2 W., Salt Lake City, Utah.

On May 19, 1869, one Elisha Thomas filed pre-emption declaratory statement covering the entire NW. $\frac{1}{4}$ of said section 26. On March 29, 1871, he sold his improvements upon the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section to Bramwell and executed a relinquishment of his filing as to said tract. He subsequently perfected title to the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section and received patent therefor. Simultaneously with the filing of Thomas' relinquishment Bramwell tendered his homestead application for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, which was accepted by the local officers. And upon said entry he made final proof December 22, 1877, upon which final certificate issued.

By the act of May 6, 1870 (16 Stat., 121), it was provided that the common terminus and point of junction of the Union Pacific Railroad Company and the Central Pacific Railroad Company

shall be definitely fixed and established on the line of railroad as now located and constructed, northwest of the station at Ogden, and within the limits of the sections of land hereinafter mentioned.

Then follows a description of nine sections of land, among which is section 26 before referred to. Said companies were

authorized to enter upon, use, and possess said sections, which are hereby granted to them in equal shares, with the same rights, privileges, and obligations now by law provided with reference to other lands granted to said railroads.

It was further provided that said railroad companies

shall pay for any additional lands acquired by this act at the rate of two dollars and fifty cents an acre. Also "that no rights of private persons shall be affected by this act."

Bramwell's entry was first considered in your office decision of July 21, 1881, in which the same was held for cancellation for the reason, as held, that Bramwell's rights were initiated subsequently to the approval of the act of May 6, 1870; and he was not protected by the provisions of said act.

Your office decision was affirmed by departmental decision of September 12, 1883. A review of said decision was denied October 27, 1883 (2 L. D., 844). In this decision the grant of 1870 was held to be an absolute and unconditional grant so far as it related to the even numbered sections, and passed title thereto subject only to the rights of those then claiming the lands.

Bramwell's application for reinstatement is made under the provisions of the third section of the act of March 3, 1887 (24 Stat., 556), the object and purpose of which is to correct all decisions made by this Department where it shall appear that any homestead or pre-emption entry has been erroneously canceled on account of any railroad grant or withdrawal of public lands from market, provided the party has not located another claim or made an entry in lieu of the one so erroneously canceled; and provided also that he did not voluntarily abandon his original entry.

Hearing was duly ordered upon Bramwell's application for reinstatement, notice of which was given the companies but they failed to enter an appearance and the testimony is *ex parte*. By the testimony it is shown that after making final proof Bramwell continued to reside upon, improve and cultivate the land covered by his entry to the date of hearing in 1893, and that he had never at any time abandoned said entry or made another in lieu of the one formerly canceled.

Upon this showing your office letter of August 9, 1893, forwarded the papers with a recommendation that Bramwell's entry be reinstated. In your office letter it does not appear that the companies were notified of your recommendation; but in June, 1894, an argument was filed on behalf of the Union Pacific Railroad Company opposing the reinstatement of Bramwell's entry. Nothing has been filed on behalf of the Central Pacific Railroad Company.

From the record before me it is apparent that the act of May 6, 1870, could not have been at once operative upon this land, for it is admitted by the company that Thomas was in possession of and occupying the tract under his pre-emption filing at that time and for about a year thereafter. It is alleged that he was unable to pay for the entire tract and for that reason sold and relinquished his claim as to the west half of the land covered by his filing in favor of Bramwell. Accepting, as urged by the company, that the act of 1870 was a present grant, there

might be a serious question as to whether the same passed any title to this tract, for the reason it is admitted, as against Thomas, that no title would have been conveyed thereby. But a decision upon this question is unnecessary in the disposition of the application under consideration. No other consideration can be reached with respect to the principal object of said act than that it was the intendment thereof that these companies should establish at some particular point upon the lands included within the lines of the square described, a terminus or junction, and the grant was made that terminal facilities of such character and extent as might be rendered necessary for the successful and convenient operation of two such railroads, might be established.

While it appears that a point was selected within the square at a small town by the name of Harris, where the tracks of the two roads should meet, yet it is well known that the real terminal point established for a running connection in the operation of these roads is located at Ogden, more than five miles from Harris and about four miles and a half distant from the nearest point on any portion of the land embraced within the square composed of the designated sections named in the act of 1870. While it may be true, as stated by contestant, that the portion of the road between Harris and Ogden was built and is still owned by the Union Pacific Railroad Company, yet a lease was made of the same by the last named company to the Central Pacific Company, and it would appear that said lease was made in order that the point of running connection between the two roads might be located at Ogden.

Of the nine sections composing the square named in the act of 1870, no claim has ever been made to any portion of the even numbered sections within said square, with the exception of the tract here in question; adverse claim having attached to all of said lands prior to the passage of the act of 1870, which claims were all perfected by the original claimants, with the exception of Thomas' claim of this tract. Of the odd numbered sections in the square, but two hundred acres have ever been claimed as railroad land, and these were claimed by the Central Pacific Company not under the act of 1870 but as inuring to it under the act of July 1, 1862.

The fact that the lands within the square named were thus covered by prior claims, thus rendering it practically impossible to realize the purpose of the act of 1870, may have been the moving cause for the establishment of the common terminus at Ogden. It is apparent, however, that this land is not useful to the companies for the purpose indicated, and in fact it does not appear that any joint claim has been asserted thereto, as provided in the act of 1870.

The protest filed on behalf of the Union Pacific Railroad Company is therefore overruled, the previous decisions of this Department before referred to, ordering the cancellation of Bramwell's entry, are recalled and vacated, and said entry will be reinstated upon the records of your office.

MINERAL LANDS—BUILDING STONE—PLACER CLAIM.

SIMON RANDOLPH.

Prior to the passage of the act of August 4, 1892, there was no authority to locate and purchase lands chiefly valuable for building stone under the placer mining laws.

Under the provisions of section 1, of said act, no rights are secured prior to application, and if at such time the lands are not subject to entry the claim under said act must be rejected.

Secretary Francis to the Commissioner of the General Land Office, October 3, 1896. (C. J. W.)

The Sucia Island Stone Mine is a consolidation of seven locations, made by seven parties on November 8, 1890. On April 10, 1893, Simon P. Randolph, claiming as locator of one of said claims and as assignee of the locators of the other six, filed in the local office at Seattle mineral application No. 97 for said consolidated claim.

By decision of June 29, 1893, the local officers rejected such application for the reason that the tract applied for was reserved for lighthouse purposes under order of the President of July 13, 1892. The applicant appealed from said decision, and on March 3, 1894, your office passed upon the case and affirmed the decision of the local officers. From this decision Randolph appealed to the Department. Pending said appeal here, a survey and selection of such part of the land reserved for lighthouse purposes, as was needed, was made, and a map or drawing of the same filed, and a recommendation made that the remainder of said reservation be restored to the public domain. It appears that the land so selected for lighthouse purposes did not embrace any part of the land applied for by Randolph.

On August 29, 1895, the case being under consideration here, and the reservation for lighthouse purposes no longer conflicting with said application, it was held, that the rights of the applicant under the act of August 4, 1892 (27 Stat., 348), should be reconsidered. The case was returned to your office with directions that you readjudicate the same under existing conditions, and the record and papers in the case were transmitted to your office.

On September 17, 1895, said decision was recalled and your office requested to return the same without promulgation. In accordance with said request, the decision and record were returned here.

On March 4, 1896, the executive order of July 13, 1892, reserving the group of islands known as Sucia Islands for lighthouse purposes, was canceled, except the parts located and designated as being for said purposes; and the remaining part of said islands was permanently reserved for military purposes. This reservation was made on the request of the Secretary of War.

Since the decision of August 29, 1895, the applicant has been granted

a further hearing here, and it becomes necessary to determine what his rights are under conditions as they exist now. The contention of the applicant is, that he has the right under section 2319 of the Revised Statutes to purchase the land covered by his application, as a placer mining claim, and that such right is confirmed by the act of August 4, 1892. This act was, by request of your office, construed here for your guidance by letter of instructions of August 29, 1896 (23 L. D., 322). It is therein held, that the chief and material thing considered in said act of August 4, 1892, was the disposal by the United States of building stone, and that said act did not take building stone out of the provisions of the act of 1878 (20 Stat., 89) or add it to the class of substances known as mineral. It simply provides that lands chiefly valuable for building stone may be entered under the placer mining laws. In said letter of instructions it is said that the extension of right under said act is limited to the right to enter such lands. The right so given can only attach by entry.

Under the mineral laws a discovery and location are both necessary, and in cases where title is sought they both must precede the entry. Mineral claimants who conform to the laws and regulations are protected in their possessory rights to their claims whether they seek to make entry or not, so long as they comply with the laws and regulations. The matter of entry is left optional with them. They secure their rights by discovery, location, performing the required amount of labor on their claims. Under section 1 of the act under consideration a claimant for lands chiefly valuable for building stone can only secure a right to the land by making an entry thereof and the payment of the government price of the land. It follows that in order to the exercise of the right of entry under section one of the act under consideration and preceding the entry, a discovery will be necessary and no right will attach in favor of the entryman until he makes an application to enter, describing it by legal subdivisions if on surveyed land.

It does not follow, that because the mere right of entry under the placer laws is extended to claimants of lands that are chiefly valuable for building stone, that such claimant is thereby invested with all the rights of claimants under the mineral laws. The building stone claimant is only vested with such rights as the statute gives to him, which can only become vested at the time he makes entry.

If the right to locate and purchase land chiefly valuable for building stone under the placer mining laws, existed before the passage of the act of August 4, 1892, the act itself would seem to be unnecessary. It is believed and held that prior to the passage of that act it could not be so located and purchased, and it follows that applicant secured no right by his mineral location.

It may be that an application to purchase and the payment of the purchase money for land, is equivalent to entry within the meaning of the act of August 4, 1892, as above construed.

Randolph filed his application to purchase on June 29, 1893, and made tender of two hundred and eighty-seven and fifty one-hundredths dollars, being the legal price of the land, which was refused. If he had the right to pay for it at that time, the tender continuing he would lose no right by its refusal. If the land was at the time subject to entry, he should have been permitted to purchase and pay the purchase

money. Prior to that date he had made no application to enter, or any other application equivalent thereto, and therefore had predicated no legal right to the land. This application was rejected because on July 13, 1892, the land was in reservation. The order reserving it was not rescinded until March 4, 1896, and the rescinding order of that date, releasing it from use for lighthouse purposes, contained a clause reserving it permanently for military purposes. It must therefore be held that at the time Randolph made his application to purchase, the land was in reservation; and so remained and is still in reservation and not subject to purchase or entry. It follows that the action of the local officers in rejecting his application was proper, and your office decision approving their action is affirmed.

SHOOK *v.* DOUGLAS.

Motion for rehearing denied by Secretary Francis, October 3, 1896. See departmental decision of June 9, 1896, 22 L. D., 646.

PRACTICE—NOTICE—RAILROAD GRANT—SETTLEMENT RIGHT.

NORTHERN PACIFIC R. R. CO. *v.* WALTERS ET AL.

Notice of an appeal served upon a duly recognized agent of a railroad company is a proper and sufficient service.

A settlement right, set up as against a railroad grant, is ineffective if it appears that the alleged settler had prior thereto exhausted his rights under the settlement laws.

Secretary Francis to the Commissioner of the General Land Office, October 3, 1896. (W. A. L.) (E. M. R.)

This case involves the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 13, T. 13, R. 18 E., and the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 13, of the same range and township, North Yakima land district, Washington.

The record shows that your office, on March 26, 1894, in pursuance of departmental instructions of February 19, 1894, ordered a hearing as to the John W. Walters case and as to the Shedrick J. Lowe case on May 19, 1894, under departmental decision of April 5, 1894, said cases being consolidated by order of the Department. On May 18, 1895, your office decision was rendered, affirming the action of the local officers, and holding that John W. Walters, under whom Lowe claims, was disqualified as a settler under the pre-emption and homestead laws at the date of the definite location of the line of the Northern Pacific R. R. opposite this tract of land, namely, on May 24, 1884, on which date the right of the plaintiff company attached to the land within the primary limits of its grant.

In your office decision was discussed a motion to dismiss the appeals of the defendants in this cause, because not properly served upon the railroad company. So much of that decision as held the appeals improperly filed because not served upon the designated authority of the railway company, appears to be in conflict with the case of *Boyle v. The Northern Pacific R. R. Co.*, 22 L. D., 184, wherein it was said (Syllabus):

Notice of an appeal duly served on the general land agent of a railroad company is sufficient service on said company:

and on page 185 thereof it was said, in speaking of the *O'Connor* case, which was cited by your office as of controlling authority:

In that case notice had been served upon a firm not authorized to accept notice for the company, and it could not therefore be held to be bound by the service; in other words, no service had been made. While it might be inferred from the language used that jurisdiction could not be acquired except by service upon the designated attorney, yet it was not the intention so to hold, but rather to show that in that case no service had been made to bind the company.

The company having designated a person to accept service for it, it would seem to be proper to serve all notices upon that person, but it cannot be held that service upon any other proper person will not bind the company.

It would therefore appear that your office decision was in error in holding that service upon the duly recognized agent of the company was not a proper service.

Especially is this the case when it appears that the appeals were duly served upon H. C. Humphrey, the agent of the company at North Yakima, in accordance with the Session Laws of Washington for 1893, page 409.

John W. Walters settled upon these tracts of land in the fall of 1879. He had at that time exhausted his homestead and pre-emption rights by entry and filing in the State of California, but had not exhausted his timber culture or desert land rights. It appears from his testimony as contained in the record that in 1882, two years prior to the attachment of the rights of said company under its grant, he went to the local office and asked if he would be allowed to make a desert land entry upon these tracts, which he was told would not be permitted. It appears that he did not tender any written application to so enter, or make any tender of the fees due in such cases.

It therefore becomes unnecessary to pass upon the question as to whether in the event he had done so the doctrine laid down in *Ard v. Brandon*, 156 U. S., 537, would apply, inasmuch as no legal application was in fact made.

The disposition, therefore, of this case made by your office, was correct, and judgment heretofore rendered is affirmed.

CONFIRMATION—ACT OF MARCH 3, 1891.

UNITED STATES *v.* COOPER ET AL. (ON REVIEW).

The confirmation of an entry under section 7, act of March 3, 1891, for the benefit of a transferee, is not contemplated by said statute in case of a transfer prior to the issuance of final certificate.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 3, 1896. (P. J. C.)

Motion for review of departmental decision of April 26, 1895, in *United States v. Cooper et al.* (20 L. D., 403), having been filed, and notice thereof having been served on opposing party under the rule, the same comes up for consideration.

It appears that Thomas Cooper made pre-emption cash entry, September 7, 1883, of the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and lots 2 and 3, Sec. 2, T. 5 N., R. 3 W., 6th P. M., McCord, Nebraska, land district. On the report of a special agent, your office, on January 3, 1887, held said entry for cancellation on the ground that more than two months before making final proof and entry Cooper had conveyed the land to William J. McGillen. The local officers reported that the entryman had been notified, the usual time given him to apply for a hearing, and had taken no action. Your office, therefore, on April 2, 1887, canceled the entry. On April 7, following, this action was rescinded on the application of the Harlem Cattle Company, who appealed from your office order of April 2, "alleging that it had received no notice of the action of January 3, 1887, until March 1, 1887," and a hearing was ordered. It seems that the hearing was continued from time to time for more than two years, and on June 1, 1889, the local officers so reported, and enclosed an abstract of title showing the conveyance by Cooper prior to entry. Thereupon your office, on July 27, 1889, adhered to your former judgment canceling his entry.

On August 14, 1889, Cooper's relinquishment was filed, also the Harlem Cattle Company's acknowledgment of notice of your action of July 27, and its waiver of appeal. Again, on September 17, 1889, your office ordered the cancellation of the Cooper entry.

On October 1, 1889, William J. McGillen made homestead entry of the tracts.

On October 11, 1890, there was forwarded to your office an application of I. R. Darnell, trustee of the Kit Carter Cattle Company, alleging that it was mortgagee of said land, and setting forth sufficient grounds to warrant your office in ordering a hearing. As a result thereof the local officers recommended the reinstatement of the pre-emption cash entry, and that the same be confirmed under section 7 of the act of March 3, 1891 (26 Stat., 1095). On appeal your office, by letter of November 30, 1892, reversed their action, but on motion for review, by letter of April 11, 1893, reversed your former action and affirmed the

local officers. On appeal the Department, on April 26, 1895, reversed your office decision.

In the departmental decision it is found as a matter of fact that the Harlem Cattle Company, remote grantees of Cooper, executed a deed of trust on the tracts involved, and others, to the Kit Carter Cattle Company for the consideration of \$20,000, on June 24, 1886; that the deed from Cooper and McGillen being on record, and showing that it was executed more than two months before final proof and entry, was constructive notice to the Kit Carter Cattle Company, and that it can not, therefore, invoke the confirmatory provisions of section 7 of said act of March 3, 1891.

Review of this judgment is now asked, and numerous grounds of error are set forth, but at such great length and in such argumentative form that it is not practicable to quote them.

The only question necessary to discuss in this motion is, whether the Cooper entry was confirmed under the act of March 3, 1891.

The hearing ordered by your office, April 30, 1887, was continued from time to time to suit the convenience of the special agent. He finally filed an abstract of title to the land, dated January 21, 1889, which was forwarded to your office June 1, following, with this statement:

Such abstract has been filed in this office by Special Agent A. B. Crump, and is enclosed herewith, together with a communication from Ex-Special Agent Coburn, by directions of Crump, who is of the opinion that further evidence in the case on the part of the government would be superfluous.

It was upon this report that your office, on July 27, 1889, canceled the Cooper entry, as the abstract showed the transfer by Cooper prior to his entry.

At this stage of the proceedings the fact that the Kit Carter Cattle Company did not have notice of the proceedings which resulted in the cancellation of the Cooper entry cuts no figure, for the reason that under its showing its right to be heard was recognized and a hearing was had at its instance.

Section 7 of the act of March 3, 1891, only contemplates the confirmation of such entries as had been made, upon which final certificates were issued, and was transferred thereafter to *bona fide* purchasers or incumbrancers. Cooper's entry was not transferred *after* final certificate issued. Hence it follows that this is not such an entry as can be confirmed under that statute.

The motion is therefore overruled.

ALASKAN LANDS—SURVEY—RIGHTS OF NATIVE OCCUPANTS.

FORT ALEXANDER FISHING STATION.

In the survey of Alaskan land, under the act of March 3, 1891, the claim must be as nearly as practicable in a square form, and not include land to which the natives have prior rights by virtue of actual occupation.

Secretary Francis to the Commissioner of the General Land Office, October 3, 1896. (W. A. L.) (W. M. B.)

This Department is in receipt of the papers transmitted with your office letter, of date June 10, 1895, which relates to survey No. 68, executed under provision of sections 12 and 13 of the act of March 3, 1891 (26 Stat., 1095), by Francis Tagliabue, U. S. deputy surveyor, of a tract of land claimed by the Fort Alexander Fishing Station (a corporation) situate on the Nushagak River, Bristol Bay, district of Alaska, containing 132.33 acres, and used for cannery purposes.

From the record submitted it appears that the improvements made by the company upon the tract claimed are quite extensive, being valued at not less than \$50,000, and that the cannery has a capacity of 30,000 cases of four dozen one pound cans each of salmon per season.

In your office letter to the United States marshal, ex-officio surveyor-general for Alaska, in connection with this survey, you say:

In reply you are informed that the survey cannot be accepted by this office for the reason that the regulation as to square form has not been complied with, and because of the apparent infringement upon the rights of the natives alongside who stand as much in need of the waters of the stream enclosed as the claimants, and further because more land is claimed than is occupied for their business.

The attorney for claimants appealing from the decision of your office files assignments of error as follows:

1. That the quantity of land surveyed does not exceed the area allowed by the act of March 3, 1891.
2. The lines of survey conform to or are within the monuments and boundaries of the location of the claim as found on the ground at the time of the survey.
3. That the length of the shore line is necessary and material to the company as seining ground for fishing purposes.
4. That the tract cannot be further extended inland without including swamp and overflow land, which by the policy of the government, is reserved for the future State.
5. That the tract should be practically in the present form to embrace the improvements belonging to the company.

The field notes of this survey, and the plat thereof, as returned show that the tract embraced therein, in its general outline, varies very slightly in shape from the letter "L", that portion of the tract corresponding to the long part of said letter—extending in an easterly and westerly direction—having a shore line on its northern boundary something over a mile and a quarter in length, with a width of about three and one-third chains at point of narrowest breadth. That portion of

the tract corresponding to the short part of said letter—extending in a northerly and southerly direction—has a boundary line on the west approximately three-fifths of a mile in length.

With reference to contention of appellants with respect to the lines of survey conforming to and being within the monuments and boundaries of the location of the claim “as found on the ground at the time of the survey,” the report of the deputy who performed the work in the field contains the following statement:

The survey was made according to the boundaries of the tract as claimed and desired by H. C. Jensen, agent and superintendent of the Fort Alexander Fishing Station, but as he was not present at the time the survey was made he could not point out the places where the stakes marking the boundaries were originally set, or where the traps are generally placed when the cannery is in operation.

How the deputy could consistently state in the same sentence of his report that the survey was made “according to the boundaries of the tract as claimed,” in the face of the further statement therein contained to the effect, substantially, that at the time the lines of survey were run he was not able, on account of the absence of the company’s agent, to locate the *situs* of the monuments or stakes indicating the boundary of the claim, is a matter rather difficult to comprehend.

These special surveys should not be approved and accepted unless executed in accordance with such general instructions as were issued to the deputy for the execution of the survey under consideration, in words following:

You, . . . , must conform to said act of March 3, 1891, and other laws of the United States, the regulations thereunder dated June 3, 1891, the printed manual of surveyor’s instructions, approved December 2, 1889, and other instructions heretofore issued, or which may hereafter be issued by the said Commissioner, and with such special instructions as may be issued from time to time, from this office.

The provision of the act, and regulations thereunder, mentioned in the instructions as above quoted required that these surveys should be so run as to embrace a tract of land “as near as practicable in square form,” and the attorney in the case at bar was notified by departmental letter of November 25, 1891, that such requirement must be complied with in all cases. *Vide* 13 L. D., 608.

The contention of claimants that the survey should be practically in its present form in order to embrace the improvements belonging to the company, is without merit, for the reason that the nearest improvement (a building used for a boarding house) on the western portion of the claim, to the only alleged improvement (a fish trap at the mouth of the creek between corners No. 9 and 10) on the eastern portion of the tract, are more than a mile distant from each other, and if the limit or total of the area—one hundred and sixty acres—authorized to constitute a single entry, in case of actual occupancy of the whole of such area, was allowed the claimants it would have to be in square form with none of the side or exterior lines more than one half mile (40 chains) in length, which rule if applied in the case at bar would necessarily exclude from

purchase and entry that part of the tract, and the improvements thereon, forming either the eastern or western portion of appellant's claim.

The survey embracing the part of the tract which forms that portion of appellant's claim extending in a northerly and southerly direction was made in the form as appears on the plat, in order to embrace as much of the creek as possible, and for the apparent purpose of securing to claimants the exclusive ownership, control, and use of the only fresh water supply in that immediate vicinity, but whether it was so intended or not it would have that effect if the survey be approved in its existing form. While claimants would secure a monopoly of the only available fresh water supply, long used by the natives, the said natives would at the same time be cut off from the use thereof for domestic purposes by the line of survey forming the western boundary of appellant's claim, and which runs in close proximity to the village of Kanuleck Indians. The said creek appears to be between two and three hundred yards distant from said Indian village, and it may be safely held that land in such close proximity to a native settlement upon which is located the sole and long used source of fresh water supply of the inhabitants is land which in contemplation of law is actually occupied by said natives, and that to accept and approve a survey including within its lines the land containing such water supply would be in contravention of that particular provision of section 14 of said act of March 3, 1891, which reserves or excludes from purchase and entry all lands "to which the natives of Alaska have prior rights by virtue of actual occupation."

The foregoing reasons being sufficient for not approving the survey, it is not necessary to notice those assignments of error to which no consideration has been given, and your office decision of May 11, 1895, rejecting the survey, upon the grounds above stated, is hereby affirmed.

ALASKAN LANDS—SURVEY—SWAMP LAND.

BARTLETT BAY PACKING CO.

A survey of Alaskan land, that does not follow the requirement as to square form, will not be approved on the ground that the irregularity in form is necessary in order to exclude swamp land, as there is no statutory provision excepting such lands from purchase.

Secretary Francis to the Commissioner of the General Land Office, October 3, 1896. (W. A. L.) (W. M. B.)

With your letter of June 7, 1895, you transmitted the papers relating to survey No. 61 executed—under provision of sections 12 and 13 of the act of March 3, 1891 (26 Stat., 1095)—by Clinton Gurnee, Jr., U. S. deputy surveyor, of a tract of land claimed by the Bartlett Bay Packing Company, containing 154.10 acres, situate on Ugashik river on the westerly shore of the Alaskan peninsula, and used for a salting and fishing station.

The said survey was suspended, as stated in your office letter, of date May 9, 1895, to the United States marshal, *ex-officio* surveyor-general, for the district of Alaska, for the reason

that more land is included (therein) than is occupied by the claimants for their business, and because the tract is not as near as practicable in square form.

Your office supplemented such action with the suggestion that the survey be amended in manner set forth in its said letter of May 9, 1895, wherein it is stated that the survey so amended "would include all the land occupied by the claimants for their business, an area of about 14 acres."

Appealing from the action of your office, as above indicated, appellants, as grounds for such appeal, after setting up the usual contention in this class of cases with respect to the entire area claimed being needed for their business; that the extended shore line is necessary for seining and fishing purposes; and that the survey was made in conformity with the monuments and boundaries of the claim; contend further:

That to extend the boundaries of the claim farther inland would include swamp lands which are reserved from sale in contemplation of the future transfer to the State of Alaska.

It is not necessary at this time to consider whether the area claimed by appellants is needed and actually occupied by appellants for the transaction of their business, if the survey fails to conform to statutory requirement, and rules and regulations made in accordance therewith, as to square form.

The tract embraced in the survey is not as "near as practicable in a square form," as required by law, and for that reason its suspension was proper.

While it is quite evident that the survey was made to assume its present form, embracing a tract of land nearly one mile in length and less than one fourth of a mile in breadth, in order to enable claimants to secure as extended a shore line as possible, which they claim is necessary for seining purposes, yet appellants state that the lines of survey could not be run farther inland without including swamp lands which they allege "are reserved from sale in contemplation of the future transfer to the State of Alaska."

It has been held by this Department that these special surveys, under act of March 3, 1891, cannot vary from the statutory requirement as to "square form" for the purpose of embracing a lengthy shore line for seining and fishing purposes. It has also been settled by previous departmental rulings that there is no provision, statutory or otherwise, requiring the lines of survey to conform to the delimitation, by claimants, of tracts of land sought to be purchased and entered by them.

There is no merit in appellants' further contention that the survey should be accepted because the lines thereof had to be run and estab-

lished as shown by the field notes and the plat in order not to take in certain swamp land which they allege to be reserved from sale.

Under provision of sections 12 and 13 of the act of March 3, 1891, every character of land composing the body of public lands in the district of Alaska—for the particular use and purpose named—is subject to survey, purchase and entry, save that “containing coal or the precious metals,” and excepting lands of every character which form the islands of the Pribylov Group or the Seal Islands and the Annette Islands, which are specially reserved by provision contained in sections 14 and 15 of said act, from sale and entry for any purpose.

Since swamp lands are not embraced in that particular class of lands which—on account of their coal or mineral bearing character—are reserved from purchase and entry under provision of section 12 of said act, lands of said description (swamp) are purchasable and can be properly included in the lines of a survey of appellant's claim, if said survey be made in conformity with the requirement of existing law.

For the foregoing reasons your said office decision of May 9, 1895, suspending the survey in question, is hereby affirmed.

WAGON ROAD GRANT—ACT OF APRIL 21, 1876.

DUNCAN ET AL. *v.* THE DALLES MILITARY WAGON ROAD CO. (ON REVIEW).

An entry of land embraced within the limits of a wagon road grant is not confirmed by section 1, act of April 21, 1876, for the reason that when allowed the diagram on file did not show said land to be within the grant, if, by the terms of the grant in fixing the terminus of the road, the fact that said land fell within the grant was apparent.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 3, 1896. (F. W. C.)

The case of James M. Duncan *et al. v.* The Dalles Military Wagon Road Company, involving certain lands in T. 20 S., R. 47 E., W. M., Burns land district, Oregon, is again before this Department upon the motion filed for a review of departmental decision of March 7, 1896 (22 L. D., 271), in which the action of your office in holding for cancellation the entries made by Duncan and others, for conflict with the grant under the act of February 25, 1867 (14 Stat., 409), under which said Wagon Road Company lays claim, was affirmed.

This motion was entertained May 8, 1896, and returned for service and has been again filed bearing evidence of service upon the said company, which has replied thereto.

The act of February 25, 1867 (*supra*), made a grant to the State of Oregon to aid in the construction of a military wagon road

from Dalles City, on the Columbia river, by way of Camp Watson, Canon City, and Mormon or Humboldt Basin, to a point on Snake river opposite Fort Boise, in Idaho Territory.

Under this legislation the eastern terminus of the grant was to be at a point on Snake river, to which the company duly located and constructed its road. In the preparation of the diagram, however, the river was incorrectly indicated. The facts bearing upon the same, as taken from your office decision, being as follows :

According to the old diagram showing the limits of the grant, the Snake river was shown to pass through T. 20 S., R. 46 E., whereas the new diagram, now in use in this office, shows that the river forms the western '(eastern)' boundary of the fractional township 20 south, range 47 east, and the tracts are within the primary limits of the grant for said company.

Your office decision held that:

Even though the diagram, on file in your office, failed to show the tracts above described, to be within the limits of the grant, it should have been noticed that the plat of survey of said T. 20 S., R. 47 E., approved by the surveyor-general January 25, 1876, has the statement endorsed thereon that said wagon road passes through sections 18 and 19 to the ferry in the NE. $\frac{1}{4}$, Sec. 19.

It was therefore held that the entries were improperly allowed, and with the exception of the one upon which patent had issued, the same were held for cancellation.

In the decision under review, in affirming your office decision, it was held that:

The plat of survey in your office of T. 20 S., R. 47 E., shows that the terminus of the road is at the ferry landing on the west bank of the Snake River in the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ of Sec. 19. The tracts in question fall west of a line drawn through that point at right angles to the general direction of the last ten miles (the length of a section under the company's grant) of the road, and are therefore within the limits of the grant. See *Daily v. M., H. and O. R. R. Co. et al.*, 19 L. D., 148.

The motion for review urges that these entrymen are entitled to the protection granted by section one of the act of April 21, 1876 (19 Stat., 35), which provides:

That all pre-emption and homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith by actual settlers, upon tracts of land of not more than one hundred and sixty acres each, within the limits of any land grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office of the district in which such lands are situated, or after their restoration to market by order of the General Land Office, and where the pre-emption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed, and patent for the same shall issue to the parties entitled thereto.

It is claimed that through the mistake in the representation of the river, these tracts were not shown to be embraced within the grant. That is, it would appear that they were east of the river and that therefore, even though they must be considered as embraced within the grant, yet as the diagram did not show them to be within the grant they were not formally withdrawn at the date of the allowance of these entries, the diagram not being corrected until after the allowance of said entry. As before stated, under the terms of the grant the road was to be constructed to a point on Snake River, and the diagram as

prepared shows said river to be the eastern terminus of the grant. While the river was incorrectly indicated upon the map, yet these facts were sufficient notice to any one settling or laying claim to land upon the western bank of the river—the same being included within said grant.

I am therefore of the opinion that these entrymen are not entitled to confirmation under the act of April 21, 1876; the previous decision of the Department is adhered to, and the motion for review is denied.

WITHDRAWAL OF CONTEST—REINSTATEMENT.

WARES ET AL. v. THOMPSON.

A contest based on alleged priority of settlement being withdrawn on a disclaimer of interest on the part of the adverse entryman, and his application to amend his entry so as to embrace different land, should be reinstated, with all rights incident thereto, on the withdrawal of the entryman's application for amendment.

Secretary Francis to the Commissioner of the General Land Office, October 3, 1896. (W. A. L.) (C. J. W.)

November 3, 1893, Isaac Thompson made homestead entry No. 3270 for the SE. $\frac{1}{4}$ of section 28, T. 28 N., R. 3 E., Perry, Oklahoma.

November 6, 1893, John C. Wares filed his affidavit of contest alleging that he made settlement on said tract before Thompson made entry and before he or any other person had made settlement thereon, and at the same time filed his application to enter the land, which was rejected because of conflict with Thompson's entry.

November 11, 1893, Thompson filed an application to amend his entry so as to substitute the SW. $\frac{1}{4}$ of Sec. 10, T. 28 N., R. 3 E., alleging that on September 25, 1893, he made settlement thereon and began to dig a well and build a house with the intention of making it his home, but by mistake he made entry for the SE. $\frac{1}{4}$ of section 28, T. 28 N., R. 3 E., on which he believed at the time he made entry he had settled, and did not discover his mistake until November 6, 1893. On the same day Wares filed a dismissal of his contest.

December 25, 1893, Reuben M. Bilyer filed his protest against allowing Thompson's application to amend and also an application to enter the SW. $\frac{1}{4}$ of section 10, T. 28 N., R. 3 E.

April 26, 1894, Thompson withdrew his application to amend his entry, and on the same day Bilyer withdrew his protest.

November 5, 1894, L. B. Hart filed his affidavit of contest charging that Thompson had abandoned the land embraced in his entry, for more than six months since the entry was made.

December 4, 1894, Wares filed his sworn application to have his contest reinstated, alleging, in substance, that he had been misled by the advice of his attorney and the statements of the register of the land

office, in dismissing his contest and filing application to enter, as well as by Thompson's representations.

His contest was accordingly reinstated. A hearing was had at which Wares appeared and Hart made default, and the local officers thereafter rendered a decision in which they found that Wares was the first settler on the land and recommended the cancellation of Thompson's entry and that Wares be allowed to make entry for the land. From this decision Hart appealed, and on August 20, 1895, your office passed upon said appeal and reversed the decision of the local officers. Wares has appealed from your office decision and the same is now here for consideration.

After stating the record facts substantially as above set forth, your office found that, "These facts show that there is neither law nor equity to support your decision" (Meaning the decision of the local officers), and they were directed to order another hearing on Hart's affidavit of contest.

This adjudication, that Wares showed no right to the land, either legal or equitable, is alleged to be erroneous and is the chief assignment of error.

In addition to the record facts already stated certain others appear in the record. Wares, on the reinstatement of his contest, was permitted to introduce testimony from which it appears that he was the settler upon the land in question on the day of the opening; that no one else has ever settled upon or occupied it, and that he and his family have constantly resided upon and cultivated it since October 1893; that most of the land is enclosed, and the improvements are worth two hundred dollars or more; and that he was thus living upon and claiming the land at the date of Hart's affidavit of contest, as well as at the date of Thompson's entry. Certain affidavits explaining the circumstances under which Wares dismissed his affidavit of contest are a part of the record, and from these it appears, that he was all the time acting in good faith and seeking to perfect his claim to the land. That when Thompson appeared and disclaimed the land and put on record the admission that his entry of it was the result of mistake, he was induced to believe, and that by the statements of the register of the land office, as well as those made by Thompson, that there was no need for the further prosecution of his contest.

Wares therefore appears as the first settler upon the land, who has followed his initiatory acts with valuable improvements and the establishment of residence and the maintenance of residence, with a view to obtaining patent and making the land his permanent home.

The record and affidavits accompanying it show that as soon as Wares ascertained that there was an entry on the land covered by his settlement, he filed contest against it. That Thompson at once voluntarily notified Wares that his entry was a mistake and that no contest would be necessary but that he would at once make known the mistake and

have the entry corrected. This disclaimer of intentional entry of the land claimed by Wares was filed in the local office by Thompson. It was not until this was done that Wares withdrew his contest, simply awaiting the action of the Department on Thompson's application to correct his mistake. Six months after Thompson's application and disclaimer was thus filed, it was withdrawn without any notice to Wares. It is clear that Thompson having entered this land by mistake it was voidable at his option, and having voluntarily notified Wares that he did not claim the land, and having reiterated that disclaimer in his application to correct the entry, it was error to allow the withdrawal of the application under the circumstances without notice to Wares, and it follows that the action of the local officers in reinstating Wares' contest was proper. Upon its reinstatement Wares occupied the status of a first contestant, and Hart under his affidavit was no necessary party to the hearing, as the only charge he makes is that of abandonment of the land by Thompson and not by Wares, and he alleges no settlement by himself at any time.

Your office decision is accordingly reversed and that of the local officers affirmed. The entry of Thompson will be canceled, Hart's affidavit dismissed and Wares allowed to make entry.

CITY OF GUTHRIE *v.* NICHOLS ET AL.

Motion for review of departmental decision of February 17, 1896, 22 L. D., 190, denied by Secretary Francis, October 3, 1896.

RAILROAD GRANT—CERTIFICATION—ACT OF AUGUST 3, 1854.

ENGLISH *v.* LEAVENWORTH, LAWRENCE AND GALVESTON R. R. CO.

The certification of land under a railroad grant, in accordance with the provisions of the act of August 3, 1854, is of no operative effect if the land in fact was excepted from the grant.

Secretary Francis to the Commissioner of the General Land Office, October 3, 1896. (W. A. L.) (F. W. C.)

Edward E. English has appealed from your office decision of February 26, 1894, sustaining the action of the local officers in rejecting his homestead application presented February 15, 1893, covering the SW. $\frac{1}{4}$ of Sec. 21, T. 24 S., R. 19 E., Topeka, Kansas, land district, for the reason that said tract has been certified to the State of Kansas on account of the grant made by the act of March 3, 1863 (12 Stat., 772), to aid in the construction of the road afterwards known as the Leavenworth, Lawrence and Galveston Railroad.

From the facts contained in your office decision it appears that this tract is within the primary limits of the grant above referred to and was

certified to the State on account of said grant February 26, 1873. The rights under the grant attached upon the definite location November 27, 1866. One H. M. Ellis, on January 3, 1861, filed pre-emption declaratory statement covering this land, alleging settlement December 17, 1860. Said filing has never been canceled, but, as stated in your office decision, the land was offered land and by law he was required to make proof and payment within twelve months from the date of his settlement. This he failed to do, and your office decision therefore held that the grant was not defeated by reason of said filing. It might be further stated that Ellis, in support of his application, alleges that he commenced settlement on this land in the spring of 1861, and that he has made improvements upon the land to the value of about \$1500. Whether he ever applied to enter the tract prior to the attachment of rights or the certification under the grant does not appear in the record now before me.

The matter presented for consideration by the record is, Was the certification of February 26, 1873, operative so as to prevent further disposition by the United States?

I am aware that this Department has repeatedly held that certification of lands under a railroad grant deprives the Department of further jurisdiction in the matter; but in view of the recent decision of the supreme court in the case of *Weeks v. Bridgman* (159 U. S., 541), I am of opinion that where such certification, being made as in this case under the act of August 3, 1854 (10 Stat., 346), embraced lands excepted from the grant, such certification has no operative effect.

In the case of *Weeks v. Bridgman* (*supra*) there was pending at the date of the filing of the map of definite location of the St. Paul and Pacific Railroad, on appeal from the action of the local officers rejecting the same, an application by one Brott to file a pre-emption declaratory statement for the land there involved, he claiming the right to pre-empt the same as a mail contractor under the act of March 3, 1855. His right to make such filing was recognized by this Department in 1861. Notwithstanding such favorable decision, the land was certified to the State of Minnesota under the act of August 3, 1854, as a part of lands granted by the act of March 3, 1857, to aid in the construction of the St. Paul and Pacific Railroad.

As stated by the court:

But under the granting act, lands to which pre-emption rights had attached, when the line was definitely fixed, were as much excepted therefrom as if in a deed they had been excluded by the terms of the conveyance. And this was true in respect of applications for pre-emption rejected by the local land office and pending on appeal in the land department at the time of definite location, since the initiation of the inchoate right to the land would prevent the passage of title by the grant, and the determination of its final destination would rest with the government and the claimant. *Railway Company v. Dunmeyer*, 113 U. S., 629; *Railroad Company v. Whitney*, 132 U. S., 357; *Bardon v. Railroad Company*, 145 U. S., 535; *Ard v. Brandon*, 156 U. S., 537; *Whitney v. Taylor*, 158 U. S., 85.

The act of August 3, 1854, provided that where lands had been or should be thereafter granted to the several States or Territories, and the law did not convey the fee

simple title of such lands or require patents to be issued therefor, the lists of such lands which had been, or might thereafter be certified, "shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, said lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby."

As we have seen, this particular land was not included in the grant, and the Secretary of the Interior had so decided on August 30, 1861, when he determined that the pre-emption right had attached. And since it was not so included nor subject to disposition as part of the public domain, on October 25, 1864, the action of the land department in including it within the lists certified on that day was ineffectual. *Noble v. Railroad Co.*, 147 U. S., 165, 174.

As against Brott the certification had no operative effect.

It is also objected that Brott was not a qualified claimant under the act of 1855, because that act only applied to a contractor engaged in carrying the mail through any of the Territories west of the Mississippi, and because it does not appear that his declaratory statement was ever accepted or recognized, or that he made proof of his occupation of the land as a mail station, but these and other like objections involve questions between Brott and the government, already determined in his favor, and which the railroad company and its grantees are not in a position to raise upon this record.

The grant under consideration, namely, the act of March 3, 1863, contained a like exception to that considered by the court in the case of *Weeks v. Bridgman* (*supra*), and if the initiation of the inchoate right to the land was sufficient to defeat the grant, surely the perfected proceeding resulting in the allowance of Ellis' filing, which was still of record uncanceled at the date of the definite location of the company's road, is sufficient to except the tract now under consideration from the operation of the grant of 1863. This being so, the action of the Land Department in including it in the lists of 1873 was ineffectual.

I must therefore reverse your office decision and direct that Ellis be permitted to complete entry upon his application heretofore presented. So far as this may be in conflict with any previous holding of this Department, as to the effect of an outstanding certification, such previous holding will be modified; and in the administration of these grants, the certifications made under the act of 1854 will only be considered as operative where they include tracts actually passed by the grant.

WALKER v. TAYLOR.

Motion for review of departmental decision of July 13, 1896, 23 L. D., 110, denied by Secretary Francis, October 3, 1896.

RAILROAD LANDS—ACT OF SEPTEMBER 29, 1890.

CROWLEY *v.* RITCHIE ET AL. (ON REVIEW).

Lands restored to the public domain by the forfeiture act of September 29, 1890, are subject to settlement from the date of the passage of said act.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 3, 1896. (C. J. W.)

Margaret Ritchie, Charles C. White, John Provost, and John J. McCoy, sent their applications by mail to enter the NW. $\frac{1}{4}$ of Sec. 9, T. 48 N., R. 7 W., Ashland, Wisconsin. Margaret Ritchie's application was for the whole of said NW. $\frac{1}{4}$, Provost's for the north half, White's for the SW. $\frac{1}{4}$ of said NW. $\frac{1}{4}$ and McCoy's for the SE. $\frac{1}{4}$ of said NW. $\frac{1}{4}$. These applications were all received at the local office by mail prior to 9 o'clock, A. M., on November 2, 1891, the announced hour of the opening. All the applicants alleged settlement on the land applied for, and the local officers held said applications to be simultaneous. Daniel C. Crowley at two minutes past nine o'clock, A. M., on November 3, 1891, appeared in person and filed application to enter the land in dispute, alleging settlement thereon. A hearing was ordered to determine the rights of the parties. Said hearing commenced on January 4, 1892, all the parties appearing in person and by attorney. Thereafter the local officers held that the application of John Provost as to the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, of John J. McCoy as to the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, of Daniel C. Crowley as to the entire NW. $\frac{1}{4}$ should be dismissed, and the application of Margaret Ritchie allowed. The losing applicants appealed from the decision, and on September 14, 1892, your office passed upon the case and affirmed the finding of the local officers. From this decision the losing applicants appealed to the Department, and on May 21, 1894, the case was passed upon here, and your office decision was reversed and the right of entry awarded to Crowley. The losing parties filed motion for review, and on March 7, 1896, said motion was here considered and denied.

A motion for re-review has been filed, based upon the ground, that this was one of a batch of cases held up for a long time for the purpose of determining whether or not they were within the rule laid down in the case of *Smith v. Malone* (18 L. D., 482), and that this case was erroneously held to come within said rule, while all of the other cases were held to be free from said rule, although they involved the same questions involved in this case. It was not discovered that the land in question in this case was within the ten mile limits of the Wisconsin Central Railroad grant forfeited by the act of September 29, 1890 (26 Stat., 496), and therefore within the rule announced by the supreme court, in the case of *Forsyth v. Wisconsin Central Railroad Company* (U. S., Vol. 159-46), until after the opinion of March 7, 1896, was rendered, and the motion for review denied. The opinion was based upon

the assumption that the land was in reservation and not subject to entry at the date of the several applications, except that of Crowley. It turns out that the Department was mistaken as to this fact, and this is deemed sufficient reason for the reconsideration of the former departmental decisions in this case. The departmental decision of May 21, 1894, which reversed your office decision of September 14, 1892, rested solely upon the supposed fact that the land was in reservation at the time all of the applications to enter were made, except that of Crowley, and for that reason the doctrine in the case of *Smith v. Malone* was invoked. There was, therefore, a mistake of a material fact in said decision, which mistake has been followed in subsequent departmental action in the case, but which should now be corrected. Under this view of the case, the facts disclosed by the record as to the acts of settlement performed by the several applicants become important. In reference to the acts of settlement, the local officers found as follows:

The condition of the land at the time Margaret Ritchie established settlement thereon was wholly unimproved and uncultivated, that there were no marks upon any of the corners indicating that any person claims this land; it was free from improvements of any kind; that she had no notice of any prior claim of any party, and that she followed up her settlement with residence and improvements is undisputed.

Your office made the following finding from the record:

The preponderance of the proof is that Crowley is a single man; that he went on the land on the morning of November 2, after twelve, cut brush and started a house, cut down some trees and built a house two logs high; remained there eight hours; he has since built a house and cleared some brush; he went on the land again December 1, stayed three days and built his house on the 8th; he never lived in the house; it was built of logs, pole roof covered with boughs and earth; no floor, no furniture; the house was not finished at date of hearing. House worth \$25. He saw Mrs. Ritchie's house when he went on the land to build his house. I find that John Provost made his settlement and improvements on the NE. $\frac{1}{4}$ of the section, and I do not find sufficient evidence to show any settlement or improvements on the NW. $\frac{1}{4}$, the land in controversy, to give notice of any intention of claiming the same. I also find from the evidence that McCoy made his settlement and improvements on the NE. $\frac{1}{4}$ and not on the quarter-section involved, and that he made no such improvements on the NW. $\frac{1}{4}$ as to give notice of any intention of claiming the same.

As to the claims of Provost, McCoy and White, whilst their applications were simultaneous with Mrs. Ritchie's, their settlements and improvements having been made on other quarter-sections than the one in dispute and having given no legal notice of claim to any part of the NW. $\frac{1}{4}$, they can claim nothing by reason of their settlement on other quarters.

The facts found by the local officers and by your office are in accord with the record. In departmental decision of March 7, 1896, it was held that Mrs. Ritchie could take no benefit from her acts of settlement and occupancy performed prior to the hour of opening on November 2, 1891, which holding was error, since the tract was subject to settlement from September 29, 1890. It appears, therefore, that the finding of the local officers and your office should have been affirmed

instead of reversed. Departmental decisions of May 21, 1894, and March 7, 1896, are revoked, in so far as they deny to Margaret Ritchie the right to make entry and perfect her claim to the land in dispute, and your office decision of September 14, 1892, awarding the land to her, is affirmed.

AURORA LODGE v. BULGER, HILL AND NUGGET GULCH PLACER.

Motion for review of departmental decision of July 13, 1896, 23 L. D., 95, denied by Secretary Francis, October 3, 1896.

SCHOOL LANDS—ACT OF APRIL 28, 1870.

MILLER v. STATE OF NEBRASKA.

By section 2, act of April 28, 1870, extending the jurisdiction of the State of Nebraska over the territory added thereto by the provisions of said act, Congress conferred upon said State all the rights incident to the original enabling act, and it therefore follows that the reserved school sections, embraced within such added territory, passed to said State by such transfer of jurisdiction, though the statute does not in terms make an express grant thereof to the State.

Secretary Francis to the Commissioner of the General Land Office, October 3, 1896. (W. A. L.) (A. B. P.)

It appears from the record in this case that on March 15, 1895, James A. Miller applied to make homestead entry of lots 3, 4, 6 and 7, Sec. 36, T. 89, R. 48, O'Neill, Nebraska.

The local officers rejected his application for the reason that the land is part of a section belonging to the State of Nebraska for the support of common schools. On appeal to your office the action below was affirmed. Miller again appeals.

The land was originally within the Territory of Dakota, but now lies in the State of Nebraska, south of the Missouri River.

By the fourteenth section of the act of March 2, 1861 (12 Stat., 239), organizing the Territory of Dakota, it was provided:

That when the land in said Territory shall be surveyed, under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in the States hereafter to be erected out of the same.

The State of Nebraska was formed under the act of April 19, 1864 (13 Stat., 47), whereby the middle of the channel of the Missouri River was established as the eastern, and in part the northern boundary lines thereof. As the river then ran, the land in question was left to the north, and in the Territory of Dakota. Subsequently, however, the channel of the river changed completely at this point and the land in question fell to the south thereof.

By the seventh section of the Nebraska enabling act, there was granted to the State for the support of common schools, sections sixteen and thirty-six of every township therein, but the land in question was not within the then prescribed limits of the State.

Subsequent to the change in the channel of the river, however, the Congress, by act of April 28, 1870 (16 Stat., 93), appears to have recognized the change, and in view thereof, provided that upon Nebraska's giving her consent thereto in the manner prescribed, which was done, the center of the main channel of the Missouri River, as it then existed, should be the boundary line between the State and the Territory of Dakota, at certain stated points, which placed the land in controversy within the limits of the State of Nebraska.

By the second section of that act it was provided:

That the respective jurisdictions of said State and Territory shall extend to and over all of the territory, within their limits, according to the line herein designated, to all intents and purposes as fully and completely as if no change had taken place in the channel of said Missouri river. And the Secretary of the Interior is hereby authorized and required to cause to be made all necessary surveys and meanderings, and to order the transfer of all plats, papers, and documents which may be necessary in the premises.

The substance of appellant's contention is that inasmuch as the lands affected by said change in the channel of the river were thus transferred from the Territory of Dakota to the State of Nebraska after the passage of the enabling act under which said State was formed, there never has been a grant to the State, for school purposes, of sections sixteen and thirty-six of the townships embracing said lands.

It does not appear to me that this contention could, in any event, avail the appellant, for the reason that if said sections sixteen and thirty-six do not belong to the State of Nebraska for school purposes, they are still in a state of reservation under the act organizing the Territory of Dakota, and therefore could not be entered under the public land laws.

The reservation in the Dakota territorial act, of sections sixteen and thirty-six of every township therein, was for the purpose of applying the same to schools in States thereafter to be erected out of said Territory.

In view of the change in the channel of the Missouri River, and of the subsequent legislation by Congress relative thereto, as stated, it is clear that the State of Nebraska was in part erected out of the lands affected by said change and legislation. While not within the limits prescribed by the Nebraska enabling act of 1864, they were brought within the boundaries of the State as extended by the act of 1870, and thus became a part and parcel of the lands of that State.

The remaining question is, whether the State of Nebraska is entitled to sections sixteen and thirty-six for school purposes. We have seen that by the act of April 28, 1870, the jurisdiction of the State was extended to and over the newly acquired territory, to all intents and

purposes as fully and completely as if no change in the channel of the Missouri River had ever taken place. By that act it was the intention of Congress, in my judgment, to place the lands within the newly defined boundary limits of the State of Nebraska, the same as though they had originally fallen, and subject to all the provisions, conditions, and limitations relative to the lands which did fall, within the boundary limits as prescribed by the act under which the State was formed. In other words, it was the purpose of the act to place the lands within the jurisdiction of the State of Nebraska, subject to all the conditions and restrictions imposed, and with full right in the State to all the privileges granted, by the original enabling act.

If the main channel of the Missouri River had always been where it was at the date of the passage of the act of 1870, and is now, then the said lands would have fallen within the original jurisdictional limits of the State of Nebraska, and would have been in all respects subject to the operation of the act under which the State was formed; and sections sixteen and thirty-six of every township thereof would have passed to the State by that act. It was in that position exactly that Congress intended to place the lands, in my judgment, when by the second section of the act of 1870 it extended the jurisdiction of the State of Nebraska to and over the same, "as fully and completely as if no change had taken place in the channel of said Missouri River." And although that act is without words of express grant of sections sixteen and thirty-six to the State of Nebraska for school purposes, yet the intention of Congress obviously was to transfer said sections (and the other lands embraced by the act) to said State, the same, and with like effect, as though they had originally been a part of said State.

It can hardly be presumed that Congress intended to continue the reservation of sections sixteen and thirty-six, under the Dakota territorial act, after the lands had been thus transferred to the State of Nebraska, without any purpose for such continued reservation, specified or otherwise.

I am of the opinion, therefore, that the land here in question belongs to the State of Nebraska for school purposes, and the decision appealed from is accordingly affirmed.

CHILDS *v.* FLOYD.

Motion for review of departmental decision of April 6, 1896, 22 L. D., 442, denied by Secretary Francis, October 3, 1896.

RAILROAD GRANT—INDEMNITY SELECTIONS—ADVERSE CLAIM.

GAMBLE *v.* NORTHERN PACIFIC R. R. CO.

Indemnity selections of the Northern Pacific resting on alleged losses east of Superior City, regular and legal under the existing construction of the grant at the time when made, should be protected under the changed construction of the grant, with due opportunity to assign new bases, as against intervening adverse claims.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 3, 1896. (F. W. C.)

With your office letter of May 20, 1896, was forwarded an application, filed in behalf of E. R. Gamble, for a writ of certiorari, in the case of Gamble *v.* Northern Pacific Railroad Company, involving the SW. $\frac{1}{4}$ of Sec. 31, T. 147 N., R. 49 W., Fargo land district, North Dakota.

The tract is within the indemnity limits of the grant for said company and was included in the company's selection list No. 6, filed March 12, 1883.

Said list was not accompanied by a list of losses as bases for the selections made, but an amended list was filed October 12, 1887. This list contained losses, but were in bulk, not tract for tract, with the selected lands.

On February 23, 1892, further amendment was made by arranging the losses tract for tract with the selections. The losses assigned were, however, in Wisconsin and east of Superior.

On November 13, 1895 (21 L. D., 412), this Department held that the grant for the Northern Pacific Railroad Company did not extend east of Superior, Wisconsin.

It was further held in said opinion, that:

I further learn upon inquiry at your office that the lands east of Superior City were made the basis for the selection of a large quantity of lands from the indemnity belt of the company's grant in North Dakota. These selections having been made some while ago, many, if not all, of the lands selected have, perhaps, been sold by the company.

The previous action of this Department giving color to the company's right to a grant east of Superior City, and the application of the rule that the indemnity lands should be selected nearest to those lost, were the probable causes for the specification of these lands as a basis for the selections referred to.

In view thereof, I have to direct that the company be allowed sixty days from notice of this decision within which to specify a new basis for any of its indemnity selections avoided by this decision, and that during that period no contests against such selections, where the charge is that the basis was made of lands east of Superior City, or application to enter under the settlement laws, will be received.

Acting under this holding the company, on November 25, 1895, filed a further amendment to said list No. 6, substituting losses in Montana.

Gamble's claim rests upon an application tendered on March 20, 1895, and rejected for conflict with the company's selection, from which action he appealed. This appeal was dismissed by your office because the

service made was held not to be sufficient to bind the company, i. e., that no sufficient service was made upon the company.

It has been repeatedly held that an application for certiorari will not be granted where substantial justice has been done in the action complained of.

Your office sustained the rejection of Gamble's application for conflict with the company's selection, but denied him the right of further appeal, because no sufficient service had been made of the appeal from the action of the local officers.

In support of the application under consideration it is urged that the selection of record, at the date of Gamble's application, was invalid, being without a sufficient basis, and could not be amended in the presence of his adverse claim.

It must be admitted that, as a general proposition, amendment can not be made, or a defect cured, except the same be subject to intervening rights, but here the selections were to be made under the direction of the Secretary of the Interior.

Under the rules established, in view of the previous action of the Department tacitly recognizing the grant and making a withdrawal of the lands upon the location east of Superior, it became necessary for the company to resort, in its selections, to the losses east of Superior. It is true that the Department afterwards held that there is no grant east of Superior, but it would be inequitable to avoid a selection made in accordance with departmental regulations, simply for the reason that change had been made in the construction of the grant, without first affording the company an opportunity to comply with the changed condition.

As before stated, the selections are made under the direction of the Secretary of the Interior, and as the selection made before the decision of November 13, 1895 (*supra*), was in all respects regular and legal under the previous construction of the grant, it was not the intention to avoid the same by said decision, but rather to afford the company, within a limited time, an opportunity to supply a new basis, which it has done, and no exception has been taken to the sufficiency of the same. It is therefore held that the rejection of Gamble's application was proper, and that the pendency of his appeal was no bar to the allowance of the amendment in the company's selection, under the circumstances before detailed.

The application is accordingly denied.

SHELDON *v.* ROACH.

Motion for review of departmental decision of May 23, 1896, 22 L. D., 630, denied by Secretary Francis, October 3, 1896.

RELINQUISHMENT—MINERAL LAND—LIMESTONE—LODE LOCATION.

LONG v. ISAKSEN.

An instrument executed by a homestead entryman purporting to waive all claim to any mineral land embraced within his entry, but which does not in terms surrender any specific legal sub-division, and was evidently not intended as an abandonment of any specific tract, should not be regarded as a relinquishment. A lode location on a bed or ledge of limestone is not authorized under the provisions of the mining laws.

To exclude land from appropriation under the homestead law, on the ground that it contains a valuable bed of limestone, it must affirmatively appear that the land is more valuable on account of the stone contained therein than for agricultural purposes.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 3, 1896. (P. J. C.)

The land involved in this controversy is lots 4 and 5 and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 20, T. 10 S., R. 10 W., W. M., Vancouver, Washington, land district.

The record shows that Elias Isaksen made homestead entry of said tract August 19, 1889, and after publication notice, made commutation proof before the clerk of the superior court of Pacific county, Washington, February 28, 1891, making and filing the usual non-mineral affidavit. In answer to question No. 10 of final proof in relation to the presence of mineral on the land, the claimant said—"On a small portion of the tract there are indications of lime, but of no known value." The proof was transmitted to the local office, when, for some reason, wholly unexplained by the record, on March 5, 1891, it required him to furnish "affidavit or additional proof as to the mineral character of the land."

On March 17, 1891, Ira M. Long filed an uncorroborated affidavit of contest against said entry, alleging that it "contains a valuable mineral deposit consisting of a ledge or lode of limestone" which "renders said tract much more valuable for minerals than for agricultural or any other purpose;" that this was well known to claimant, and that his final proof testimony as to its non-mineral character "was and is untrue."

On March 30 following the claimant asked for sixty days in which to comply with the order of March 5, which was granted. On the same day—March 30—there was filed in the local office this statement by Isaksen—

I, Elias Isaksen being first duly sworn state that I am the same person who made homestead application No. 6800 on S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and lots 4 and 5, section 20, T. 10 north, range 10 west, Wil. Mer., and offered proof thereon the 2d day of February 1891; that the indications of lime referred to in said proof in my own affidavit crops out on lot 5 near the northern boundary and indications of the same are found in the immediate vicinity of said outcropping; that I was not at the time of giving said testimony and am not now informed of the full extent of said indications or crop-

pings of limestone; but am now informed that said limestone cropping is a mineral deposit of value and have become convinced of that fact since making said proof; that it is no part of my purpose to include in my homestead claim any mineral land or lands not properly and legally subject to such homestead entry, and that said proof was not intended to secure any mineral lands; that I hereby expressly consent to the exclusion of said ledge or mineral deposit from my said homestead entry, and ask that my homestead final receipt be issued so as to exclude such portions of lot No. 5 and 4 as includes said mineral deposit or any mineral claim located thereon.

On May 11, 1891, W. C. Kellum made application to purchase lot 5, under the timber and stone act.

On May 11, 1891, Samuel L. Tee filed a notice of the location of the "Little Bob" placer mining claim on May 6, preceding. This is described by metes and bounds, and is said to contain twenty acres in lot 5. On the same day Levi F. Hodge filed a similar notice of the location of the "Belle" placer, purporting to have been located on May 6, and to contain twenty acres in lot 5 also.

On October 27, 1891, Isaksen filed an affidavit sworn to July 11, preceding, in which he alleges that he cannot understand the English language well enough to talk it intelligently; that he is informed that a paper filed by him is a relinquishment of a part of his homestead entry; that he did not understand the object and effect of it when he signed it, and signed it under the advice of

counsel whom I understood to tell me that if I would sign said paper my entry on said land on which I had submitted final proof would be perfected thereby, and that existing obstacles to the allowance of said proof would be thereby removed;

that he never intended to relinquish his entry or any part thereof, and would not have signed the paper had he known it to be a relinquishment. He requests that he may be allowed to withdraw it.

On November 5, 1891, Hodge filed an affidavit of contest against lot 5 of Isaksen's homestead entry, alleging that the ground is "wholly unfit for cultivation and is solely valuable for the deposit of limestone thereon."

On the same day W. C. Kellum filed affidavit of contest against Isaksen's homestead entry of lot 5, alleging that it was "not subject to entry under the homestead laws, and was taken and was held for speculative purposes, and not for agricultural purposes."

For some reason unexplained by the record notice of contest was not issued until February 12, 1892, when it was issued on the Long contest. (The testimony shows that Long transferred his interest in the mining claim to Horatio J. Duffy, August 20, 1891, who does not appear anywhere in the case, except as a witness for contestant.) This notice was served on Isaksen, Kellum, Tee and Hodge, the testimony to be taken before a United States Commissioner at Astoria. Long and Isaksen appeared, but the others made default.

As a result of the hearing the local office recommended that the homestead entry of Isaksen should be canceled as to the land in lot 5 included in Long's mineral location. Isaksen, Hodge and Kellum

appealed, and your office, by letter of January 26, 1894, affirmed the action below, whereupon Isaksen prosecutes this appeal, assigning several grounds of error, among others, alleging that it was error to hold a ledge of limestone to be mineral within the meaning of the statute, and that the claimant executed and delivered the so-called relinquishment advisedly.

First, in regard to this so-called relinquishment: It is very questionable in my mind whether, under any circumstances, this instrument could be construed as a relinquishment. It will be observed that it does not contain words of grant; it does not in terms relinquish to the government any thing; he does not surrender to the United States any definite tract of land, but by the statement leaves it to be determined in the future whether there is any mineral that would reserve the land from homestead entry. He does not state that it does exist, but says he is "now informed that said limestone cropping is a mineral deposit of value;" that he has become convinced of that fact; that it was not his intention to include in his homestead claim "mineral land or lands not properly and legally subject to such homestead entry;" and by this statement consents "to the exclusion of said ledge or mineral deposit from my said homestead entry," and that it may be excluded from his final receipt.

It is apparent that the local office did not consider this such a relinquishment as authorized it to cancel any part of the entry. At least, they did not do so, and in refusing or neglecting to do so, as the case may be, I think they were fully justified.

But aside from this, I think the evidence clearly shows that it was not Isaksen's intention to relinquish any part of his land. It is shown that he is a native of Norway, and that he does not understand the English language sufficiently to transact business, and that one Olsen, who is called "Judge" Olsen, because of his having been probate judge of the county, was his friend, counselor, and interpreter. It was through the efforts of Olsen, with the assistance of Long, that this paper was secured. Long's contest had been filed on March 17, previous to the execution of this paper. It appears that Isaksen was anxious to get his final receipt, and he was informed by Olsen that if he would sign this paper Olsen and Long would at once procure the same. There can be no doubt as to Long's interest and anxiety in the matter. On the same day this instrument was signed, he located a lode claim on the land, "to be known as Bear River Lime and Cement Claim." It is also shown that he—Long—paid the expenses of the execution of this paper. Olsen swears that he interpreted the paper to Isaksen, and both Olsen and Long swear that they were present when the district clerk who took the acknowledgement asked Isaksen if he understood it, and he answered that he did. No one swears but Olsen that Isaksen understood this to be a relinquishment. Isaksen claims that he did not so understand it, and I think the circumstances

connected with the matter corroborate his statement. He swears that he did not know of any claim of relinquishment on his part until he saw a letter from an attorney in Vancouver, dated April 15, 1891, addressed to Olsen, evidently in reply to one Olsen had sent him, in which this attorney said the local officers could not cancel any part of Isaksen's entry, because no legal subdivision was specified, and until the mining claim was segregated by an official survey the matter would rest in *statu quo*. Isaksen swears that this was the first knowledge he had of relinquishment, and for the first time in their intercourse he mistrusted Olsen. He therefore immediately consulted another attorney, and the result was the filing of his disclaimer of any intention to relinquish.

I cannot escape the conclusion that Isaksen was acting in good faith in this matter, and that it was not his intention to surrender any part of his entry. The entire transaction on the part of Long and Olsen is so persuasive of an intent to advance their own interests at the sacrifice of Isaksen's, that one is justified in looking with suspicion upon their demeanor. The conduct of Olsen, who was the confidential friend and paid attorney of Isaksen in going upon the witness stand in behalf of Long and volunteering testimony of other transactions aside from this that was intended to cast discredit on his client, and which were not in issue, is not calculated to impress one with his entire disinterestedness.

For these reasons I cannot concur in the decisions below holding this instrument to be a relinquishment, or the conclusion that Isaksen intended to make a relinquishment. (*Vide Ficker v. Murphy*, 2 L. D., 135.)

Your office also decided in the case at bar (1) that the land in controversy is more valuable for the deposit of limestone than for agricultural purposes, and (2) that lime is a mineral within the purview of the statute, and on the latter proposition cite as authorities a letter by Commissioner Burdett, dated January 28, 1875 (2 C. L., O., 55), and *W. H. Hooper* (1 L. D., 560).

The letter of Commissioner Burdett, referred to, is addressed to H. C. Rolfe, and is in full as follows—

In reply to your letter of the 13th ult, I have to state that lands which are more valuable on account of deposits of limestone or marble than they are for purposes of agriculture may be patented under the mining acts of Congress.

If this expression of opinion could be dignified as the legal opinion of your predecessor upon the law involved in this proposition, it would not be binding on the Department. But this is evidently a letter in reply to an inquiry, the full nature of which we are not advised, and should not, in my judgment, be accepted as an authority, even by your office, warranting the location of limestone as a lode claim.

In the *Hooper* case the sole question was as to whether gypsum could be taken under the placer mining laws.

From my view of the matter neither of these authorities support the proposition decided by your office, nor do I find any decision of the Department wherein it is expressly held that a lode location may be made on a bed or ledge of limestone, but in every instance where it has been allowed it was under the placer law. On the contrary it was expressly held in *Shepherd v. Bird et al.* (17 L. D., 82), that a tract containing limestone "was not subject to location and entry as a lode claim."

I do not believe that a bed of limestone can be construed as a "vein or lode," or "vein, lode, or ledge," as those terms are used in sections 2320 and 2322, Revised Statutes. These terms are synonymous, and are used by Congress only in connection with such metals as are named when found in "rock in place."

In mining, ledge is a common name in the Cordilleran region for the lode, and for any outcrop supposed to be that of a mineral deposit or vein. (Century Dictionary.)

Where limestone, or any of the other substances mentioned in *Maxwell v. Brierly* (10 C. L. O., 50), and in the circular of January 30, 1883 (9 Id., 210), are permitted to be located and entered as a placer it must appear affirmatively that the land is more valuable for limestone than for agricultural purposes, or, as said in the circular above referred to, the applicant must "show that the lands are not valuable for any other purpose than the one for which application is made."

So far as shown by the testimony, there has never been a pound of the rock used for commercial purposes. The testimony as to its value is purely speculative; that is, the witnesses fix a value on the land on the hypothesis that the outcropping ledge is continuous and that the rock may be successfully used for cement or lime. The tests made of the rock to ascertain its properties are crude in the extreme, simply by pouring acid over it, and burning pieces of the rock in an open fire. The expert geologist or mineralogist says, when asked the proportion of the constituents,—“I only know that approximately, as I made no analysis. I only made home tests.”

In view of what has been done by the mineral claimant to test the rock and to develop his claim, it seems a little short of absurdity to assert, as do some of his witnesses, that the property is worth from seven thousand to ten thousand dollars, or, as said by one witness, "fifteen thousand dollars or more," for mining purposes. The value of the tract for agricultural purposes is estimated by contestant's witnesses, varying in amount from ten to forty dollars per acre for what they call the "tide lands."

The testimony for the defendant shows that all the lands included in the homestead entry are valuable for agricultural purposes. One of the witnesses held lots 4 and 5 where it is claimed mineral exists, for quite a number of years, under the pre-emption and homestead laws, and sold his improvements to Isaksen for \$150. His witnesses are men living in the neighborhood, who have an opportunity to judge of the

value of the lands, and they put the value of these lots for agricultural purposes at \$5,000. There is also testimony tending to show that this ledge of limestone has been practically tested, and that it is valueless; also that it has been worked in the past and abandoned, because unprofitable. The defendant has lived on the land, and probably has done as much improvement as his circumstances would permit. In fact, his good faith is in no wise impeached by any creditable evidence.

In my judgment the evidence signally fails to prove the land more valuable for mineral than for agricultural purposes.

Your office judgment is therefore reversed, and the local officers are directed to approve Isaksen's final proof.

JOEL FAY.

Motion for review of departmental decision of March 19, 1895, 20 L. D., 247, denied by Secretary Francis, October 3, 1896.

FINAL PROOF—PROTEST—HEARING—DECISION.

SPAULDING *v.* DAVIS.

In the disposition of a case arising on a protest against final proof, where a hearing is ordered to determine priority of right, and evidence duly submitted, the respective rights of the parties as well as the regularity of the proof should be considered.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 3, 1896. (J. A.)

The land involved herein is the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Section 15, T. 5 N., R. 21 W., Missoula, Montana, land district.

March 3, 1893, Robert Davis filed declaratory statement for said tract under the Act of June 5, 1872 (17 Stat., 226), providing for the sale of lands in the Bitter Root valley, Montana, to actual settlers. On May 7, 1894, Henry H. Spaulding filed a declaratory statement for the tract under the same act.

January 2, 1894, Davis gave notice of intention to make final proof on February 15, 1894, but for some reason not appearing from the record he failed to make proof. March 14, 1894, he gave notice of intention to make final proof on April 26, 1894. He appeared at the time set for taking final proof, but finding that Spaulding had appeared as protestant, failed to submit his proof. May 5, 1894, he again gave notice of his intention to make final proof. Notice for publication issued on the same date, directing final proof to be taken before a United States circuit court commissioner at Hamilton, Montana, on June 29, 1894, and specially citing Spaulding to appear and cross-examine Davis and his witnesses and to offer proof in answer. Instead of offering his proof

in accordance with the requirement of the circular of December 15, 1885 (4 L. D., 297), between the hours of 8:00 A. M. and 6:00 P. M. on June 29th, Davis offered his proof very early in the morning, according to the commissioner's affidavit on file in the case, between the hours of six and seven o'clock. The proof was carried away from the commissioner's office before seven o'clock and transmitted to the local officers, by whom it was received on the following day. Spaulding was thus deprived of the opportunity of cross-examining Davis and his witnesses.

July 2, 1894, Spaulding filed a protest against the acceptance of Davis' final proof, whereupon the local officers on July 11th ordered a hearing for August 31, 1894, to determine the question of prior right. In the notice of hearing they directed that testimony be taken on August 24, 1894, before a United States Circuit Court Commissioner at Hamilton, Montana. Both parties submitted testimony on the date appointed, and on October 4, 1894, the local officers rendered decision finding that Davis is the prior settler and recommending that his final proof be accepted and that the protest of Spaulding be dismissed. On Spaulding's appeal your office rendered decision June 7, 1894, finding that "almost every circumstance concerning Davis' relation to this land tends strongly to impeach the good faith of his claim," but holding that it is not necessary for the purpose of the decision to look beyond the facts concerning the submission of his final proof. As said proof was irregularly submitted, the decision of the local officers was reversed and the proof rejected.

Davis has appealed from said decision to the Department, contending that your office erred in not finding that he is the prior *bona fide* settler, and in not allowing him to submit new proof.

At the hearing which was had at Spaulding's request made after the irregular submission of Davis' final proof, the case was fully and fairly tried upon the merits. Your office therefore erred in not deciding the question of prior right. (Platt *et al. v. Graham*, 7 L. D., 229; Langford *v. Butler*, 20 L. D., 76.)

In the case of Langford *v. Butler* (*supra*), which is cited in the decision of your office in support of the holding that Davis' final proof must be rejected, and also apparently in support of the holding that it is not necessary for the purpose of said decision to look beyond the facts concerning the submission of Davis' final proof, the facts are as follows:

August 17, 1891, Langford made homestead entry for a tract of land, and on the same day Butler filed a pre-emption declaratory statement for a tract including part of the land entered by Langford. October 9, 1891, Butler made final proof before a United States circuit court commissioner. Langford appeared to cross-examine Butler and his witnesses and protested against the acceptance of his proof. November 7, 1891, before the final proof had been passed upon by the local officers, he filed an affidavit of contest as to the tract in controversy, alleging prior settlement. Hearing was had December 22nd and 23, 1891.

March 31, 1893, your office rendered decision awarding the land in controversy to Butler and holding Langford's homestead entry for cancellation as to said tract. On Langford's appeal the Department first considered the facts in regard to the submission of Butler's final proof and held that the same must be rejected for the reason that it was irregularly submitted, and directed your office to strictly enforce the circular regulation in regard to the submission of final proof. The contest between the parties was then considered and Langford was awarded the right to the land in dispute, being part of the land claimed by Butler, and it was further held that Butler's pre-emption declaratory statement must be canceled, for the reason that he had not established his residence upon the land.

That decision did not warrant the holding in the decision appealed from, that it is not necessary to consider the facts beyond the submission of Davis' final proof. The precedent established in *Platt et al. v. Graham*, cited *supra*, and followed in *Langford v. Butler*, of considering a case on the merits when a hearing was had after the irregular submission of final proof, should have been followed by your office in the case at bar. A decision on the merits would not have been incompatible with an observance of the directions given in *Langford v. Butler* to strictly enforce the regulation in regard to the submission of final proof.

Davis did not establish his residence on the land until January 22, 1894, after his first notice of intention to make final proof. He resided on the land continuously until July 6, 1894, one week after the submission of his final proof, with the exception of about five weeks in March and April. The cost of erecting his improvements on the land was about seventy dollars, although his estimate of their value is much higher.

Spaulding went on the land on January 8, 1894, and on that day laid the foundation for a log house. He did not complete the house, but returned to the land on January 19, and built a lumber house twelve by fourteen feet, in which he established his residence. He continuously resided in his house until shortly before the hearing, when he went away to work at "harvesting." His improvements are worth about as much as those of Davis.

The actions of Davis indicate that he is not a *bona fide* settler. His final proof must therefore be rejected and his declaratory statement canceled. The decision appealed from is accordingly modified.

WELCH v. PETRE ET AL.

Motion for review of departmental decision of June 9, 1896, 22 L. D., 651, denied by Secretary Francis, October 3, 1896.

RESTORATION OF LOST OR OBLITERATED CORNERS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., October 16, 1896.

The increasing number of letters from county and local surveyors received at this office making inquiry as to the proper method of restoring to their original position lost or obliterated corners marking the survey of the public lands of the United States, or such as have been willfully or accidentally moved from their original position, have rendered the preparation of the following general rules necessary, particularly as in a very large number of cases the immediate facts necessary to a thorough and intelligent understanding are omitted. Moreover, surveys having been made under the authority of different acts of Congress, different results have been obtained, and no special law has been enacted by that authority covering and regulating the subject of the above-named inquiries. Hence, the general rule here given must be considered merely as an expression of the opinion of this office on the subject, based, however, upon the spirit of the several acts of Congress authorizing the surveys, as construed by this office, and by United States court decisions. When cases arise which are not covered by these rules, and the advice of this office is desired, the letter of inquiry should always contain a description of the particular corner, with reference to the township, range, and section of the public surveys, to enable this office to consult the record.

An *obliterated* corner is one where no visible evidence remains of the work of the original surveyor in establishing it. Its location may, however, have been preserved beyond all question by acts of landowners, and by the memory of those who knew and recollect the true situs of the original monument. In such cases it is not a lost corner.

A *lost* corner is one whose position can not be determined, beyond reasonable doubt, either from original marks or reliable external evidence.

Surveyors sometimes err in their decision whether a corner is to be treated as *lost* or only *obliterated*.

Surveyors who have been United States deputies should bear in mind that in their private capacity they must act under somewhat different rules of law from those governing original surveys, and should carefully distinguish between the provisions of the statute which guide a Government deputy and those which apply to retracement of lines once surveyed. The failure to observe this distinction has been prolific of erroneous work and injustice to landowners.

To restore extinct boundaries of the public lands correctly, the surveyor must have some knowledge of the manner in which townships were subdivided by the several methods authorized by Congress. Without this knowledge he may be greatly embarrassed in the field,

and is liable to make mistakes invalidating his work, and leading eventually to serious litigation. It is believed that the following synopsis of the several acts of Congress regulating the surveys of the public lands will be of service to county surveyors and others, and will help to explain many of the difficulties encountered by them in the settlement of such questions.

Compliance with the provisions of Congressional legislation at different periods has resulted in *two* sets of corners being established on *township lines* at one time; at other times *three* sets of corners have been established on *range lines*; while the system now in operation makes but *one* set of corners on *township boundaries*, except on standard lines—i. e., base and correction lines, and in some exceptional cases.

The following brief explanation of the modes which have been practiced will be of service to all who may be called upon to restore obliterated boundaries of the public land surveys:

Where two sets of corners were established on township boundaries, one set was planted at the time the exteriors were run, those on the north boundary belonging to the sections and quarter sections north of said line, and those on the west boundary belonging to the sections and quarter sections west of that line. The other set of corners was established when the township was subdivided. This method, as stated, resulted in the establishment of two sets of corners on all four sides of the townships.

Where three sets of corners were established on the range lines, the subdivisional surveys were made in the above manner, except that the east and west section lines, instead of being closed upon the corners previously established on the east boundary of the township, were run due east from the last interior section corner, and new corners were erected at the points of intersection with the range line.

The method now in practice requires section lines to be initiated from the corners on the south boundary of the township, and to close on existing corners on the east, north, and west boundaries of the township, except when the north boundary is a base line or standard parallel.

But in some cases, for special reasons, an opposite course of procedure has been followed, and subdivisional work has been begun on the north boundary and has been extended southward and eastward or southward and westward.

In the more recent general instructions, greater care has been exercised to secure rectangular subdivisions by fixing a strict limitation that no new township exteriors or section lines shall depart from a true meridian or east and west line more than twenty-one minutes of arc; and that where a random line is found liable to correction beyond this limit, a true line on a cardinal course must be run, setting a closing corner on the line to which it closes.

This produces, in new surveys closing to irregular old work, a great number of exteriors marked by a double set of corners. All retracing

surveyors should proceed under these new conditions with full knowledge of the field notes and exceptional methods of subdivision.

SYNOPSIS OF ACTS OF CONGRESS.

The first enactment in regard to the surveying of the public lands was an ordinance passed by the Congress of the Confederation May 20, 1785, prescribing the mode for the survey of the "Western Territory," and which provided that said territory should be divided into "townships of six miles square, by lines running due north and south, and others crossing them at right angles" as near as might be.

Ordinance of the Congress of the Confederation of May 20, 1785, U. S. Land Laws, p. 349. Edition 1828.

It further provided that the first line running north and south should begin on the Ohio River, at a point due north from the western terminus of a line run as the south boundary of the State of Pennsylvania, and the first line running east and west should begin at the same point and extend through the whole territory. In these initial surveys only the exterior lines of the townships were surveyed, but the plats were marked by subdivisions into sections 1 mile square, numbered from 1 to 36, commencing with No. 1 in the southeast corner of the township, and running from south to north in each tier to No. 36 in the northwest corner of the township; mile corners were established on the township lines. The region embraced by the surveys under this law forms a part of the present State of Ohio, and is generally known as "the Seven Ranges."

The Federal Congress passed a law, approved May 18, 1796, in regard to surveying the public domain, which applied to "the territory northwest of the River Ohio, and above the mouth of the Kentucky River."

Act of May 18, 1796. U. S. Statutes at Large, vol. 1, p. 465. Section 2395, U. S. Revised Statutes.

Section 2 of said act provided for dividing such lands as had not been already surveyed or disposed of "by north and south lines run according to the true meridian, and by others crossing them at right angles, so as to form townships of 6 miles square," etc. It also provided that "one-half of said townships, taking them alternately, should be subdivided into sections containing, as nearly as may be, 640 acres each, by running through the same each way parallel lines at the end of every two miles; and by marking a corner on each of said lines at the end of every mile." The act also provided that "the sections shall be numbered, respectively, beginning with the number one in the northeast section, and proceeding west and east alternately through the township, with progressive numbers till the thirty-sixth be completed." This method of numbering sections is still in use.

An act amendatory of the foregoing, approved May 10, 1800, required the "townships west of the Muskingum, which are directed to be sold in quarter townships, to be subdivided into half sections of 320 acres each, as nearly as may be, by running parallel lines through the same from east to west, and from south to north, at the distance of one mile from each other, and marking

Act of May 10, 1800, U. S. Statutes at Large, vol. 2, p. 73. Section 2395, U. S. Revised Statutes.

corners, at the distance of each half mile on the lines running from east to west, and at the distance of each mile on those running from south to north. And the interior lines of townships intersected by the Muskingum, and of all townships lying east of that river, which have not been heretofore actually subdivided into sections, shall also be run and marked * * *. And in all cases where the exterior lines of the townships thus to be subdivided into sections or half sections, shall exceed or shall not extend six miles, the excess or deficiency shall be specially noted, and added to or deducted from the western or northern ranges of sections or half sections in such townships, according as the error may be in running the lines from east to west or from south to north." Said act also provided that the northern and western tiers of sections should be sold as containing only the quantity expressed on the plats, and all others as containing the complete legal quantity.

The act approved June 1, 1796, "regulating the grants of land appropriated for military services," etc., provided for dividing the "United States Military Tract," in the State of Ohio, into townships 5 miles square, each to be subdivided into quarter townships containing 4,000 acres.

Act of June 1, 1796.
U. S. Statutes at Large
vol. 1, p. 490.

Section 6 of the act approved March 1, 1800, amendatory of the foregoing act, enacted that the Secretary of the Treasury was authorized to subdivide the quarter townships into lots of 100 acres, bounded as nearly as practicable by parallel lines 160 perches in length by 100 perches in width. These subdivisions into lots, however, were made upon the plats in the office of the Secretary of the Treasury, and the actual survey was only made at a subsequent time when a sufficient number of such lots had been located to warrant the survey. It thus happened, in some instances, that when the survey came to be made the plat and survey could not be made to agree, and that fractional lots on plats were entirely crowded out. A knowledge of this fact may explain some of the difficulties met with in the district thus subdivided.

Act of March 1, 1800.
U. S. Statutes at Large,
vol. 2, p. 14.

The act of Congress approved February 11, 1805, directs the subdivision of the public lands into quarter sections, and provides that all corners marked in the field shall be established as the proper corners of the sections or quarter sections which they were intended to designate, and that corners of half and quarter sections not marked shall be placed as nearly as possible "equidistant from those two corners which stand on the same line." This act further provides that "the boundary lines actually run and marked" (in the field) "shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended, and the length of such lines as returned by either of the surveyors aforesaid shall be held and considered as the true length thereof. And the boundary lines which shall not have been actually run and marked as aforesaid shall be ascertained by running straight lines from the established

Act of February 11,
1805. U. S. Statutes at
Large, vol. 2, p. 318.
Section 2296, U. S. Re-
vised Statutes.

corners to the opposite corresponding corners, but in those portions of the fractional townships where no such opposite or corresponding corners have been or can be fixed, the said boundary lines shall be ascertained by running from the established corners due north and south, or east and west lines, as the case may be, to the water course, Indian boundary line, or other external boundary of such fractional township."

The act of Congress approved April 24, 1820, provides for the sale of public lands in half-quarter sections, and requires that

"in every case of the division of a quarter section the line for the division thereof shall run north and south," "and fractional sections, containing 160 acres and upwards, shall in like manner, as nearly as practicable, be subdivided into half quarter sections, under such rules and regulations as may be prescribed by the Secretary of the Treasury; but fractional sections containing less than 160 acres shall not be divided."

Act of April 24, 1820.
U. S. Statutes at Large,
vol. 3, p. 568. Section
2397, U. S. Revised
Statutes.

The act of Congress approved May 24, 1824, provides "that whenever, in the opinion of the President of the United States, a departure from the ordinary mode of surveying land on any river, lake, bayou, or water course would promote the public interest, he may direct the surveyor-general in whose district such land is situated, and where the change is intended to be made, under such rules and regulations as the President may prescribe, to cause the lands thus situated to be surveyed in tracts of two acres in width, fronting on any river, bayou, lake, or water course, and running back the depth of forty acres."

Act of May 24, 1824.
U. S. Statutes at Large,
vol. 4, p. 34.

The act of Congress approved April 5, 1832, directed the subdivision of the public lands into quarter-quarter sections; that in every case of the division of a half-quarter section the dividing line should run east and west, and that fractional sections should be subdivided, under rules and regulations prescribed by the Secretary of the Treasury. Under the latter provision the Secretary directed that fractional sections containing less than 160 acres, or the residuary portion of a fractional section, after the subdivision into as many quarter-quarter sections as it is susceptible of, may be subdivided into lots, each containing the quantity of a quarter-quarter section as nearly as practicable, by so laying down the line of subdivision that they shall be 20 chains wide, which distances are to be marked on the plat of subdivision, as are also the areas of the quarter quarters and residuary fractions.

Act of April 5, 1832.
U. S. Statutes at Large,
vol. 4, p. 503. Section
2397, U. S. Revised
Statutes.

These two acts last mentioned provided that the corners and contents of half-quarter and quarter-quarter sections should be ascertained as nearly as possible in the manner and on the principles prescribed in the act of Congress approved February 11, 1805.

GENERAL RULES.

From the foregoing synopsis of Congressional legislation it is evident—
1st. That the boundaries of the public lands established and returned

by the duly appointed Government surveyors, when approved by the surveyors general and accepted by the Government, *are unchangeable*.

2d. That the original township, section, and quarter-section corners established by the Government surveyors must stand as the true corners which they were intended to represent, whether the corners be in place or not.

3d. That quarter-quarter corners not established by the Government surveyors shall be placed on the straight lines joining the section and quarter-section corners and midway between them, except on the last half mile of section lines closing on the north and west boundaries of the township, or on other lines between fractional sections.

4th. That all subdivisional lines of a section running between corners established in the original survey of a township must be straight lines, running from the proper corner in one section line to its opposite corresponding corner in the opposite section line.

5th. That in a fractional section where no opposite corresponding corner has been or can be established, any required subdivision line of such section must be run from the proper original corner in the boundary line due east and west, or north and south, as the case may be, to the water course, Indian reservation, or other boundary of such section, with due parallelism to section lines.

From the foregoing it will be plain that extinct corners of the Government surveys must be restored to their original locations, whenever it is possible to do so; and hence resort should always be first had to the marks of the survey in the field. The locus of the missing corner should be first identified on the ground by the aid of the mound, pits, line trees, bearing trees, etc., described in the field notes of the original survey.

The identification of mounds, pits, witness trees, or other permanent objects noted in the field notes of survey, affords the best means of relocating the missing corner in its original position. If this can not be done, clear and convincing testimony of citizens as to the locality it originally occupied should be taken, if such can be obtained. In any event, whether the locus of the corner be fixed by the one means or the other, such locus should always be tested and confirmed by measurements to *known* corners. No definite rule can be laid down as to what shall be sufficient evidence in such cases, and much must be left to the skill, fidelity, and good judgment of the surveyor in the performance of his work.

EXCEPTIONAL CASES.

When new measurements are made on a single line to determine the position thereon for a restored lost corner (for example, a quarter-section corner on line between two original section corners), or when new measurements are made between original corners on two lines for the purpose of fixing by their intersection the position of a restored missing corner (for example, a corner common to four sections or four townships),

it will almost invariably happen that discrepancies will be developed between the new measurements and the original measurements in the field notes. When these differences occur the surveyor will in all cases establish the missing corner by proportionate measurements on lines conforming to the original field notes and by the method followed in the original survey. From this rule there can be no departure, since it is the basis upon which the whole operation depends for accuracy and truth.

In cases where the relocated corner can not be made to harmonize with the field notes in all directions, and unexplained error in the first survey is apparent, it sometimes becomes the task of the surveyor to place it according to the requirements of one line and against the calls of another line. For instance, if the line between sections 30 and 31, reported 78 chains long, would draw the missing corner on range line 1 chain eastward out of range with the other exterior corners, the presumption would be strong that the range line had been run straight and the length of the section line wrongly reported, because experience shows that west random lines are regarded as less important than range lines and more liable to error.

Again, where a corner on a standard parallel has been obliterated, it is proper to assume that it was placed in line with other corners, and if an anomalous length of line reported between sections 3 and 4 would throw the closing corner into the northern township, a surveyor would properly assume that the older survey of the standard line is to control the length of the later and minor line. The marks or corners found on such a line closing to a standard parallel fix its *location*, but its *length* should be limited by its actual intersection, at which point the lost closing corner may be placed.

The strict rule of the law that "all corners marked in the field shall be established as the corners which they were intended to designate," and the further rule that "the length of lines returned by the surveyors shall be held and considered as the true length thereof," are found in some cases to be impossible of fulfillment in all directions at once, and a surveyor is obliged to choose, in his own discretion, which of two or more lines must yield, in order to permit the rules to be applied at all.

In a case of an erroneous but existing closing corner, which was set some distance out of the true State boundary of Missouri and Kansas, it was held by this office that a surveyor subdividing the fractional section should preserve the boundary as a straight line, and should not regard said closing corner as the proper corner of the adjacent fractional lots. The said corner was considered as fixing the position of the line between two fractional sections, but that its length extended to a new corner to be set on the true boundary line. The surveyor should therefore preserve such an original corner as evidence of the line; but its erroneous position can not be allowed to cause a crook between mile corners of the original State boundary.

It is only in cases where it is manifestly impossible to carry out the literal terms of the law, that a surveyor can be justified in making such a decision.

The principle of the preponderance of one line over another of less importance has been recognized in the rule for restoring a section corner common to two townships in former editions of this circular. The new corner should be placed *on* the township line; and measurements to check its position by distances to corners within the townships are useful to confirm it if found to agree well, but should not cause it to be placed off the line if found not to agree, if the general condition of the boundary supports the presumption that it was properly alined.

TO RESTORE LOST OR OBLITERATED CORNERS.

1. *To restore corners on base lines and standard parallels.*—Lost or obliterated standard corners will be restored to their original positions on a base line, standard parallel, or correction line, by proportionate measurements on the line, conforming as nearly as practicable to the original field notes and joining the nearest identified original standard corners on opposite sides of the missing corner or corners, as the case may be.

(a) The term "standard corners" will be understood to designate standard township, section, quarter-section, and meander corners; and, in addition, closing corners, as follows: Closing corners used in the original survey to determine the position of a standard parallel, or established during the survey of the same, will, with the standard corners, govern the alinement and measurements made to restore lost or obliterated standard corners; but no other closing corners will control in any manner the restoration of standard corners on a base line or standard parallel.

(b) A lost or obliterated closing corner from which a standard parallel has been initiated or to which it has been directed will be reestablished in its original place by proportionate measurement from the corners used in the original survey to determine its position. Measurements from corners on the opposite side of the parallel will not control in any manner the relocation of said corner.

(c) A missing closing corner originally established during the survey of a standard parallel as a corner from which to project surveys *south* will be restored to its original position by considering it a standard corner and treating it accordingly.

(d) Therefore, paying attention to the preceding explanations, we have for the restoration of one or several corners on a standard parallel, and for general application to all other surveyed lines, the following proportion:

As the original field-note distance between the selected known corners is to the new measure of said distance, so is the original field-note length of any part of the line to the required new measure thereof.

The sum of the computed lengths of the several parts of a line must be equal to the new measure of the whole distance.

(e) As has been observed, existing original corners can not be disturbed; consequently, discrepancies between the new and the original field-note measurements of the line joining the selected original corners will not in any manner affect measurements beyond said corners, but the differences will be distributed proportionately to the several intervals embraced in the line in question.

(f) After having checked each new location by measurement to the nearest known corners, new corners will be established permanently and new bearings and measurements taken to prominent objects, which should be of as permanent a character as possible, and the same recorded for future reference.

2. *Restoration of township corners common to four townships.*—Two cases should be clearly recognized: 1st. Where the position of the original township corner has been made to depend upon measurements on two lines at right angles to each other. 2d. Where the original corner has been located by measurements on one line only; for example, on a guide meridian.

(a) For restoration of a township corner originally subject to the first condition: A line will first be run connecting the nearest identified original corners on the meridional township lines, north and south of the missing corner, and a temporary corner will be placed at the proper proportionate distance. This will determine the corner in a north and south direction only.

Next, the nearest original corners on the latitudinal township lines will be connected and a point thereon will be determined in a similar manner, independent of the temporary corner on the meridional line. Then through the first temporary corner run a line east (or west) and through the second temporary corner a line north (or south), as relative situations may suggest. The intersection of the two lines last run will define the position of the restored township corner, which may be permanently established.

(b) The restoration of a lost or obliterated township corner established under the second conditions, i. e., by measurements, on a single line, will be effected by proportionate measurements on said line, between the nearest identified original corners on opposite sides of the missing township corner, as before described.

3. *Reestablishment of corners common to two townships.*—The two nearest known corners on the township line, the same not being a base or a correction line, will be connected as in case No. 1, by a right line, and the missing corner established by proportionate distance as directed in that case; the location thus found will be checked upon by measurements to nearest known section or quarter-section corners north and south, or east and west, of the township line, as the case may be.

4. *Reestablishment of closing corners.*—Measure from the quarter-section, section, or township corner east or west, as the case may be, to the

next preceding or succeeding corner in the order of original establishment, and reestablish the missing closing corner by proportionate measurement. The line upon which the closing corner was originally established should always be remeasured, in order to check upon the correctness of the new location. See pages 8, 12, and 13 for details.

5. *Reestablishment of interior section corners.*—This class of corners should be reestablished in the same manner as corners common to four townships. In such cases, when a number of corners are missing on all sides of the one sought to be reestablished, the entire distance must, of course, be remeasured between the nearest existing recognized corners both north and south, and east and west, in accordance with the rule laid down, and the new corner reestablished by proportionate measurement. The mere measurement in any one of the required directions will not suffice, since the direction of the several section lines running northward through a township, or running east and west, are only in the most exceptional cases true prolongations of the alinement of the section lines initiated on the south boundary of the township; while the east and west lines running through the township, and theoretically supposed to be at right angles with the former, are seldom in that condition, and the alinements of the closing lines on the east and west boundaries of the township, in connection with the interior section lines, are even less often in accord. Moreover, the alinement of the section line itself from corner to corner, in point of fact, also very frequently diverges from a right line, although presumed to be such from the record contained in the field notes and so designated on the plats, and becomes either a broken or a curved line. This fact will be determined, in a timbered country, by the blazes which may be found upon trees on either side of the line, and although such blazed line will not strictly govern as to the absolute direction assumed by such line, it will assist very materially in determining its approximate direction, and should never be neglected in retracements for the reestablishment of lost corners of any description. Sight trees described in the field notes, together with the recorded distances to same, when fully identified, will, it has been held, in one or more States, govern the line itself, even when not in a direct or straight line between established corners, which line is then necessarily a broken line by passing through said sight trees. Such trees, when in existence and properly identified beyond a question of doubt, will very materially assist in evidencing the correct relocation of a missing corner. It is greatly to be regretted that the earlier field notes of survey are so very meager in the notation of the topography found on the original line, which might in very many instances materially lessen a surveyor's labors in retracement of lines and reestablishment of the required missing corner. In the absence of such sight trees and other evidence regarding the line, as in an open country, or where such evidence has been destroyed by time, the elements, or the progress of improvement, the line connecting the known corners should be run straight from corner to corner.

6. *Reestablishment of quarter-section corners on township boundaries.*—Only one set of quarter-section corners are actually marked in the field on township lines, and they are established at the time when the township exteriors are run. When double section corners are found, the quarter-section corners are considered generally as standing midway between the corners of their respective sections, and when required to be established or reestablished, as the case may be, they should be generally so placed; but great care should be exercised not to mistake the corners belonging to one township for those of another. After determining the proper section corners marking the line upon which the missing quarter-section corner is to be reestablished, and measuring said line, the missing quarter-section corner will be reestablished in accordance with the requirements of the original field notes of survey, by proportionate measurement between the section corners marking the line.

Where there are double sets of section corners on township and range lines, and the quarter-section corners for sections south of the township or east of the range lines are required to be established in the field, the said quarter-section corners should be so placed as to suit the calculation of areas of the quarter sections adjoining the township boundaries as expressed upon the official township plat, adopting proportionate measurements when the present measurement of the north and west boundaries of the section differ from the original measurements.

7. *Reestablishment of quarter-section corners on closing section lines between fractional sections.*—This class of corners must be reestablished according to the original measurement of 40 chains from the last interior section corner. If the measurements do not agree with the original survey, the excess or deficiency must be divided proportionately between the two distances, as expressed in the field notes of original survey. The section corner started from and the corner closed upon should be connected by a right line, unless the retracement should develop the fact that the section line is either a broken or curved line, as is sometimes the case.

8. *Reestablishment of interior quarter-section corners.*—In some of the older surveys these corners are placed at variable distances, in which case the field notes of the original survey must be consulted, and the quarter-section corner reestablished at proportionate distances between the corresponding section corners, in accordance therewith. The later surveys being more uniform and in stricter accordance with law, the missing quarter-section corner must be reestablished equidistant between the section corners marking the line, according to the field notes of the original survey. The remarks made under section 5, in relation to section lines, apply with full force here also; the caution there given not to neglect sight trees is equally applicable, since the proper reestablishment of the quarter-section corner may in some instances very largely depend upon its observance, and avoid one of the many sources of litigation.

9. *Where double corners were originally established, one of which is standing, to reestablish the other.*—It being remembered that the corners established when the exterior township lines were run, belong to the sections in the townships north and west of those lines, the surveyor must first determine beyond a doubt to which sections the existing corner belongs. This may be done by testing the courses and distances to witness trees or other objects noted in the original field notes of survey, and by remeasuring distances to known corners. Having determined to which township the existing corner belongs, the missing corner may be reestablished in line north or south of the existing corner, as the case may be, at the distance stated in the field notes of the original survey, by proportionate measurement, and tested by retracement to the opposite corresponding corner of the section to which the missing section corner belongs. These double corners being generally not more than a few chains apart, the distance between them can be more accurately laid off, and it is considered preferable to first establish the missing corner as above, and check upon the corresponding interior corner, than to reverse the proceeding; since the result obtained is every way more accurate and satisfactory.

10. *Where double corners were originally established, and both are missing, to reestablish the one established when the township line was run.*—The surveyor will connect the nearest known corners on the township line by a right line, being careful to distinguish the section from the closing corners, and reestablish the missing corner at the point indicated by the field notes of the original survey by proportionate measurement. The corner thus restored will be common to two sections either north or west of the township boundary, and the section north or west, as the case may be, should be carefully retraced, thus checking upon the reestablished corner, and testing the accuracy of the result. It can not be too much impressed upon the surveyor that any measurements to objects on line noted in the original survey are means of determining and testing the correctness of the operation.

11. *Where double corners were originally established, and both are missing, to reestablish the one established when the township was subdivided.*—The corner to be reestablished being common to two sections south or east of the township line, the section line closing on the missing section corner should be first retraced to an intersection with the township line in the manner previously indicated, and a temporary corner established at the point of intersection. The township line will of course have been previously carefully retraced in accordance with the requirements of the original field notes of survey, and marked in such a manner as to be readily identified when reaching the same with the retraced section line. The location of the temporary corner planted at the point of intersection will then be carefully tested and verified by remeasurements to objects and known corners on the township line, as noted in the original field notes of survey, and the necessary corrections made in such relocation.

A permanent corner will then be erected at the corrected location on the township line, properly marked and witnessed, and recorded for future requirements.

12. *Where triple corners were originally established on range lines, one or two of which have become obliterated, to reestablish either of them.*—It will be borne in mind that only two corners were established as actual corners of sections, those established on the range line not corresponding with the subdivisional survey east or west of said range line. The surveyor will, therefore, first proceed to identify the existing corner or corners, as the case may be, and then reestablish the missing corner or corners in line north or south, according to the distances stated in the original field notes of survey in the manner indicated for the reestablishment of double corners, testing the accuracy of the result obtained, as hereinbefore directed in other cases. If, however, the distances between the triple corners are not stated in the original field notes of survey, as is frequently the case in the returns of older surveys, the range line should be first carefully retraced, and marked in a manner sufficiently clear to admit of easy identification upon reaching same during the subsequent proceedings. The section lines closing upon the missing corners must then be retraced in accordance with the original field notes of survey, in the manner previously indicated and directed, and the corners reestablished in the manner directed in the case of double corners. The surveyor can not be too careful, in the matter of retracement, in following closely all the recorded indications of the original line, and nothing, however slight, should be neglected to insure the correctness of the retracement of the original line; since there is no other check upon the accuracy of the reestablishment of the missing corners, unless the entire corresponding section lines are remeasured by proportional measurement and the result checked by a recalculation of the areas as originally returned, which, at best, is but a very poor check, because the areas expressed upon the margin of many plats of the older surveys are erroneously stated on the face of the plats, or have been carelessly calculated.

13. *Where triple corners were originally established on range lines, all of which are missing, to reestablish same.*—These corners should be reestablished in accordance with the foregoing directions, commencing with the corner originally established when the range line was run, establishing the same in accordance with previously given directions for restoring section and quarter-section corners; that is to say, by remeasuring between the nearest known corners on said township line, and reestablishing the same by proportionate measurement. The two remaining will then be reestablished in conformity with the general rules for reestablishment of double corners.

14. *Reestablishment of meander corners.*—Before proceeding with the reestablishment of missing meander corners, the surveyor should have carefully rechaind at least three of the section lines between known

corners of the township within which the lost corner is to be relocated, in order to establish the proportionate measurement to be used. This requirement of preliminary remeasurement of section lines must in no case be omitted; since it gives the only data upon which the fractional section line can be remeasured proportionately, the corner marking the terminus, or the meander corner, being missing, which it is intended to reestablish. The missing meander corner will be reestablished on the section or township line retraced in its original location, by the proportionate measurement found by the preceding operations, from the nearest known corner on such township or section line, in accordance with the requirements of the original field notes of survey.

Meander corners hold the peculiar position of denoting a point on line between landowners, without usually being the legal terminus or corner of the lands owned. Leading judicial decisions have affirmed that meander lines are not strictly boundaries, and do not limit the ownership to the exact areas placed on the tracts, but that said title extends to the water, which, by the plat, appears to bound the land.

As such water boundaries are, therefore, subject to change by the encroachment or recession of the stream or lake, the precise location of old meanders is seldom important, unless in States whose laws prescribe that dried lake beds are the property of the State.

Where the United States has disposed of the fractional lots adjacent to shores, it claims no marginal lands left by recession or found by reason of erroneous survey. The lines between landowners are therefore regarded as extended beyond the original meander line of the shore, but the preservation or relocation of the meander corner is important, as evidence of the *position* of the section line.

The different rules by which division lines should be run between private owners of riparian accretions are a matter of State legislation, and not subject to a general rule of this office.

15. *Fractional section lines.*—County and local surveyors being sometimes called upon to restore fractional section lines closing upon Indian, military, or other reservations, private grants, etc., such lines should be restored upon the same principles as directed in the foregoing pages, and checked whenever possible upon such corners or monuments as have been placed to mark such boundary lines.

In some instances corners have been moved from their original position, either by accident or design, and county surveyors are called upon to restore such corners to their original positions, but, owing to the absence of any and all means of identification of such location, are unable to make the result of their work acceptable to the owners of the lands affected by such corner. In such cases the advice of this office has invariably been to the effect that the relocation of such corner must be made in accordance with the orders of a court of competent jurisdiction, the United States having no longer any authority to order any changes where the lands affected by such corner have been disposed of.

RECORDS.

The original evidences of the public-land surveys in the following States have been transferred, under the provisions of sections 2218, 2219, and 2220, United States Revised Statutes, to the State authorities, to whom application should be made for such copies of the original plats and field notes as may be desired, viz:

Alabama: Secretary of State, Montgomery.

Arkansas: Commissioner of State Lands, Little Rock.

Illinois: Auditor of State, Springfield.

Indiana: Auditor of State, Indianapolis.

Iowa: Secretary of State, Des Moines.

Kansas: Auditor of State and Register of State Lands, Topeka.

Michigan: Commissioner of State Land Office, Lansing.

Mississippi: Commissioner of State Lands, Jackson.

Missouri: Secretary of State, Jefferson City.

Nebraska: Commissioner of Public Lands and Buildings, Lincoln.

Ohio: Auditor of State, Columbus.

Wisconsin: Commissioners of Public Lands, Madison.

In other public-land States the original field notes and plats are retained in the offices of the United States surveyors general.

SUBDIVISION OF SECTIONS.

This office being in receipt of many letters making inquiry in regard to the proper method of subdividing sections of the public lands, the following general rules have been prepared as a reply to such inquiries. The rules for subdivision are based upon the laws governing the survey of the public lands. When cases arise which are not covered by these rules, and the advice of this office in the matter is desired, the letter of inquiry should, in every instance, contain a description of the particular tract or corner, with reference to township, range, and section of the public surveys, to enable the office to consult the record; also a diagram showing conditions found:

1. *Subdivision of sections into quarter sections.*—Under the provisions of the act of Congress approved February 11, 1805, the course to be pursued in the subdivision of sections into quarter sections is to run straight lines from the established quarter-section corners, United States surveys, to the opposite corresponding corners. The point of intersection of the lines thus run will be the corner common to the several quarter sections, or, in other words, the legal center of the section.

(a) Upon the lines closing on the north and west boundaries of a township, the quarter-section corners are established by the United States deputy surveyors at 40 chains to the north or west of the last interior section corners, and the excess or deficiency in the measurement is thrown into the half mile next to the township or range line, as the case may be.

(b) Where there are double sets of section corners on township and range lines, the quarter corners for the sections south of the township lines and east of the range lines are not established in the field by the United States deputy surveyors, but in subdividing such sections said quarter corners should be so placed as to suit the calculations of the areas of the quarter sections adjoining the township boundaries as expressed upon the official plat, adopting proportionate measurements where the new measurements of the north or west boundaries of the section differ from the original measurements.

2. *Subdivision of fractional sections.*—Where opposite corresponding corners have not been or can not be fixed, the subdivision lines should be ascertained by running from the established corners due north, south, east, or west lines, as the case may be, to the water course, Indian boundary line, or other boundary of such fractional section.

(a) The law presumes the section lines surveyed and marked in the field by the United States deputy surveyors to be due north and south or east and west lines, but in actual experience this is not always the case. Hence, in order to carry out the spirit of the law, it will be necessary in running the subdivisional lines through fractional sections to adopt mean courses where the section lines are not due lines, or to run the subdivision line parallel to the east, south, west, or north boundary of the section, as conditions may require, where there is no opposite section line.

3. *Subdivision of quarter sections into quarter quarters.*—Preliminary to the subdivision of quarter sections, the quarter-quarter corners will be established at points midway between the section and quarter-section corners, and between quarter corners and the center of the section, except on the last half mile of the lines closing on the north or west boundaries of a township, where they should be placed at 20 chains, proportionate measurement, to the north or west of the quarter section corner.

(a) The quarter-quarter section corners having been established as directed above, the subdivision lines of the quarter section will be run straight between opposite corresponding quarter-quarter section corners on the quarter section boundaries. The intersection of the lines thus run will determine the place for the corner common to the four quarter-quarter sections.

4. *Subdivision of fractional quarter sections.*—The subdivision lines of fractional quarter sections will be run from properly established quarter-quarter section corners (paragraph 3) due north, south, east, or west, to the lake, water course, or reservation which renders such tracts fractional, or parallel to the east, south, west, or north boundary of the quarter section, as conditions may require. (See paragraph 2 (a).)

5. *Proportionate measurement.*—By “proportionate measurement,” as used in this circular, is meant a measurement having the same ratio to that recorded in the original field notes as the *length of chain* used in

the new measurement has to the *length of chain* used in the original survey, assuming that the original and new measurements have been correctly made.

For example: The length of the line from the quarter-section corner on the west side of sec. 2, T. 24 N., R. 14 E, Wisconsin, to the north line of the township, by the United States deputy surveyor's chain, was reported as 45.40 chains, and by the county surveyor's measure is reported as 42.90 chains; then the distance which the quarter-quarter section corner should be located north of the quarter-section corner would be determined as follows:

As 45.40 chains, the Government measure of the whole distance, is to 42.90 chains, the county surveyor's measure of the same distance, so is 20.00 chains, original measurement, to 18.90 chains by the county surveyor's measure, showing that by proportionate measurement in this case the quarter-quarter section corner should be set at 18.90 chains north of the quarter-section corner, instead of 20.00 chains north of such corner, as represented on the official plat. In this manner the discrepancies between original and new measurements are equitably distributed.

S. W. LAMOREUX,
Commissioner.

DEPARTMENT OF THE INTERIOR,
October 16, 1896.

Approved:
DAVID R. FRANCIS,
Secretary.

PRACTICE—REVIEW—SECOND CONTEST—EVIDENCE.

STATE OF CALIFORNIA *v.* REEVES (ON REVIEW).

A contest allowed during the pendency, on appeal, of a prior suit involving the same land is without jurisdiction; and the evidence submitted therein cannot be considered in support of a motion for review of the decision rendered in the prior case.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
July 1, 1896. (A. E.)

Your office letter of May 25, 1896, transmits a motion for review of departmental decision in the above entitled cause, rendered February 17, 1896 (22 L. D., 203). The land involved is the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 18, T. 5 N., R. 10 W., S. B. M., Los Angeles, California. This motion is filed by one H. W. Duncan, who signs himself as attorney for the State of California.

In this motion it is admitted that there were no errors of law in the departmental decision referred to, but the motion is based upon the testimony alleged to have been taken in a contest case entitled Peter

B. Mathiason v. Harlan B. Sweet, assignee of *Albert F. Reeves*. As this contest involved the land in controversy between the State of California and *Reeves*, and the latter case was pending in this Department at the time said contest hearing was held, to wit, January 14, 1896, said hearing was irregular, erroneously allowed, and was without jurisdiction.

The mover of the motion under consideration files with his motion what he swears is a correct copy of the testimony taken at the hearing in the contest case referred to, but in view of the fact that said contest proceedings were illegal, the fact that the alleged copy is not certified and the testimony not sworn to is immaterial.

The motion is denied.

TIMBER CULTURE CONTEST—NOTICE OF CANCELLATION—APPLICATION.

WHITE *v.* LINNEMANN.

One who files an affidavit of contest against a timber culture entry, pending the disposition of a prior suit against the same entry, is not entitled to notice of cancellation if the entry is canceled under the prior proceedings; nor will an application to enter filed with the subsequent contest secure any right to the applicant if the successful contestant fails to exercise his preferred right.

Secretary Francis to the Commissioner of the General Land Office, October 16, 1896. (P. J. C.)

The land involved in this appeal is the SE. $\frac{1}{4}$ of Sec. 14, T. 22, R. 54, Alliance, Nebraska, land district.

The history of this tract as I glean it from the record is that on September 25, 1885, one David Freedom made timber culture entry of it; that on September 27, 1890, the same was canceled as the result of a contest initiated by one David T. Cummins; that subsequent to the initiation of this contest, and on September 27, 1889, one H. Paddock also filed a contest subject to that of Cummins; that on November 20, 1889, the plaintiff herein, Isaac White, filed a third contest, which was endorsed, "Filed Nov. 20, 1889,—9:15 A. M.—subject to Cummins and Paddock *v.* Freedom." Below this endorsement and apparently put there at a later period is this, "Entry canceled by first contest." White presented an application to make timber culture entry of the tract September 3, 1890. This application is endorsed, "Fees tendered and returned; application received and filed September 2, '90, and filed with his application to contest." On October 20, 1890, Tongers H. Linnemann made timber culture entry of the tract.

On June 9, 1891, White presented at the local office an affidavit showing his qualifications to perfect his entry; also that Cummins did not avail himself of his preference right under his contest; that he had not received notice from the local office of the cancellation of

Freedom's entry, and was not aware of it until informed by his attorney, who discovered the fact by an examination of the record. With this affidavit he again tendered the required fees. The local office rejected this tender of his fees, and his application to enter, for the reasons, (1) that the cancellation of Freedom's entry was not the result of White's contest; (2) that he did not deposit the one dollar "for notice of cancellation;" (3) that his application to enter was not filed with his contest, but ten months thereafter; (4) that the application conflicts with the entry of Linnemann, and (5) that the timber culture law has been repealed.

White appealed, and your office, by letter of October 14, 1891, held that it was error not to have notified White of the cancellation of Freedom's entry, and ordered that Linnemann be allowed sixty days in which to show cause why his entry should not be canceled and White's entry placed of record.

A hearing was thereupon had before the local officers, and as a result they decided in favor of Linnemann. White appealed, and your office, by letter of October 5, 1892, reversed their action, and held defendant's entry for cancellation, and that plaintiff be allowed to make his timber culture entry, whereupon Linnemann prosecutes this appeal.

There are several specifications of error, but they may be condensed into one proposition, that is, can a third contestant, whose application to enter the land involved did not accompany his contest, but was presented and filed with the contest before the cancellation of the entry and before the repeal of the timber culture law, have such an accruing right in the land as will entitle him to perfect the entry so tendered, when the prior contestants fail to exercise their preference rights?

Cummins did not exercise his preference right. It will be observed that before the expiration of the thirty days in which Cummins might have entered the land the defendant's entry was allowed.

It has been frequently decided by the Department that a preference right does not accrue to a second or third contestant where the entry in question is canceled as the result of the first contest. (*Armenag Simonian*, 13 L. D., 696; *Edwin M. Wardell*, 15 L. D., 375; *Adamson v. Blackmore*, 16 L. D., 111; *Owens v. Gauger*, 18 L. D., 6.) No preference right having accrued to White, he was therefore not entitled to notice of cancellation of Freedom's entry.

White could gain no advantage or right by his application to enter, because at that time the land was segregated by a prior subsisting entry. The rejection, therefore, of his application was not erroneous. (*Goodale v. Olney*, 13 L. D., 498; *Maggie Laird*, 13 L. D., 502.)

Your office decision seems to have been based largely on the case of *Heilman v. Syverson* (15 L. D., 184). That case has recently been overruled. *Shea v. Williams* (23 L. D., 119). In that case it was held that:

It is a fundamental principle that rights secured by an application filed with a timber culture contest, depend upon the establishment of the charge, and if the con-

test fails the application falls with it. It is also well established that the second contestant does not secure any preference right by reason of his contest, where the entry under attack is canceled in the prior contest of another. *Armenag Simonian* (13 L. D., 696).

Your office judgment is therefore reversed, and the entry of *Linne-mann* will remain intact.

RAILROAD GRANT—INDEMNITY SELECTION—SPECIFICATION OF LOSS.

NORTHERN PACIFIC R. R. CO. *v.* DREW.

In the case of an indemnity selection list where the losses are not arranged tract for tract, and a tract is included therein that is in fact not lost to the grant, any applicant for a tract embraced within said list is entitled to claim that the failure in the loss assigned relates to his tract.

Secretary Francis to the Commissioner of the General Land Office, October 16, 1896. (F. W. C.)

On November 1, 1887, L. B. Drew was permitted to make homestead entry for the SW. $\frac{1}{4}$ of Sec. 29, T. 55 N., R. 21 W., Duluth land district, Minnesota. This tract is within the second indemnity belt of the grant to the Northern Pacific Railroad Company. The company's right under its selections covering said SW. $\frac{1}{4}$ of Sec. 29 was considered in departmental decision of March 11, 1896 (not reported), in which your office decision of January 7, 1895, adverse to the company, was affirmed. The company filed a motion for review of said decision, as to the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said Sec. 29, which motion was duly entertained and returned for service. It has since been returned bearing evidence of service upon Drew.

It appears that the company first made selection of the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ in its list of April 23, 1883. This list contained a designation of losses equal in amount to the selected land, but the same were not arranged tract for tract with the selections. A re-arranged list was filed June 19, 1891.

In the previous decision of this Department your office decision was affirmed, upon the ground, as reported in your office decision, that there was a variance between the lists of 1883 and 1891 in the matter of the losses assigned as bases for said selections. The ground upon which the motion rests is that there was no variance between the lists of 1883 and 1891.

An answer to the motion has been filed on behalf of Drew, in which attention is called to the fact that in the list of 1883 the company specified as lost to the grant, and as a part of the bases on which said selection list rested, the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 25, T. 137, R. 28; that said tract does not appear among the losses contained in the list of June 19, 1891, but the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said section 25, T. 137, R. 28, is found designated as a basis, said last mentioned tract not being included in the list of 1883.

Upon inquiry at your office I learn that the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said Sec. 25 was not lost to the grant, the records showing that the company received patent therefor. It was presumably a clerical mistake in describing the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ instead of the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said Sec. 25, which last mentioned tract was lost to the grant by reason of the location of agricultural college scrip on October 10, 1867.

Within the second indemnity belt only certain losses will support a selection, namely, losses after the date of the passage of the act of July 2, 1864, and of land within the State in which the selection is made which cannot be satisfied from lands within the first indemnity belt.

It is clear, therefore, that the list of 1883 was unsupported as to eighty acres, that is, the bases stated in the list were eighty acres short of the amount selected. This circumstance evidences clearly the necessity of requiring the losses to be arranged tract for tract with the selected lands, for had this been done in the original list it would have been readily ascertained which of the tracts selected was based upon this alleged loss that did not exist.

By failing to arrange the losses tract for tract with the selections, it was within the power of any one attacking any part of the selection list to claim that the failure in the loss assigned related to his tract. Drew has called attention to the matter, and in my opinion is clearly entitled to claim that the loss wrongly assigned applied to his tract.

The previous decision of this Department, recognizing Drew's entry as against the company's selection, is, for the reasons hereinbefore given, adhered to, and the motion for review is accordingly denied.

GRANDIN ET AL. *v.* LA BAR.

Motion for review of departmental decision of August 29, 1896, 23 L. D., 301, denied by Secretary Francis, October 16, 1896.

RAILROAD GRANT—LANDS EXCEPTED—ADDITIONAL HOMESTEAD.

NORTHERN PACIFIC R. R. CO. *v.* WALLACE.

The occupancy of a tract in connection with land covered by an original homestead entry, with a view to establishing a claim thereto as an additional homestead, excepts the tract so occupied from the operation of a railroad grant on definite location.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 16, 1896. (C. J. W.)

On November 17, 1873, Robert Wallace made homestead entry, No. 232, for the W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 34, T. 18 N., R. 18 E., North Yakima, Washington, upon which final proof was submitted February 17, 1881, alleging settlement November 17, 1873, and establishment of residence

December 10, 1874, on which final homestead certificate issued February 17, 1881, and patent issued March 30, 1882.

On April 4, 1890, Wallace presented an application to make additional homestead entry for S. $\frac{1}{2}$ of SE. $\frac{1}{4}$, Sec. 27, T. 18 N., R. 18 E. The railroad company was duly notified of said application, and filed objections against the acceptance of the same May 23, 1890.

The land applied for is within the limits of the withdrawal upon the map of general route of the branch line of said road, filed August 15, 1873, but was restored in November, 1879, after the limits were adjusted to the line of the amended general route filed June 11, 1879. Upon the definite location of the road, as shown upon the map filed May 24, 1884, the land in controversy fell within the primary or granted limits of said road.

On July 28, 1887, said railroad company listed the land in question under acts of July 2, 1864 (13 Stat., 356), and May 31, 1870 (16 Stat., 378), per list No. 7.

The company filed a map of amended general route on June 11, 1879, which was the basis of the abrogation of the withdrawal of August 15, 1873, and of the restoration of the land then withdrawn, in November, 1879.

The hearing on Wallace's application to make additional homestead entry having been closed, on September 17, 1890, the register at North Yakima rendered the decision of the local office, holding that the claim of Wallace to the tract in August, 1873, was of such character as to except it from the operation of the grant to the company; that his continued claim and cultivation of the land up to the present, excepted it from the withdrawal of June 11, 1879, and also from the withdrawal for the definite location of the road, May 24, 1884. The company appealed from this decision, and on May 11, 1895, your office reversed the finding and held, that Wallace could not claim the benefit of any settlement rights antedating the perfection of his homestead entry, upon which patent issued March 30, 1882, and upon which his application to make additional homestead entry is predicated.

From this decision Wallace appeals.

Upon examination, it appears that Wallace was claiming the land in controversy as early as 1870; that he commenced to work upon it in the fall of 1873, and in 1874 planted several acres of it to crop, and has ever since claimed, cultivated and used it. His original occupancy, he states, was with a view to its acquisition under timber culture laws, but he does not seem to have placed such claim of record at any time, and inasmuch as he was not in the year 1873 residing upon it or contemplating settlement upon it, it would seem that his claim was not of such character on August 15, 1873, as to except it from the grant to the company, if the withdrawal of 1873 had been valid, but the route of 1873 was abandoned and all lands along that line released. (*Morrill v. Northern Pacific R. R. Co.*, 22 L. D., 536.) He continued to cultivat

and claim it, however, and upon the perfection of his homestead entry of the eighty acres adjoining it, he changed his purpose of acquiring title under timber culture laws, and adopted that of covering it by an additional homestead entry, his use and possession of it continuing.

Your office held in effect that he could have no lawful settlement upon this land while residing upon the eighty acres for which he had made homestead entry, and, inferentially, that when he commenced his cultivation and use of the land in question, it was in reservation. It may be safely said upon the authority of *Morrill v. Northern Pacific R. R. Co.*, already quoted, that it was not in reservation by either the withdrawal of 1873 or of 1879, and was not withdrawn, if at all, until May 24, 1884. Wallace's use and cultivation of the land covered the period from August, 1873, to May 24, 1884, the date of the company's definite location, and therefore a period during which such use and cultivation might ripen into a right in Wallace preceding the definite location of the road. Did Wallace predicate such right? The claim of the company to this land is based upon the act of July 2, 1864 (13 Stat., 365). The third section of said act grants to the company every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, subject to the following qualification, viz:

Whenever on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office.

The lands therefore covered by the granting act are subject to the lawful claims and rights of settlers existing at the time of the passage of the act or which may exist at the time the line of the road is definitely fixed, and the map of location filed. Wallace's claim on the land as a timber culture entry would have excepted the land from the grant, if it had been of record. He changed his purpose of entering it for timber culture and continued to cultivate and use it with a view to entering as additional homestead. Could he lawfully do this? This change of purpose seems to have occurred in March, 1882. At the time Wallace made his homestead entry in an even section within the limits of the company's grant, he was restricted to an entry of eighty acres only. The act of March 3, 1879, provides:

That from and after the passage of this act, the even sections within the limits of any grant of public lands to any railroad company, or to any military road company, or to any State in aid of any railroad or military road shall be open to settlers under the homestead laws to the extent of one hundred and sixty acres to each settler, and any person who has, under existing laws, taken a homestead on any even section within the limits of any railroad or military road land grant, and who by existing laws shall have been restricted to eighty acres, may enter under the homestead laws an additional eighty acres adjoining the land embraced in his original entry if such additional land be subject to entry; or if such person so elect, he may surrender his entry to the United States for cancellation, and thereupon be entitled to enter lands under the homestead laws the same as if the surrendered entry had

not been made. And any person so making additional entry of eighty acres, or new entry after the surrender and cancellation of his original entry, shall be permitted so to do without payment of fees and commission; and the residence and cultivation of such person upon and of the land embraced in his original entry shall be considered residence and cultivation for the same length of time upon and of the land embraced in his additional or new entry, and shall be deducted from the five years' residence and cultivation required by law: *Provided*, That in no case shall patent issue upon an additional or new homestead entry under this act until the person has actually, and in conformity with the homestead laws, occupied, resided upon, and cultivated the land embraced therein at least one year. (20 Stat., 472.)

It seems clear that when in March, 1882, Wallace commenced to use and cultivate the land with a view to its incorporation with his original homestead adjoining thereto, that he had a right under the law to do so, and that from that date his residence on and cultivation of his original homestead in connection therewith, would be deemed residence on and cultivation of this land. The right thus predicated existed when the company definitely located the line of its road, May 24, 1884, and the land was thereby excepted from the grant.

Your office decision is accordingly reversed, and Wallace's application to make additional homestead entry for the land in question is accepted, subject to his compliance with the law in such cases.

DREWICKE *v.* THE STATE OF MINNESOTA.

Motion for review of departmental decision of July 23, 1896, 23 L. D., 148, denied by Secretary Francis, October 16, 1896.

OKLAHOMA TOWN LOTS—TRANSFEREE—DEED.

HARRINGTON ET AL. *v.* HEGARTY.

The right of an assignee claiming through a town lot occupant, who has complied with the law, to receive a deed, is not affected by the fact that the application of such assignee is in the interest of one who was disqualified as an original lot occupant on account of being inside the Territory at the hour of opening.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 16, 1896. (C. J. W.)

John Harrington, William Reaves, Martha Blanchard, and Charles E. Hegarty, filed applications adverse to each other for a deed to lot 19, block B, Perry, Oklahoma, and on the 8th of October, 1894, a hearing was had between said parties before the townsite board, at which they found that one W. J. Taylor was the first legal occupant of the lot, and that his occupancy was maintained and was continuing at the date of the townsite entry, and that Hegarty was a *bona fide* purchaser from him, since that date, had made valuable improvements, and was therefore entitled to a deed. From this decision the losing applicants all appealed.

On July 1, 1895, your office affirmed the finding of the board. The losing applicants made further appeal, and on February 17, 1896, your office decision was affirmed here. On June 19, 1896, Harrington filed a motion for new trial, based on alleged newly discovered evidence, which alleged evidence is substantially—

That at the date of Hegarty's application for a deed J. E. Malone was owner of a half interest in said lot, and that since the application Hegarty has conveyed the other half to the wife of J. E. Malone; that said application is for the benefit of Malone, who was a "sooner" and disqualified.

The motion was entertained here, has been served, and is now to be considered.

It is not insisted that at the date of Hegarty's purchase from W. J. Taylor, who was found to be the occupant in his own right of the town lot in question, at the date of the townsite entry, Malone had any interest in it, but that after Hegarty's purchase from Taylor, and before Hegarty as assignee of Taylor applied for a deed, Malone became interested in the lot to the extent of one half. That the conveyance from Taylor to Hegarty was a valid transfer of his right to a deed seems free from doubt. The entry of the land for townsite purposes, by trustees, is by the law declared to be for the benefit and use of its occupants, at the date of such entry, according to their respective interests. Taylor then had earned a deed to the lot in question, nineteen days before the execution of his deed to Hegarty. Under date of November 30, 1894, the Secretary of the Interior promulgated certain rules for the guidance of township trustees in the execution of their trusts (19 L. D., 334). The first paragraph of Rule No. 7 thereof is as follows:

The entry having been made for the use and benefit of the occupants, only those who were occupants of lots at the date of entry, or their assignees thereafter, are entitled to the allotments hereinafter provided for.

Hegarty then, at the time he became the assignee of Taylor, was vested with the right to a deed for the lot in lieu of Taylor.

The motion presents this question—

Was Malone by reason of his presence inside the Territory to be opened, at the hour of opening, disqualified from becoming thereafter the owner by purchase of any land in the Territory, after title to the same had been earned by a qualified settler, acting for himself?

The last clause of the proviso to Sec. 13 of the act of March 2, 1889 (25 Stat., 980), is as follows:

And provided further, That each entry shall be in square form as nearly as practicable, and no person be permitted to enter more than one-quarter section thereof, but until said lands are opened to settlement by proclamation of the President, no persons shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands, or acquire any right thereto.

The town lot in question is in the Cherokee Outlet, and was opened to settlement September 16, 1893 (27 Stat., 612). The prohibitory clause in said act is as follows:

No person shall be permitted to occupy or enter upon any of the lands herein referred to, except in the manner prescribed by the proclamation of the President opening the same to settlement; and any person otherwise occupying or entering upon any of said lands shall forfeit all right to acquire any of said lands. (27 Stat., 643.)

In the proclamation of the President issued August 19, 1893, opening the Cherokee Outlet (28 Stat., 1222), the inhibition above quoted was set out in the precise language of the statute. It may be then said that the inhibition against "soonerism" applies to lands in the Cherokee Outlet. The words "any of these lands" used in said prohibitory clause include town lots, so that the inhibition applies to entry or occupancy of town lots in said Territory.

The prohibitory clauses quoted will be more fully understood by considering them in connection with the act of March 1, 1889 (25 Stat., 757), the act ratifying and confirming an agreement with the Muscogee (or Creek) Indians, whereby a large body of their lands had been ceded to the United States. The second section of the act is as follows:

That the lands acquired by the United States, under said agreement, shall be a part of the public domain, but they shall only be disposed of in accordance with the laws regulating homestead entries, and to the persons qualified to make such homestead entries, not exceeding one hundred and sixty acres to one qualified claimant. And the provisions of section twenty-three hundred and one of the Revised Statutes of the United States shall not apply to any lands acquired under said agreement. Any person who may enter upon any part of said lands in said agreement mentioned prior to the time that the same are opened to settlement by act of Congress shall not be permitted to occupy or to make entry of such lands or lay any claim thereto.

In the case of *Smith v. Townsend* (U. S., 148-490), the supreme court construed the prohibitory clause last quoted, together with the one contained in the act of March 2, 1889, and treated them as signifying the same thing, and that under them, presence in the Territory at the hour of opening, disqualified a person to take a homestead therein. The court declares it was

the evident intent of Congress by this legislation to put a wall around this entire territory, and disqualify from the right to acquire under the homestead laws, any tract within its limits, every one who was not outside of that wall on April 22. When the hour came the wall was thrown down, and it was a race between all outside, for the various tracts they might desire to take to themselves as homesteads.

It would therefore seem that the purpose of the prohibition was to secure fair play amongst all homeseekers under the homestead laws, and that the prohibition would cease to operate as to any particular tract when it ceased to be subject to the homestead or settlement laws. The town lot in question ceased to be subject to occupancy and settlement under townsite laws before Malone sought to acquire any interest in it; nor does it appear that he seeks to acquire any right to it through

homestead or townsite laws. The fact that he was inside the Territory, at the hour of opening, does not disqualify him as a purchaser from one who purchased from Taylor, who earned title to the lot by being its occupant at the date of the townsite entry. Hegarty is the applicant for this deed, is free from disqualification, and is entitled to a deed as assignee of Taylor.

The motion is accordingly denied.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

POWER v. OLSON ET AL.

The right of purchase under section 5, act of March 3, 1887, is limited to "the numbered sections prescribed in the grant," and therefore cannot be exercised to secure title to even numbered sections selected under the indemnity provisions of the act of June 22, 1874.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 16, 1896. (J. L. McC.)

On March 31, 1877, the Northern Pacific Railroad Company, per list No. 5, selected, under the act of June 22, 1874, the following described lands, to-wit: lots 1, 2, 3, and 4, and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, of Sec. 4; lots 1, 2, 3, and 4, the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the SE. $\frac{1}{4}$, of Sec. 6; the NW. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, of Sec. 8—all in T. 135, R. 52; also the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, and the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, of Sec. 34, T. 136, R. 52, Fargo land district, North Dakota.

On May 13, 1891, your office held said list for cancellation, with the exception of the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 6, and the NW. $\frac{1}{4}$ of Sec. 8, because made upon invalid bases.

No appeal was filed by the company from said decision; and said list of selections was, by your office letter of September 30, 1891, canceled—excepting as to the two tracts last named.

On December 18, 1891, James B. Power applied to enter all the tracts above described, under the 4th section of the act of March 3, 1887 (24 Stat., 556).

On December 2, 1891, Gunder Olson made homestead entry for the SE. $\frac{1}{4}$ of Sec. 34, T. 136, R. 52; and on December 8, 1891, Joseph A. Beeton made homestead entry for the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said Sec. 34.

On October 15, 1892, your office rejected Power's application, for the reason that the 4th section of the act of March 3, 1887, applied only to lands that had been erroneously certified or patented to railroad companies, and it was stated that, if he had any rights under said act, they would come under the 5th section thereof.

Power appealed to the Department, which affirmed said decision, on April 16, 1894 (L. & R. copybook No. 286, page 126); and on review, October 12, 1894 (L. & R. copybook No. 296, page 1).

While the case was pending certain other parties had applied to enter certain of the tracts hereinbefore described. Their applications were suspended pending the final disposition of Power's application.

On February 5, 1895, Power filed in the local office notice of his intention to submit proof in support of his claim to purchase under section 5 of said act. At the time appointed he introduced evidence showing that he was a native born citizen of the United States; that he purchased the lands in question from the Northern Pacific Railroad Company under contract in 1880 and 1881, receiving deeds therefor in January, 1883.

On January 12, 1895, the local officers held that his application to purchase should not be allowed.

Power appealed to your office, which, on April 11, 1896, affirmed the decision of the local officers, on the ground that

the grant made by the act of July 2, 1864, to the Northern Pacific Railroad Company was of odd numbered sections; the lands applied for by Power are within even numbered sections, and are therefore not within the sections prescribed by the grant.

Therefore your office affirmed the decision of the local officers.

Power has appealed to the Department, on the ground, in substance, that

said act of March 3, 1887, being remedial in character, should be liberally construed, and the provisions of the fifth section should apply to the case at bar.

In his argument in support of his appeal he contends:

No one will question the proposition that the design of said section is to afford protection to good faith purchasers of lands from railroad companies, to which such companies had no just claim; and there is no question but this appellant is such a purchaser. The evidence in the case shows that the appellant paid a valid consideration at the time of the purchase, and also that, instead of procuring the lands for the purpose of selling the same upon speculation, he at once after purchase entered into possession, and has ever since occupied and improved them as a farm and home. We are aware of the fact, as stated by the Hon. Commissioner in his decision, that section 5 of said act speaks of and in fact may relate to the numbered sections prescribed in the grant to the railroad company; but we say this does not of necessity limit the right to purchase to odd numbered sections alone, when we take into consideration the nature of the statute, the object for which it was enacted, and the rules of construction to be applied thereto The act, taken as a whole, clearly shows that Congress fully intended to protect all persons who, being citizens of the United States, or had declared their intention to become such, had in good faith purchased lands from railroad companies to which it was found, in the final adjustment of the grant, that such companies had no title or just claim. We can not believe that Congress ever intended to grant protection to one class of citizens, and deny its protection to another class equally innocent.

The language of section 5 of said act, in so far as it bears upon the question here in issue, is as follows:

That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the con-

structed parts of said road and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the *bona fide* purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands; and thereupon patents shall issue therefor to said *bona fide* purchaser, his heirs or assigns.

The language of the act is such that I see no escape from the conclusion that it was the intention of Congress to provide only for the purchase of such lands as are "the numbered sections prescribed in the grant" to a railroad company. It follows, therefore, that the local officers and your office were correct in denying Power's application to purchase lands in even numbered sections, which were never a part of the original grant to the Northern Pacific Railroad Company.

Your office decision was correct, and is hereby affirmed.

AMENDMENT OF ENTRY—NON-CONTIGUITY.

B. F. BYNUM ET AL. (ON REVIEW).

An entry cannot be amended under section 2372 R. S., if the certificate of the original purchaser has been assigned, or his right transferred.

An intervening adverse claim of record bars the allowance of an amendment under the provisions of said section.

A homestead entry embracing non-contiguous tracts, may be equitably confirmed, where the non-contiguity arises through the necessary cancellation of the entry as to one of the sub-divisions covered thereby, on account of a prior adverse claim thereto, and where said entry was made in ignorance of such adverse right.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 16, 1896. (F. W. C.)

July 26, 1860, Benjamin F. and James M. Bynum made graduation cash entry at the Huntsville land office, Alabama, for the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 11, T. 4, R. 5 E. Upon said graduation cash entry patent issued December 1, 1860.

Subsequently to the allowance of said entry the local officers permitted one William H. Hall to make homestead entry covering the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the "SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$," and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said section 11, upon which he made final proof and certificate issued.

Upon examination of said entry by your office the conflict as to the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ was discovered, and by your office letter "C" of March 22, 1882, the local officers were directed to call upon Hall to show cause why his entry should not be canceled. By letter of June 22, 1882, the local officers reported,

that we notified Mr. Hall on the 25th of March, 1882, and now transmit herewith an affidavit from B. F. Bynum showing that he intended to enter, has been paying taxes upon and cultivating, the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and stating that this is the land he has always claimed as his.

By your office letter "M" of November 13, 1882, the affidavit of Benjamin F. Bynum above referred to was returned, and the local

officers were advised that, as the graduation cash entry was made in the name of James M. and Benjamin F. Bynum, the affidavit for change in the entry must be made by both the parties interested, and further, that it must be supported by other corroborative evidence, as the affidavit of the party or parties interested is not deemed sufficient to authorize a change of entry under section 2372 of the Revised Statutes. This affidavit, it appears, was returned to the attorney who represented the parties in seeking to have the change in entry allowed, and it does not appear to have since been filed.

The second application to amend was made in March, 1893, the affidavit being made by William H. Hall, who signed as the assignee of James M. Bynum, deceased, and Benjamin F. Bynum. This application was held to be not sufficient, by your office decision of April 22, 1893, and appeal was duly taken to this Department, which appeal was considered under departmental decision of August 18, 1894 (19 L. D., 112), in which it was held that an application under section 2372 of the Revised Statutes, for the amendment of a graduation cash entry, must be supported by the affidavit of the original purchaser or his legal representatives.

A motion was filed for review of this decision, claiming that the Department did not have a complete record before it when the decision complained of was rendered. This motion was considered in departmental decision of February 10, 1896 (not reported), which granted the application as applied for. Said decision was, however, subsequently recalled, and has never been promulgated, and the case has been again considered by this Department.

The motion for review urges that the original application forwarded in letter of June 22, 1882, from the local officers, was the joint application of James M. and B. F. Bynum.

As before stated, the affidavit forwarded in 1882 was returned. From its description and the cause for its return, stated in your office decision of November 13, 1882, the statement upon which the motion is based is not supported by the record. In the affidavit filed in 1893 Hall signs as assignee of James M. Bynum, deceased. As to when the assignment was made does not appear from the record before me. With the papers is, however, the certificate of the judge and ex-officio clerk of the probate court in and for Jackson county, Alabama, which shows that on May 6, 1882, Benjamin F. Bynum did by deed convey the N. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section 11 to William H. Hall. Whether this transfer was prior or subsequent to the execution of his affidavit forwarded with the letter from the local office, dated June 22, 1882, does not clearly appear. But this is not material in view of the conclusion reached.

Upon the showing made and the entire record before this Department it does not appear that application for a change of the graduation cash entry was ever made by James M. Bynum or his legal representatives.

Further, as it is claimed that the rights of James M. and Benjamin F. Bynum, under their certificate of purchase, have been assigned, the amendment of the entry is not permissible under section 2372 of the Revised Statutes, which only authorizes an amendment "where the certificate of the original purchaser has not been assigned or his right in any way transferred," etc.

In this connection it might be noted that upon inquiry at your office I learn that the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section 11, which is desired to be included in the cash entry by amendment, is shown by your office records to have been entered under the homestead laws by one J. Harrison on November 21, 1867; which entry, although having expired, is still of record, uncanceled.

While it may be possible to clear the record of said adverse claim, yet so long as it remains of record it would bar the amendment as applied for under the section of the Revised Statutes before referred to.

For the reasons before given the motion must be and is accordingly denied, and the previous decision of this Department denying the application for amendment is adhered to. This must result in an order for cancellation of Hall's homestead entry as to said SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, which would leave the remaining tracts covered by said entry, namely, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, non-contiguous. As Hall is asserted to be the successor in interest to both James M. and B. F. Bynum he may be protected as to said SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ through the graduation cash entry. It is clear that his homestead entry was permitted to be made and perfected in ignorance of the conflicting cash entry as to the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$. This being so, it would appear that his homestead entry might be referred to the board of equitable adjudication for confirmation as to the remaining tracts covered by his entry, rendered non-contiguous by the graduating cash entry before referred to. (See *Akin v. Brown*, 15 L. D., 119.)

Herewith are returned the papers in the case for such further action as the same may warrant not in conflict with this decision.

DUNLAP *v.* SHINGLE SPRINGS AND PLACERVILLE R. R. Co.

Motion for review of departmental decision of July 7, 1896, 23 L. D., 67, denied by Secretary Francis, October 16, 1896.

RAILROAD GRANT—LAND EXCEPTED—DONATION CLAIM.

OREGON AND CALIFORNIA R. R. CO. *v.* BAGLEY.

Land embraced within an uncanceled donation notification is excepted thereby from the operation of a railroad grant on definite location.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 16, 1896. (W. A. E.)

The tract here involved, viz., the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 21, T. 9 S., R. 5 W., Oregon City, Oregon, land district, is within the primary limits of the grant made by act of July 25, 1866 (14 Stat., 239), to aid in the construction of the Oregon and California Railroad, and lies opposite the section of said road that was definitely located January 29, 1870.

By letter of December 18, 1894, your office held that said tract had been excepted from the grant to the company by reason of a donation claim existing therefor at date of definite location. The company's claim was accordingly rejected and the homestead entry of Andrew J. Bagley, made October 23, 1894, for this land, was held intact.

The appeal of the company brings the case before the Department.

It appears from the record that on the 10th day of February, 1854, one Israel D. Davis filed notification of his claim to this tract (together with adjoining land) under the Oregon donation act of September 27, 1850 (9 Stat., 496), section 4 of which provides:

That there shall be, and hereby is, granted to every white settler or occupant of the public lands, American half-breed Indians included, above the age of eighteen years, being a citizen of the United States, or having made a declaration according to law, of his intention to become a citizen, or who shall make such declaration on or before the first day of December, eighteen hundred and fifty one, now residing in said Territory, or who shall become a resident thereof on or before the first day of December, eighteen hundred and fifty, and who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act, the quantity of one half section, or three hundred and twenty acres of land, if a single man, and if a married man, or, if he shall become married within one year from the first day of December, eighteen hundred and fifty, the quantity of one section, or six hundred and forty acres, one half to himself and the other half to his wife, to be held by her in her own right.

Davis never, however, perfected title to the land, and by letter of March 11, 1887, from your office, said donation notification was canceled.

In the case of John J. Elliott, 1 L. D., 303, it was held that filing an original notification is an *ipso facto* segregation of the land described from the contiguous lands. Until, therefore, the notification is formally canceled on the records, the tract covered thereby remains in a state of segregation. The abandonment of the land by the claimant and his failure to submit the necessary proof may render his notification subject to cancellation, but can not in itself relieve the segregation.

On January 29, 1870, when the railroad claim attached, this tract was

covered by the uncanceled donation notification of Davis, and consequently was excepted from the operation of the grant.

Your office decision is affirmed, the railroad company's claim is rejected, and the homestead entry of Andrew J. Bagley will remain intact.

MCGOWAN ET AL. v. ALPS CONSOLIDATED MINING CO.

Motion for review of departmental decision of July 13, 1896, 23 L. D., 113, denied by Secretary Francis, October 16, 1896.

SURVEY—TIDE-WATER STREAM—MEANDER.

CHARLES AXFORD ET AL.

The manual of surveying instructions requires the meander of a tide-water stream on both sides, from its mouth up to the point where the tides cease.

Secretary Francis to the Commissioner of the General Land Office, October 16, 1896. (W. A. L.) (J. L.)

With your office letter "E" of April 11, 1896, was transmitted the appeal of Charles Axford, John McKenzie and Benjamin F. Armstrong from your office decision of March 11, 1896, approving an official survey of the meanders of the Querquillan river in section 35 of T. 14 N., R. 10 W., Vancouver land district, Washington.

In the year 1893, in pursuance of orders from your office, so much of the southeast corner of the township aforesaid (embracing sections 25, 26, 35 and 36), as had not been previously surveyed, was surveyed by deputy James C. Jeffrey. His field notes and plat were approved by the surveyor-general, and transmitted to your office. In the year 1895, Jeffrey's survey was examined by Special Agent John C. Brophy from your office, and his field notes and report are also on file. He found Jeffrey's survey, field notes and plat to be correct, and so reported to your office. Said surveys and field notes prove that Querquillan is a tidal river which meanders through section 35, and in which the tides of the Pacific Ocean ebb and flow. That said river has, in section 35, a mean right-angled width of about one chain up to the point where the tides cease and a mountain stream meets the tides. That at high tide the river, through three-quarters of section 35, has an average width of one and a half chains, and contains water from eight to ten feet deep as indicated by the high water mark. At low tide the bottom is exposed, except where the mountain stream flows in the channel. This river was meandered on both sides from its mouth up to the point where the tides cease.

On August 16, 1895, one hundred and six persons, representing themselves as citizens and residents of the town of "South Bend," and twenty-two persons representing themselves to be citizens and residents of the town of "Bay Center," Pacific County, Washington, filed two petitions, praying your office not to approve the meandering of Querquillan river. South Bend is the county seat, and Bay Center is a town about eight miles west. The petitioners represent that the county has laid out a road and has graded the same from South Bend almost to the river; and that the citizens are asking for and endeavoring to have a bridge built across said river in order that the road may be extended further; and they apprehend that the building of said bridge will be embarrassed and hindered, if the meander be approved, and the Querquillan river be recognized as a meandered stream.

The South Bend petition describes the river as "Quaitland slough, or what is more commonly known as Bone river."

The Bay Center petition describes the river as "Quaitland slough, commonly known as Bone river;" and then alleges that, "this slough known as Bone river, is a small inlet or indentation into the main land, at the head of which a small brook empties and forms said slough, and the tide ebbs and flows into it."

In the appeal from your office decision, the appellant's attorney alleges "as grounds for such appeal,"

1. That there is no navigable river and no navigable stream of any kind or name in said section, township and range: and
2. That there is no tidewater stream and no tide-water river in said section, township and range as Querquillan river.

These allegations are contradicted by the petitions which constitute the pleadings in the case; and also by the evidence furnished by two surveyors, of record in your office. It is idle to say, that a slough, inlet, indentation, fiith, or estuary, which twice a day, at high tide, contains water from eight to ten feet deep, and is commonly called a river, is not navigable for many useful purposes; and is not a tide-water stream.

The manual of surveying instructions, published June 30, 1894, in paragraph 2 on page 56, and paragraph 7 on page 5, prescribes as follows:

Tide-water streams, whether more or less than three chains wide, should be meandered at ordinary highwater mark, as far as tide-water extends.

In the survey of lands bordering on tide-water, meander corners will be established at the points where surveyed lines intersect high water mark, and the meanders will follow the high water line.

Querquillan river in section 35 was properly meandered. Your office decision is hereby affirmed.

MINING CLAIM—SURVEY—NOTICE—ADVERSE—CLAIM.

WHEELER ET AL. v. SMITH.

If a mining claim is not properly described in the official survey thereof it is incumbent upon the Secretary of the Interior, if the matter comes before him for disposition, to require a new survey, and new notice of application, and if during the period of republication an adverse claim is filed it is entitled to consideration. Land containing a ledge of limestone is not subject to location and entry as a lode claim.

A judicial determination that an adverse claimant is not entitled to possession is conclusive upon the Department, irrespective of any reasons the court may have assigned for its judgment.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 16, 1896. (P. J. C.)

The record in this case shows that Edward S. Smith located the "Orcas Island lime mine," in San Juan county, Washington, February 19, 1884; that on May 23, 1884, the official survey of said claim was approved by the surveyor general, designating it as survey No. 37. By said survey the lime mine is shown to be situated in sections 36 and 31, T. 37, Rs. 2 and 1 respectively, west, in the Seattle, Washington, land district. Mineral entry No. 10 was made November 29, 1884, and the papers forwarded to your office, where the matter was considered and on September 28, 1886, your office decided that the land was actually situated in "section 36, range 1 west," and "section 31, range 2 west, township 37 north," and "the entry being for other land than that located and actually claimed, and based upon an application and notices thereof correspondingly erroneous, is hereby held for cancellation." The applicant appealed and the Department, on May 8, 1888 (L. and R. No. 153, p. 331), thus modified your said office judgment—

Under these circumstances, and inasmuch as the mistake in description was a clerical error, the entryman should be allowed to make entry for the land he claims upon showing that he has given proper new notices and furnished a new plat and field notes properly describing the land.

Agreeably to this decision the applicant caused a new survey to be made, field notes and plats to be filed; and again presented his application for patent May 24, 1890, and during the period of publication adverse and protest was filed by Lee Wheeler and L. H. Wheeler. They allege the location of the "Ben. Harrison lime claim," and "The Seattle lime claim" on April 30, 1889, as placer claims, and that the Orcas Island lime mine lies wholly within the boundaries of their locations. They also charge that there is no vein or lode, or rock in place that can be located under the laws of the United States, as a vein or lode claim. Suit was instituted in support of the adverse, as prescribed by section 2326, Revised Statutes, within the statutory period, the plaintiffs alleging title in themselves, possession and right of possession by reason of their discovery and location as aforesaid. The prayer of

the complainant is that the Puget Sound Lime Company, which is shown to be the assignees of the original locators, be decreed to be entitled to the sole and exclusive possession of all the lands hereinbefore described, and every part thereof, and that the defendant be forever restrained and enjoined from proceeding further with his application for a patent therefor, etc.

The defendant answering, denies specifically the allegations of plaintiff's complaint not admitted, and then pleads affirmatively his title by reason of his discovery and location. His prayer is that the pretended placer locations of plaintiffs be adjudged a cloud upon his "rights, proprietary and possessory, in said land, and be wholly set aside and vacated;" and he "be adjudged to be entitled to the absolute and exclusive possession of said land," etc.; that the plaintiffs and their agents, etc., be restrained from claiming or asserting any right," etc., to the land, and also for an accounting and damages.

On the issues thus joined the court, without the intervention of a jury, filed its finding of fact and law, so far as pertinent to the issue here, as follows: That the land located by the Wheelers was at the time entirely unoccupied; that the defendant was "not in possession of any portion of the tract of land described in his application for a patent, nor has he been in possession of any portion of the same since the 20th day of November, 1884." As a conclusion of law the court held: "That intervenor, The Puget Sound Lime Company, is entitled to judgment herein for possession of said mining claims described," etc., and judgment was rendered in accord with said finding.

The defendant appealed, and the supreme court of Washington, on March 28, 1893, considered the case. (It is said by counsel that the case, *Wheeler et al. v. Smith*, is reported in 5 Wash., 704. I have not the volume, but a certified copy of the opinion.)

The court held (1) that although the disposition of the case they find it necessary to make does not require a discussion of the action of the Department, by its decision of May 8, 1888, requiring him to show that he has given proper new notices, etc., yet in the court's view

under no such circumstances should the claimant have been put to the trouble and expense of entirely new proceedings to entitle him to a patent in case his claim had been approved.

It then argues that the error was not his—Smith's—but the error of the deputy mineral surveyor and the surveyor-general; that the land was properly located by reference to a fixed and permanent natural object; the notice posted and published showing the location actually upon the ground,

and there was no reason why these could not have been accepted and the correction made in the land office without any further proceedings;

that under ordinary circumstances it would hold

that plaintiff's claim, initiated nearly five years after the completion of the necessary proceedings in the land office, ought not to be entertained in a suit in pursuance of the filing of an adverse claim under United States Revised Statutes section 2326. But this is not an ordinary mining claim, and its disposition depends upon other matters.

Having concluded that it was "not an ordinary mining claim," the court discusses the evidence to show that the location of the Orcas lode claim and both the placers were upon a deposit of lime stone, and for that reason it must

hold both parties in error, and that no valid location could be made of such land under the mineral laws, and that, therefore, neither party is entitled to a judgment in his favor.

The court says:

We are not unmindful of the fact that several decisions of the land office of the Interior Department have been promulgated, which hold that limestone lands may be patented as mineral claims, but as we view those decisions they are such a strained construction of the mineral laws as are unwarranted by their terms and by the spirit and intent of their enactment.

The court further holds that that part of the land in section 36, having been surveyed land at the date of these locations, under section 20 of the act of March 2, 1853 (10 Stat., 172), and section 10 of the enabling act of February 22, 1889 (25 Stat., 676), this land went to the State for school purposes. The judgment of the superior court was therefore reversed,

and the case remanded with instructions to enter a new judgment, decreeing neither party to be entitled to the possession of the lands in question, respondents to pay costs in the superior court and in this court.

Judgment was thereafter formally entered in the supreme court "that the judgment of the said superior court be, and the same is hereby reversed, with costs;" . . . "and it is further ordered that this cause be remitted to said superior court for further proceedings in accordance with the opinion herein filed."

Judgment was rendered by the superior court in accordance with the decision of the supreme court. The judgment roll was presented at the local office, together with a petition by Smith, which was in the nature of an application to purchase. It is set forth that the United States Land Office or Department of the Interior is not bound by the view taken by the supreme court of Washington; that the Wheelers were not adverse claimants, entitled to commence proceedings, because—

Our application for a patent was favorably passed upon by the Acting Secretary of the Interior many years ago and long before either of the Messrs. Wheeler attempted to enter in the Land Office any mining claim upon any part of the land covered by the Orcas Island lime mine. The proofs required by the Honorable the Acting Secretary in his decision upon our original application for a patent merely required formal proof on our part of publication and notice and no one was entitled to appear or claim to be an adverse claimant except a person who at the date when our original labor, improvements, proofs, and filing and payments were complete, which was in 1884 or 1885, was so entitled.

We respectfully request you to certify the proceedings and judgment roll to the Commissioner of the General Land Office, and request that a patent issue to Edward S. Smith according to his right; and that the view which the supreme court of the State of Washington has taken of the law, in holding that a mining claim for lime or lime stone cannot be entered as a lode or vein under the mining laws of the United

States, be disregarded as being contrary to the ruling and practice of the General Land Office, and that all the proceedings and judgment of said superior and supreme courts be disregarded, if it shall appear to the Honorable the Commissioner of the General Land Office that Messrs. Lee Wheeler, and L. H. Wheeler are, and were not, adverse claimants within the meaning and intent of sections 2325 and 2326 of the United States Revised Statutes.

And in transmitting the files and proceedings in this matter to the Honorable the Commissioner we respectfully request that you call his attention to this communication.

The register accordingly forwarded the entire record to your office, and on consideration thereof you decided, August 29, 1893, that the placer claimants were entitled to the land, holding that the decision of the supreme court of Washington was upon grounds not recognized by your office; that the judgment of the superior court was given on the merits of the controversy, and you accepted that judgment as conclusive under the circumstances.

Smith prosecutes this appeal, setting out eighteen specifications of error. These are too voluminous to give in full, but I think the material errors complained of may be treated without printing them in full.

It is contended by counsel that Smith had done everything required of him by law in his original application to entitle him to a patent; that this "must be deemed found both by the Honorable Commissioner and the Honorable Acting Secretary;" that he is entitled to "protection as against the Wheelers" in their adverse proceedings initiated under the provisions of section 2325, Revised Statutes. It is insisted with much earnestness that defendants could acquire no rights by reason of their subsequent locations which would give them standing as adverse claimants, because the order of your office "only required a new notice and a new plat;" "nothing but the correction of clerical error" in the description of the land; that the judgment of the supreme court of Washington was "that Smith was, in 1884, and ever since has been, entitled to his patent," if the land had been deemed mineral.

This position of counsel contemplates a review by the present Secretary of a judgment of his predecessor upon a question presented to and passed upon by him. It is needless to say, perhaps, that this cannot be done. It needs no argument or citation of authorities on this proposition. But aside from this, the judgment of the Department of May 8, 1888, was a proper one, and unassailable from any standpoint. The locus of the land was not correctly given, and it matters not whether it was wrongly described by accident or design, whether the error was the result of careless officials or otherwise, it was the duty of the officers charged with the disposition of the public lands to have the error corrected whenever discovered. This applies to the locus of a mining claim with peculiar force; it "should be fixed with mathematical accuracy, as well in the report of the official survey as upon the surface of the earth" (John K. Castner *et al.*, 17 L. D., 565).

The *dictum* of the supreme court of Washington in regard to the

action of the Department in reference to its order is without any force whatever. The power and authority of the Secretary of the Interior in the disposition of the public lands is derived solely from Congress, and in the exercise of his executive functions in the management thereof he will not be controlled by the action of a State court when, as in this matter, it attempts to invade the exclusive jurisdiction of the Interior Department of the government.

It should be borne in mind that the methods prescribed by Congress for obtaining patent to mining claims is different from any other class of public land, in that all adverse claimants are relegated to the local courts to settle all disputes as to possessory rights. The jurisdiction of the court in settling this question depends entirely upon the correct description of the land; that is to say, a court in a given judicial district, or circuit, only has jurisdiction over the lands or parties in that district or circuit. It can be readily seen, as in the *Castner* case, how a misdescription of the land, either as to the section, township, range, or county, as in that case, might oust the jurisdiction of the court and thus defeat the adverse claimants. Correctly fixing the locus of the land in the section, township or range, where the land is surveyed, is required by the rules as much as the placing of monuments on the ground.

Hence the order of my predecessor in requiring new notice and plat was strictly in conformity with the practice and justice to all parties, and therefore, if during the period of publication an adverse claim is filed, it is entitled to consideration.

It is pertinent to inquire at this point whether Smith could lawfully obtain title to this land under the mining laws as a lode claim. It is admitted that the location was made on a ledge of lime stone, and the land was taken for the lime therein contained; that there was no vein or lode of quartz, or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable metalliferous deposits.

It appears to me so plain that Congress only contemplated lands that were valuable for the more precious metals should be patented as lode claims that it needs no argument to convince one of the proposition. A reading of the sections of the statute (2318, 2319, 2320, *et seq.*, Revised Statutes), plainly and unmistakably shows that it was only veins or lodes upon which discovery of mineral had been made prior to location that could be patented as lode claims. In *Iron Silver Mining Company v. Cheseman* (116 U. S., 529), the United States supreme court defines a vein or lode as used in this statute to be "a body of mineral, or mineral-bearing rock, within defined boundaries in the general mass of the mountain."

I am clearly of the opinion that Smith could not obtain patent to the land in question as a lode claim, and that his location of it as such was a nullity.

But, it is contended by counsel that all questions in regard to Smith's

right to the land was submitted, passed upon and decided in his favor, except as to the description of the land, by the departmental decision of May 8, 1888. I do not so regard it. The only question discussed or decided by my predecessor was that regarding the misdescription. There was nothing in the record then that would necessarily cause the Department to pass upon this question; in other words, it was not apparent on the face of the papers that the land was sought because of its value for lime. For instance, the location certificate says it is located "along the course of this lead, lode, or vein of mineralized bearing quartz," and "on the east side of the middle of said lead, lode or vein."

The action brought by the placer claimants in support of their adverse was, by the supreme court of Washington, decided against them. This judgment in effect decided that the plaintiffs, the placer protestants and adverse claimants, were not entitled to the possession or right of possession of the land in controversy. It matters not by what course of reasoning the court may have arrived at this judgment; it is sufficient for the Department to know that the adverse claim of plaintiffs was not sustained.

It having been determined that the Orcas Island lime lode was a nullity, and the State court having rendered judgment against the adverse claimants, it follows that neither of the parties is entitled to the land in controversy; therefore your office judgment is modified, and the locations of Smith and Wheeler *et al.* will be canceled.

It is so ordered.

HILLIARD *v.* LUTZ.

Motion for review of departmental decision of March 16, 1896, 22 L. D., 324, denied by Secretary Francis, October 16, 1896.

HOMESTEAD CONTEST—PRIORITY OF SETTLEMENT.

HOPKINS *v.* WAGNER ET AL. (ON REVIEW).

There is no authority under the law, in cases of simultaneous settlement, for offering the right of entry to the highest bidder.

Rights of adverse entrymen, dependent upon priority of settlement, may be adjudicated in the absence of a formal contest as between them on evidence submitted by them in defense of their rights against a third party.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 16, 1896. (C. J. W.)

On December 5, 1895, the Department decided the case of Hopkins *v.* Wagner *et al.*, involving the SE. $\frac{1}{4}$ of Sec. 8, T. 16 N., R. 7 W., Kingfisher, Oklahoma (21 L. D., 485). In said decision it was held that—

In a case involving priority of settlement wherein it cannot be determined which of the parties was the first settler in fact, the claimants may make an amicable division of the land; or in the event of their inability to agree, the right to make entry may be awarded to the highest bidder.

Duncan and Hopkins each filed a motion for review of said departmental decision, which motions were entertained, and Wagner also filed a motion for review, which was not considered for the reason that the affidavit required by Rule 78 of the Rules of Practice was not filed with it. The omission was afterwards remedied by filing the required affidavit on April 14, 1896. Counsel for Duncan has filed a motion to dismiss Wagner's motion on account of the defect alluded to. Inasmuch as the motions of the other two parties have been allowed, and the defect in Wagner's motion had been cured before the objection to it was made the non-action of the Department upon it will be waived, and his motion will be considered with the others. The motion to dismiss it is overruled.

Accompanying these motions are several affidavits intended to cover omissions in, or to strengthen the testimony taken in behalf of, each of the parties at the hearing. To consider them would be to add to the record, without the privilege of cross-examination by the opposite parties, and they will not be considered. In their respective specifications of error, each of the parties *inter alia* alleges error in the action of the Department, wherein the right to make entry was directed to be sold to the highest bidder.

In *O'Toole v. Spicer* (20 L. D., 392), and some other cases, in which what appeared to be simultaneous settlements had been made, followed by improvements by each party, this power had been exercised, without any thorough inquiry as to its legality. In the case of *Sumner v. Roberts* (23 L. D., 201), it was held that the law does not justify forced division of homestead lands between claimants therefor; but in cases where the parties themselves voluntarily agree to a division of the land, they may properly do so. It was further held in said case that there is no authority under the law, in cases of simultaneous settlement, for offering the right to enter the land so settled upon to the highest bidder; as in cases of simultaneous applications to enter, after entry and after settlement, upon the theory that the settlements were simultaneously made, since that rule does not apply to cases where either party is a settler. Said decision does not purport to overrule final decisions in conflict with it theretofore made, but allows them to stand. The case indicates the rule thereafter to be followed.

The case at bar must, therefore, be decided on its merits, under the record as presented. It is not necessary to consider now what should be done in a case where there is no entry, and there is proof to show clearly settlements made by adverse claimants, absolutely simultaneously. Such is not the case under review.

The land involved is within the Cheyenne and Arapahoe reservation, which was opened to settlement at twelve o'clock M., on April 19, 1892.

On April 19, 1892, Duncan filed soldier's declaratory statement for the land. On April 20, 1892, Wagner made homestead entry for the tract; afterwards, but on the same day, Hopkins presented his application to enter it under the homestead laws, which was rejected for conflict with Wagner's entry. On May 11, 1892, Duncan was permitted to make homestead entry. On May 20, 1892, Hopkins filed his affidavit of contest against Wagner and Duncan, alleging prior settlement.

Before the trial was had Hopkins filed a supplementary affidavit, alleging that Duncan was disqualified to make entry for the tract, for the reason that he owned one hundred and sixty acres of land in Kansas.

On October 4, 1893, after a full hearing, the register and receiver held that it was impossible to determine from the evidence who was the first settler, but that the mere sticking of a stake in the ground and immediately leaving it did not constitute settlement upon the part of Wagner, so as to segregate the land. They recommended that Hopkins' contest be dismissed, Wagner's entry canceled, and Duncan's entry held intact. Hopkins and Wagner both appealed, and on June 25, 1894, your office reversed the decision of the local officers, held that Wagner's acts constituted acts of settlement, but agreed with the local officers that it could not be determined who made the first settlement, and directed that, upon failure of the parties to agree upon terms of compromise and division of the land, that it be disposed of to the highest bidder between the parties, as in case of simultaneous applications to enter. Your office further found that the charge of disqualification against Duncan was not sustained, and that Wagner's exception to the refusal of the local officers to allow him further opportunity to cross-examine Duncan was not well taken. This last ruling was correct.

It is not the purpose of this review to change the ruling of the Department as to all the parties being qualified settlers and as to the sufficiency of Wagner's acts of settlement. As to these matters the opinion heretofore rendered will stand.

The claim of Hopkins will be the first considered. The claim he presents is that his settlement was prior to either that of Duncan or Wagner. The burden was upon him to make good this allegation by a preponderance of the evidence. The local officers found that he had failed to do that. Upon an examination of the record it is believed that this finding was correct, and Hopkins' contest is dismissed.

This leaves the case to be considered as between Duncan and Wagner. Both of these parties have entries of record covering the land in dispute. Neither has formally contested the entry of the other. Without such formal contest, on the hearing of the case of Hopkins against both, each submitted proof to support the contention that his settlement was prior to that of the other, as well as to that of Hopkins. Under the circumstances, each will be held to have relied upon his acts of settlement as the basis of his claim, as it is manifest that if either

was prior to that of the other in point of time in performing the first acts of settlement, that fact will settle the controversy. Neither the local officers nor your office found that the parties made simultaneous settlement, but that the evidence was of such character that it could not be determined who reached the land first and made settlement. The number of persons participating in the race, the shortness of the distance to be traversed before the land was reached, and the slight disparity in the time within which it was reached by those making the race, combine to make it a task of some difficulty to determine which of the parties was the first in order upon it. After a careful examination of the record, however, the difficulty does not seem insuperable.

The strip of land to be crossed before reaching the line of the land in question was about thirteen rods wide. The point at which Wagner stopped and made his settlement is a little more distant from the starting point than the one at which Duncan stopped and made his settlement. Wagner had a horse believed to be faster than Duncan's. These facts are material only in so far as they afford the means of testing the reasonableness of the testimony of the witnesses who testified as to the order in which the parties actually reached the land and performed their respective first acts of settlement. It is to be remembered that the witnesses who were present at the time, and who were spectators of the race and testified at the hearing had a better opportunity of knowing which of these parties was first, than those who have to reach a conclusion through the testimony of these same witnesses. As they were sworn, and seem in the main to have been candid and fair witnesses, the conclusion indicated by a preponderance of their testimony should be adopted. But two of the witnesses appear in such light as to justify criticism of their testimony as unfair or unreasonable, and they are witnesses who testified for Wagner. About ten of these witnesses, including these two, give it as their opinion from what they saw that Wagner was first. Twenty-two witnesses testify with more or less directness that Duncan stopped first on the land and performed the first acts of settlement. The witnesses doubtless testified to the facts as they saw them, and the conflict in the testimony is not evidence of perjury upon the part of any of them. Weighing the whole of the testimony, together, it fairly preponderates in favor of the conclusion that Duncan was the first settler. That conclusion is accordingly adopted. He has evinced his confidence in the justice of his claim by placing improvements worth several hundred dollars upon it.

The departmental decision heretofore rendered is revoked. Your office decision appealed from is, therefore, reversed, Hopkins' contest dismissed, Wagner's entry canceled, and Duncan's entry held intact.

HEISKELL *v.* McDOWELL.

Motion for review of departmental decision of July 7, 1896, 23 L. D., 63, denied by Secretary Francis October 16, 1896.

SECOND HOMESTEAD ENTRY—ACT OF DECEMBER 29, 1894.

ALEXANDER BOWSMAN.

An application to make a second homestead entry under the act of December 29, 1894, must be denied where the first entry is canceled on a contest charging abandonment.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 16, 1896. (C. J. G.)

Alexander Bowsman, through his attorneys, has filed a motion for review of departmental decision of July 23, 1896, rejecting his application to make homestead entry of the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and lot 3, Sec. 1, and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, Sec. 12, T. 14 S., R. 29 E., Burns land district, Oregon.

Prior to making his said application Bowsman was defendant in a contest brought against homestead entry made by him for land in the same district, on the allegation of abandonment. The Department, under date of June 18, 1894 (*George v. Bowsman*, 288 L. and R., 272), held that said allegation was fully sustained and his entry was held for cancellation. In his appeal from your office decision of August 12, 1895, rejecting his application to make a second homestead entry for the land now in question, Bowsman alleged that the plaintiff and his witnesses swore falsely in the contest case when they testified that he had abandoned the land; that such false swearing amounted to an "unavoidable casualty" as contemplated by the act of December 29, 1894 (28 Stat., 599), amendatory of section 3, act of March 2, 1889 (25 Stat., 854).

In the departmental decision of which a review is asked it was held that as the charge of abandonment against Bowsman was sustained in the contest case, he was not entitled to the relief provided for in the above mentioned act, and should not therefore be permitted to make second entry.

It is now urged in support of the motion for review that the papers in the appeal case were "unskillfully drawn by one not at all familiar with the statute and that the nature of the remedy provided by said act was not understood." It is likewise urged that "the statement of facts by Bowsman was corroborated so far, at least, as the following allegations of his affidavit are concerned, to-wit:—"

That the absences from the said tract of land as shown in the trial of the said contest occurred by the reason of the fact that I was unable to wholly support my family on the said tract and was compelled to be absent for the purpose of working for wages. . . . That said land is grazing land and was used by me for pasture.

It will be observed that proof of these allegations was essential to offset the charge of abandonment in the contest case. Though given the opportunity the applicant failed to make a satisfactory showing.

The attorneys for applicant further state that

it is error to hold that a homestead claimant is not entitled to relief under said act of December 29, 1894, unless he could refute the charge of abandonment, it being quite apparent that no second entry would be necessary in such a case, and the act in question being intended for cases, just like this, where the charge of abandonment is sustained but where the *cause for the abandonment* is one of the grounds of absence named in the act of March 2, 1889.

It is true that there is such a distinction as the one referred to, and that there may be a forfeiture on the part of the entryman without sacrificing his right of second entry. But it must be made to appear that the abandonment was due to some of the causes named in the act of March 2, 1889. As the attorneys for applicant very truly state, if such a showing had been made at the hearing there would be no necessity for a second entry, for under such circumstances the applicant's absences would have been excusable and his entry would not have been canceled. But the record shows that he failed to refute the charge of abandonment; he now comes and acknowledges the fact of abandonment, but claims that the cause for the abandonment is one of the grounds of absence named in the act of March 2, 1889. The truth is, if claimant's application were allowed it would be a virtual admission, contrary to the conclusion heretofore reached, that he never abandoned the land, for if the claims he now sets up are true his admitted absences did not under the law amount to an abandonment.

Nothing is set out in the motion for review showing that there is any newly discovered evidence, or that he was prevented in any manner from substantiating his allegations at the hearing. The record shows that he was represented by an attorney, and that himself and witnesses were present at the hearing and testified.

It cannot be claimed with any degree of force that the plaintiff and his witnesses swore falsely at the hearing of the contest case in the absence of admissions to that effect or a conviction of perjury.

It has been the experience of the Department that it is difficult to establish any general or satisfactory rule to guide the local officers in the disposition of applications for second entry. It has been left to them to make application of the law to the particular cases presented, and they have been "enjoined to exercise their best and most careful judgment in the matter." For this reason their conclusions are entitled to much respect. Cases coming directly within the causes enumerated in section 3 of the act of March 2, 1889, are comparatively easy of disposition. But those arising outside of the causes so enumerated, or classed among "unavoidable casualties," must depend individually upon the peculiar circumstances surrounding each case.

The charge of abandonment in the contest case, and upon which the decision in the case at bar depends, went to the very essence of the homestead law. The term as used in the contest affidavit was employed in its usual sense. The charge was sustained. Bowsman either abandoned the land in the sense contemplated by the statutes or he did not.

If he abandoned the land in the sense contemplated by the statutes and the instructions issued relative thereto, then he is not entitled to second entry. If he did not so abandon the land then he should have made a showing to that effect when opportunity was afforded him. In this he failed, and as stated in the departmental decision of July 23, 1896, it is now too late to say that plaintiff and his witnesses swore falsely at the hearing of the contest case.

Notwithstanding the remedial character of the act of December 29, 1894, it is well established that the law allows but one homestead privilege, unless the applicant for second entry comes clearly within the provisions of said act. Such fact has not been made apparent in this case.

The said motion for review is hereby denied.

PRACTICE—MOTIONS FOR REVIEW AND REHEARING—RULE 114.

DEPARTMENT OF THE INTERIOR,

Washington, Oct. 24, 1896.

Rule 114 of Practice, see 18 L. D., 472, is amended to read as follows, to take effect as of the date hereof:

Rule 114. Motions for review, and motions for rehearing before the Secretary, must be filed with the Commissioner of the General Land Office within thirty days after notice of the decision complained of, and will act as a supersedeas of the decision until otherwise directed by the Secretary.

Such motion must state concisely and specifically the grounds upon which it is based, and may be accompanied by an argument in support thereof.

On receipt of such motion, the Commissioner of the General Land Office will forward the same immediately to this Department, where it will be treated as "special". If the motion does not show proper grounds for review or rehearing, it will be denied and sent to the files of the General Land Office, whereupon the Commissioner will remove the suspension and proceed to execute the judgment before rendered. But if, upon examination, proper grounds are shown, the motion will be entertained and the moving party notified, whereupon he will be allowed thirty days within which to serve the same together with all argument in support thereof, on the opposite party, who will be allowed thirty days thereafter in which to file and serve an answer; after which no further argument will be received. Thereafter the case will not be reopened, except under such circumstances as would induce a court of equity to grant relief against a judgment of a court of law.

All rules or parts of rules inconsistent herewith are rescinded.

DAVID R. FRANCIS,

Secretary.

RAILROAD LANDS—APPLICATION TO ENTER.

EMORY H. MARKER ET AL.

On the judicial vacation of a patent issued under a railroad grant, the Secretary of the Interior may lawfully fix a day when the lands embraced in such decree shall be open to entry; and in such case an application to enter filed prior to the time so fixed should not be allowed.

Acting Secretary Reynolds to the Commissioner of the General Land Office,
August 8, 1896. (J. L. McC.)

On July 26, 1887, the Department directed your office to demand of the St. Paul and Sioux City Railroad Company and the State of Iowa, in accordance with Sec. 2 of the act of March 3, 1887 (24 Stat., 556), the relinquishment and reconveyance of certain lands in O'Brien county, Iowa, which the Department held had been improperly patented to said State for the benefit of said railroad company (6 L. D., 47, 54; on review, *ib.*, 162).

Demand was accordingly made by your office, which, on January 7, 1888, reported to the Department that the company and the State had failed to reconvey as requested. Thereupon, the Department requested the Honorable Attorney General to institute suit in the proper court to set aside the patents thus improperly issued, and for the restoration of the title to the United States (6 L. D., 481).

Suit was accordingly instituted in the circuit court of the United States for the northern district of Iowa, which, at the October term, 1890, rendered a decision in favor of the United States (43 Fed. Rep., 617).

The case was thereupon brought by appeal before the supreme court of the United States, which, on April 21, 1895, affirmed the decision of the circuit court (159 U. S., 349).

Your office, by letter of November 19, 1895 (which letter was approved by the Secretary of the Interior), transmitted to the local officers at Des Moines, Iowa, a list of the lands in controversy, embracing 21,979.85 acres, with instructions to them to publish notice to all persons, claiming any part thereof under the act of March 3, 1887 (*supra*), to come forward within ninety days from the first publication, and file notice of their claims and their intention to make proof in accordance with the circular of February 13, 1889 (8 L. D., 348).

Said list with notice to claimants under said act was published for thirty days from November 29, 1895, in the "Sheldon Eagle." The date set in said notice on which the lands in question should become "subject to entry under the law of the United States" was February 27, 1896.

Between the date of the first insertion of said notice (November 29, 1895), and that set for the opening of the lands to entry (February 27, 1896); a considerable number of persons filed applications to make homestead entries on said lands, which applications the local officers rejected,

on the ground that the lands were not yet open to entry. The applicants appealed to your office, which dismissed their several appeals, and accorded them twenty days within which to apply for a writ of certiorari. Emory H. Marker and eighty-eight others have filed applications for such writ.

Said applications, with the exceptions of names and dates, are all alike, and in printed form. They allege seven errors on the part of your office, the gist of the whole being

that the decree of the United States supreme court, dated October 21, 1895, vested the title of the land in question in the general government; and that thereafter, the lands having been previously surveyed and platted, and the survey and plats approved by the Commissioner of the General Land Office, the land in question was subject to entry by the first legal and qualified application to be filed subsequent to October 21, 1895.

A decision of the supreme court holding that certain lands belong to the United States does not necessarily open such lands forthwith to entry. The order opening the lands to entry on February 27, 1896, was one that the Secretary might lawfully and properly issue (*Crowley v. Ritchie et al.*, 22 L. D., 276). An application to enter land, to be valid, must be made at a time when the land is legally subject to entry (*Mills v. Daly*, 17 L. D., 345, and many other cases).

The applicants for certiorari have shown no error in the decision of your office, rejecting their applications to enter the lands in question.

Their petition is therefore denied.

RAILROAD GRANT—ACT OF MARCH 3, 1871—RELINQUISHMENT.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO. ET AL. *v.* BERGERUD.

The grant made by the act of March 3, 1871, did not take effect until the relinquishment provided for therein was duly filed and accepted by the Secretary of the Interior.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 17, 1896. (W. F. M.)

This case is again before the Department on review of the decision rendered on March 6, 1896 (unreported), granted on motion of the St. Paul, Minneapolis and Manitoba Railway Company. The land in controversy is the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 27, township 133 N., range 42 W., in the land district of St. Cloud, Minnesota, and lies within the primary limits of the St. Vincent Extension of the grant to the said company made by the act of March 3, 1871 (16 Stat., 588). The decision under review held that the land was excepted from the grant by the homestead entry of Charles P. Young, which was made August 14, 1868, and not canceled until December 14, 1871.

The contention of the company now is that the grant did not take effect at its date, but on December 19, 1871, and, therefore, that the

status of the land is not affected by Young's entry, which was canceled on the 14th of the same month.

The act making the grant is entitled:

An act authorizing the St. Paul and Pacific Railroad Company to change its line in consideration of a relinquishment of lands, [and contains the following proviso:] *Provided, however,* That this change shall in no manner enlarge said grant, and that this act shall only take effect upon condition of being in accord with the legislation of the State of Minnesota and upon the further condition that proper releases shall be made to the United States by said company, of all lands along said abandoned lines from Crow Wing to St. Vincent, and from St. Cloud to Lake Superior, and that upon the execution of said releases such lands so released shall be considered as immediately restored to market without further legislation.

In construing this act the supreme court has said:

The release required by the act of March 3, 1871, was not made by the St. Paul and Pacific Railroad Company until December 13, 1871, and a formal release to the United States by the company was not executed until the 19th of that month. It was only upon the execution of the release—whether that be deemed to have been on the 13th or 19th of December—that the act took effect. The act did not make a grant upon condition subsequent. There was no condition for a breach of which any forfeiture of a grant could be required, for no grant passed until the consideration for it, the relinquishment of old lines with the lands along them, was given. The transaction was in the nature of an exchange, by which the right was given to the company to construct new lines with proportionual grants, in consideration of its relinquishing certain old lines, with their accompanying lands. The new rights were to vest with the release of the old rights. The transfer was to be mutual and simultaneous. There was, therefore, no operative grant until there was an effective release, and whichever date be taken—whether December 13, or 19—it was subsequent to the definite location of the Northern Pacific Railroad Company in Minnesota. (St. Paul and Pacific R. R. Co. v. Northern Pacific R. R. Co., 139 U. S. 1.)

While the character of the grant, as whether one *in praesenti* or *in futuro*, is, therefore, no longer an open question, it will be observed that the court premitted the further question as to the precise date at which it became effective.

On December 13, 1871, the St. Paul and Pacific Railroad Company, through its president and secretary, after due authorization thereunto by the board of directors, made, sealed and signed the release required by the proviso of the act aforesaid. This instrument was filed in this Department on December 19, 1871, and was formally accepted by the Secretary of the Interior as a compliance with the requirement of the act on the day following. The release purports to convey and does convey land. It is, therefore, in effect, a deed, and must be treated as such. A deed has no effect until delivery by the grantor and its acceptance by the grantee. It was formerly the common law rule that the deeds of a corporation did not require delivery, but in the United States no distinction appears to have been made in that regard between individuals and corporations.

In this case, as has been shown, the grant could not become operative until the relinquishment of the lands along the abandoned line should take effect, and this did not transpire until the release was filed

and accepted here, six days after the cancellation of Young's entry. The land in controversy, therefore, was free when the grant became effective and passed with it.

The decision heretofore rendered is revoked and set aside, the decision appealed from is reversed, and it is ordered that Bergerud's homestead entry be canceled.

DESERT LAND ENTRY—UNSURVEYED LAND—FINAL PROOF.

JOHN W. PHILLIPS.

If final desert land proof, submitted on an entry of unsurveyed land, is found unsatisfactory, and the entryman fails to furnish supplemental proof as required, the proof already submitted may be rejected, and the entry canceled.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 26, 1896. (W. A. E.)

On March 17, 1884, John W. Phillips made desert land entry at the Las Cruces, New Mexico, land office, for a certain tract of unsurveyed land, which was described in the entry papers, however, as the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 34, T. 9 S., R. 8 E.

February 27, 1886, he submitted final proof, which was suspended by the local officers to await survey.

May 20, 1892, your office considered said final proof and found it unsatisfactory, for the reason that the location of the springs from which the entryman alleged he derived his water supply, and the manner of diverting the water, were not shown.

The register and receiver were accordingly instructed to notify the entryman that he would be allowed sixty days in which to furnish supplementary proof.

Notice was duly mailed to the entryman, but was returned uncalled for.

October 20, 1893, William C. McDonald filed affidavit alleging that he is the owner by deed from Phillips of the tract embraced in said entry; that he has recently learned that supplemental proof is required; that the entryman has not resided in the vicinity of this land for several years and his present whereabouts are unknown. McDonald accordingly asked for six months time in which to find the entryman and make the necessary additional proof.

By letter of February 26, 1894, your office allowed McDonald sixty days "in which to furnish the evidence called for or to appeal, failing to do one of which the entry will be canceled."

Appeal was thereupon taken to the Department.

The specifications of error alleged are:

1. In not allowing assignee six months as prayed for in which to find the original entryman.

2. In now taking final action in the case, the land not being surveyed, and there being no adverse claimant.

In regard to the first specification, it is to be said: (1) that as the required supplementary proof related to the location of certain springs and the manner of distributing the water from them, it was not necessary to find the entryman to make this proof—it could be made by the assignee himself; (2) that from October 20, 1893, to the expiration of the sixty days allowed by your office letter of February 26, 1894, was more than six months, the period asked for by the assignee on the first named date; and (3) that although three years have elapsed since the assignee asked for six months time in which to find the entryman, he has never intimated to the Department that he has found the entryman or that he is ready to furnish the required proof.

As to the second allegation, I find, upon inquiry at your office, that no portion of said township 9 south, range 8 east, has been surveyed.

The practice of the Department in regard to desert land entries upon unsurveyed land is as follows:

At the time of making the entry the land must be described as accurately as is possible without survey, so that it may be easily identified. Within the time prescribed by law final proof must be submitted as in other cases. If this proof is satisfactory to the local officers, they approve it and forward it to your office, without collecting the purchase money and without issuing the final papers. It is then considered by your office and if found satisfactory is suspended until the land shall have been surveyed. After the land has been surveyed, the entryman (or his heirs or assignee) is required to file a corroborated affidavit showing the legal subdivisions of his claim. The official records are then corrected to make them describe the land by legal subdivisions, and if no objection exists, final papers are issued upon payment of the amounts due. (See circular of April 20, 1891, 12 L. D., 376; case of C. B. Mendenhall, 11 L. D., 414.)

If, however, your office finds the proof to be unsatisfactory, it may call on the entryman for supplementary proof, and if he fails after due notice to furnish the necessary additional proof, the proof already submitted may be rejected and his entry canceled, without regard to whether the land is then surveyed or unsurveyed.

The proof submitted in this case is insufficient and unsatisfactory. The assignee has had full opportunity to furnish the necessary supplementary proof, and has failed to do so.

Your office decision is accordingly affirmed, the final proof is rejected and the entry will be canceled.

SULLIVAN *v.* McPEEK.

Motion for rehearing in the case above entitled denied by Secretary Francis, October 26, 1896. See departmental decision of October 14, 1893, 17 L. D., 402.

PRACTICE—APPEAL—NOTICE—TIMBER LAND ENTRY.

HENRY C. EVANS.

On appeal from the denial of an application to contest an entry the appellant is not required to serve the entryman with notice thereof.

The withdrawal of offered lands abrogates the offering and brings them within the category of unoffered lands, and hence subject to timber land entry, if restored to the public domain.

Secretary Francis to the Commissioner of the General Land Office, October 29, 1896. (J. A.)

May 8, 1893, Constance Howard made cash timber entry for the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, E. $\frac{1}{2}$ SE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 21, T. 49 N., R. 8 W., Ashland, Wisconsin, land district.

March 4, 1895, Henry C. Evans filed an affidavit of contest against said entry under the second section of the act of May 14, 1880 (21 Stat., 140).

The local officers, acting under rule 6 of practice, transmitted the affidavit to your office.

June 15, 1895, your office held that the affidavit of contest is insufficient, and denied the application for a hearing.

August 28, 1895, and within sixty days from notice of said decision, Evans' attorneys filed an appeal. The appeal was taken as in ex parte cases under rule 100 of practice, and without notice to Mrs. Howard.

Your office, on September 28, 1895, considered the appeal defective, and, acting under rule 82 of practice, allowed Evans fifteen days within which to file evidence of service on Constance Howard under rule 86 of practice.

October 15, 1895, Evans' attorneys filed a motion for review of said decision. The motion was denied October 24, 1895, and on the same day your office transmitted the papers in the case in order that the appeal may be dismissed by this Department under rule 82 of practice.

In cases of appeals from rejections of applications to enter this Department has uniformly held that an adverse claimant of record is entitled to service of notice of the appeal. The reason for this requirement is found in the fact that in such cases an entryman is, from the nature of the case, a party to the proceedings, and is therefore, under rule 70 of practice, entitled to service of notice. It is stated in instructions, 17 L. D., 325, that the holding that an adverse claimant is entitled to service of notice of appeal from the rejection of an application to enter "embodies a sound principle of law, and conduces to the ends of justice and fair dealing between claimants for the same land." This reasoning does not apply to cases of appeals from rejections of applications to contest, as in such cases the entryman is not a party to the proceeding. Nor do I find anything in the rules of practice to warrant the construction that such an appeal must be served on the entryman.

Your office held that under rule 86 of practice, which requires that, Notice of an appeal from the Commissioner's decision must be filed in the General Land Office and served on the appellee or his counsel within sixty days from the date of the service of notice of such decision,

it was necessary for Evans to serve notice of appeal on Mrs. Howard. That rule applies only to cases in which jurisdiction has been acquired over the entryman. In contest cases jurisdiction over an entryman can be acquired only by his voluntary appearance or by service of notice after hearing has been ordered. It follows that it was not necessary for the appellant to serve notice of his appeal on Mrs. Howard. The question presented by the appeal will therefore be considered.

The affidavit of contest alleges that the land has been offered and is therefore not subject to timber entry under the act of June 3, 1878 (20 Stat., 89), as amended by the act of August 4, 1892 (27 Stat., 348).

The land had been offered at public sale July 4, 1853. It is within the fifteen miles indemnity limits of the grant of June 3, 1856 (11 Stat., 20), for the benefit of the Chicago, St. Paul, Minneapolis and Omaha Railroad Company, and was selected by said company March 20, 1885. The selection was canceled January 8, 1891, for the reason that the grant to said company had been satisfied.

The land is also within the primary limits of the grant of May 5, 1864 (13 Stat., 66), for the Wisconsin Central Railroad Company, which grant took effect notwithstanding the fact that the land had been withdrawn under the grant of June 3, 1856 (Wisconsin Central R. R. Co. v. Forsythe, 159 U. S., 46). A withdrawal was made for the Central R. R. Co., but on the failure of said company to construct its road between Ashland and Superior the land was forfeited by the act of September 29, 1890 (26 Stat., 496).

In the case of *Anway v. Phinney* (19 L. D., 513) it was held that (syllabus),

The withdrawal of offered lands in aid of a railroad grant abrogates the original offering, and brings them within the category of unoffered lands, and hence, subject to timber land entry if restored to the public domain.

The land in controversy must therefore be considered as unoffered land and subject to timber entry.

The decision of your office holding that the affidavit of contest is insufficient is accordingly affirmed.

REPAYMENT—ENTRY ERRONEOUSLY ALLOWED.

LOUISE C. GROTHJAN.

An entry made during the pendency of an appeal involving the land is "erroneously allowed", and the purchase money should be repaid, if the entry in question cannot be confirmed.

Secretary Francis to the Commissioner of the General Land Office, October
(I. H. L.) 29, 1896. (P. J. C.)

Application for repayment of purchase money paid for pre-emption cash entry, No. 1044, SW. $\frac{1}{4}$ of Sec. 4, Tp. 9 N., R. 5 W., Boise City, Idaho, by Louise C. Grothjan, is presented by this appeal. The application is in due form and accompanied with her relinquishment.

Your office denied the application, on the ground that her entry was canceled because she "never resided upon the land or made her home thereon in good faith," and decided that "the law governing the return of purchase money does not apply to cases where parties attempt to secure title to public land through false testimony." The applicant's appeal brings the case before the Department.

The history of this entry, so far as material to the controversy, is as follows:

Grothjan filed her pre-emption declaratory statement for the tract July 7, 1886. February 9, 1887, Joseph L. Johnson filed his pre-emption declaratory statement, and on January 2, 1888, after publication of notice, submitted final proof, whereupon Grothjan protested. A hearing was had, and as a result the local officers decided in favor of the protestant. From this action Johnson appealed. Pending this appeal, Grothjan submitted final proof, and was permitted to make entry.

Your office, by letter of September 8, 1890, in passing upon this feature of that controversy, said:

Your action in accepting the final proof of Louise C. Grothjan, accepting her cash payment, and issuing to her a final certificate, was clearly improper, and such proceedings should not have been had while the appeal involving said land was still pending. (See Rule 53 of the Rules of Practice; *Laffoon v. Artis*, 9 L. D., 279; *Scott v. King*, 9 L. D., 299.)

It was also decided that she had not "resided upon this land and made her home thereon in good faith."

This judgment was affirmed by the Department, March 31, 1892 (L. and R., 239, p. 198). The subsequent history of this controversy will be found in 15 L. D., 195; 16 Id., 180; 22 Id., 29.

Section 2 of the act of June 16, 1880 (21 Stat., 287), provides, that in all cases where entries have been

canceled for conflict, or where, from any cause, the entry has been erroneously allowed, and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry the fees, commissions and purchase money.

It seems to me that this application comes clearly within the purview of this statute. It cannot be maintained with seriousness that the action of the local officers in accepting her final proof and payment, pending the appeal, was regular.

If the records of the local office, or the proofs furnished, should show that the entry ought not to be permitted, and yet it were permitted, then it would be "erroneously allowed." (General Circular, 1895, p. 97.)

That is the exact condition in this case. Johnson had appealed from the decision of the local officers. This had the effect of holding the land in *statu quo* until that appeal was disposed of.

The fact that your office and the Department subsequently decided that she had not complied with the law can cut no figure in this transaction. The entry was erroneously allowed before it had been determined that there was a failure on her part, and her money had been received anterior to that time. It is perfectly fair to assume that if the local officers had done their full duty in this matter, and held her final proof until the pending appeal had been finally disposed of, she would not have paid the money necessary to make her final entry. Contrary to the rule, they received the final payment, and "erroneously allowed" the entry. (See Ignatz Reitober, 22 L. D., 615.)

I am of the opinion that the application for repayment should be granted.

Your office decision is therefore reversed, and repayment will be made.

RAILROAD LANDS—ACT OF SEPTEMBER 29, 1890.

REITH *v.* NILES.

The right to purchase railroad lands forfeited by the act of September 29, 1890, under the acts amendatory thereof, is secured to persons entitled to exercise such right between the dates of September 29, 1890, and January 1, 1897, and no adverse claim can attach between said dates.

Secretary Francis to the Commissioner of the General Land Office, October 29, 1896. (C. J. G.)

This controversy is in relation to the SE. $\frac{1}{4}$ of Sec. 25, T. 3 N., R. 31 E., W. M., La Grande land district, Oregon.

This case has been before the Department once before and the details thereof are set out in 19 L. D., 449. It was decided therein that—

The right to purchase forfeited railroad lands under section 3, act of September 29, 1890, by persons holding under license from a railroad company, is inheritable, and may be exercised by an administrator for the benefit of the estate, where under the local law, he is given the control of the real and personal property of the deceased.

Your office, in a letter dated May 17, 1895, addressed to the local office, no motion for review of the above decision having been filed, closed the case, concluding as follows:

Notify Reith that he will be allowed sixty days to present payment for the land and in event of his so doing you will issue certificate to "the Heirs of B. J. Terven," cancel the entry of Niles and report the same to this office.

Under date of January 21, 1896, the local office reported that "the said Reith has taken no action pursuant to your said letter of May 17, 1895," and at the same time transmitted evidence of service of notice upon Reith.

Under date of February 1, 1896, your office, without further action, closed the case, this time holding Niles' entry intact.

From this decision Reith has appealed to this Department, alleging in substance that purchasers under section 3 of the act of September 29, 1890, are entitled to purchase the lands forfeited by said act at any time prior to January 1, 1897.

The act of Congress approved December 12, 1893 (28 Stat., 15), reads as follows:

That section three of an act entitled "An Act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes," approved September twenty-ninth, eighteen hundred and ninety, and the several acts amendatory thereof, be, and the same is, amended so as to extend the time within which persons entitled to purchase lands forfeited by said act shall be permitted to purchase the same, in the quantities and upon the terms provided in said section, at any time prior to January first, eighteen hundred and ninety-seven: *Provided*, That nothing herein contained shall be so construed as to interfere with any adverse claim that may have attached to the lands or any part thereof.

As to the proviso in the above act, relative to any adverse claim that may have attached to the land, it is evident that the defendant herein has gained no rights thereunder. He makes no claim of settlement prior to September 29, 1890; the only rights he alleges are those under his entry of September 1, 1891. The act of September 29, 1890 (26 Stat., 496), allowed persons qualified to purchase the lands forfeited by said act, two years from the date of its passage within which to purchase said lands. The act of June 25, 1892 (27 Stat., 59), extended the said right to purchase one year. The act of January 31, 1893 (27 Stat., 427), which was a special act having reference to lands forfeited by the act of September 29, 1890, upon the line of the Northern Pacific Railroad Company between Wallula, Washington, and Portland, Oregon, extended the time within which persons entitled to purchase said lands could purchase the same, to January 1, 1894. And the act of December 12, 1893, quoted above, still further extended the time of persons entitled to purchase said lands to January 1, 1897. On account of these various acts, original and amendatory, it will readily be seen that the right to purchase these lands is secured to persons entitled to purchase the same between the dates of September 29, 1890, and January 1, 1897, and that no adverse claim could attach between those dates.

By departmental decision of December 4, 1894, (19 L. D., 449, *supra*), Reith was adjudged to be qualified to purchase under section 3 of the act of September 29, 1890 (*supra*). Accordingly, the only question involved in the present appeal is as to the time within which Reith is entitled to consummate the purchase of this land for the benefit of the estate he represents.

From the language of the acts referred to, it being remembered that said acts are remedial in their nature, I am of the opinion that there was no authority for limiting the time within which Reith must purchase, to sixty days, as was done in your office letter of May 17, 1895. According to the provisions of said acts he has until January 1, 1897, within which to purchase the land in question, as claimed by him in his appeal.

Your office decision is accordingly reversed, and Reith will be notified of his right as herein indicated.

TOWN SITE—MINERAL LAND—ALASKAN LANDS.

GOLDSTEIN *v.* JUNEAU TOWNSITE.

A townsite settlement in Alaska prior to the act of March 3, 1891, confers no right that relieves the town site applicant from the burden of proof in a controversy as to the character of the land between such applicant and a mineral claimant, where the mining claim is of record at the date of the townsite application. Land must be held mineral in character if mineral has been found thereon, and the evidence shows that a person of ordinary prudence would be justified in further expenditures, with a reasonable prospect of success in developing a valuable mine.

Secretary Francis to the Commissioner of the General Land Office, October 29, 1896. (C. J. W.)

John Olds, acting as trustee for the occupants of the land applied for, filed application for patent for one hundred and twenty-one and fifty-two-hundredths acres of land described in his application by metes and bounds, which application was made on the 10th of June, 1893, and under the provisions of the townsite laws. The land is located in a mining district, but was alleged to be non-mineral. Notice of intention to offer proof in support of the application was given by publication in the "Alaska Journal" at Juneau, Alaska, and by posting copies of said notice in three conspicuous places on the land, as required in such cases, the time therein fixed for the submission of proof being the 15th day of August, 1893. Pursuant to the notice proofs were submitted, and on October 13th, 1893, cash entry No. 1 for the townsite of Juneau was allowed and the purchase price for the land covered by the entry was paid. On May 19, 1894, a paper protesting against the issuance of patent to the trustee for the land covered by the entry was filed in the name of Anna Goldstein, in your office, through her attorney, J. H. Hickock, Jr., alleging her ownership of a mineral claim in conflict with said townsite, and alleging the mineral character of the land. Various papers accompanied the protest, tending to show that the mine claimed by protestant was, in June, 1886, located by O. L. Sandstone and Louis Cotta on Bonanza lode in Harris mining district, Alaska; that the location was made in accordance with law; that it had been

duly recorded and that the title to the same had passed to her. By office letter of date December 8, 1894, your office directed the local officers to order a hearing to determine the character of the land embraced in the mineral claim of protestant, and in conflict with the entry. A hearing was accordingly ordered. In pursuance of said order the parties appeared, in person and by their attorneys, before Henry Melten, U. S. commissioner, at Juneau, Alaska, and submitted testimony touching the character of the land. The taking of testimony was commenced April 29, 1895. The evidence so taken was duly certified and filed in the office of the register and receiver at Sitka, Alaska, on May 31, 1895. On June 22, 1895, the local officers rendered a joint decision, in which they found that the land in controversy was non-mineral in character. On July 15, 1895, the mineral claimant appealed to your office. On September 16, 1895, your office, in substance, affirmed the decision of the local officers. A motion was made for review of this decision, which was by your office overruled, on January 8, 1896. On February 8, 1896, appeal from your office decisions of September 16, 1895, and January 8, 1896, was duly filed, and the case is now to be considered here under said appeal.

The only vital question in the case is, the mineral or non-mineral character of the land. Certain other questions, however, arose in the trial and argument of the case, and will be disposed of as preliminary to the main question.

The affidavit of Anna Goldstein, which was the ostensible predicate for the hearing, was objected to before the local officers as insufficient for such purpose, mainly for the reason that it was not in fact her affidavit. The same point was insisted upon before your office, and is insisted upon here. It is unnecessary to consider in detail the criticisms made upon this paper. It is sufficient to say that any defects, which may have existed in its original execution, were cured by her subsequent ratification and acknowledgment of it as her act. The mineral character of the land was alleged in a number of other affidavits, and the fact of the mineral location and survey were record facts of which your office had knowledge. The facts thus made to appear were sufficient not only to justify the ordering of a hearing, but to require such hearing to be ordered. Such hearing was in fact ordered, and in fact had, and both parties to the controversy appeared, both in person and by attorneys, and submitted testimony in support of their respective contentions, as to the character of the land. The opportunity was not only thus afforded to each side to be heard fully on the merits of the case, but each side availed itself of that opportunity, and mere informalities preceding the hearing have become inconsequent and without significance.

One other question, which may be regarded as preliminary to the main one, is as to which party should bear the *onus probandi*.

In your office letter of December 8, 1894, ordering a hearing in the

case, the rule to be observed by the local officers in passing upon the character of the land, was suggested, and that suggestion seems to have been followed by them. Your office referring to record facts relating to the land in controversy then said:

The land being held and claimed for mineral purposes long prior to the townsite entry, it was error on the part of your office to have allowed the entry until after due notice to the mineral claimants and no objections, and the allowance of such entry does not impair the right of the mineral claimant. See *Piru Oil Company* (16 L. D., 117).

Therefore in a contest to determine the character of the land it rests upon the townsite claimant to prove that the land is non-mineral in character, its value for town lots being an immaterial question. The *State of Washington v. McBride* (18 L. D., 199).

It was unusual to predetermine a question to be passed upon at a hearing thereafter to be had, and the language used is not quoted for the purpose of questioning the right of your office to change the view therein expressed on consideration of the case after the hearing, but for the reason that it is believed that the rule therein expressed is in substance correct, notwithstanding it was receded from in the later decision of your office. The location notice of the mineral claimants was duly recorded, June 30, 1886, in the office of the district recorder of the Harris mining district, and has remained of record. The townsite claimant was charged with notice of the claim, and the record abounds with evidence of the fact that its existence was public, and very generally known to the people of the vicinity long prior to the date of the townsite application. Looking, therefore, to the record evidence and the notoriety of the mineral claim, and its priority in existence to the townsite application, it would seem that the burden of proof was upon the townsite applicant to show the non-mineral character of the land. In opposition to this view, however, is one presented by counsel for the townsite claimant, which is not without force and leaves the matter almost in doubt. It is insisted that most of the area in conflict was settled upon by different occupants of town lots, who recognized a plat and survey made in 1881 by Master Hanus, U. S. N., and that the mineral claimant had notice of these claims and settlements before the date of the mineral location. If at the time of these settlements the townsite laws had been operative and of force in Alaska there would be no question but that the townsite should be treated as a prior claimant, and the burden of proof put upon the mineral claimant. The only way out of the confusion is to follow the law, wherever it may lead. The act of May 17, 1884 (23 Stat., 24), provided for a government for the district of Alaska, and made it a land district of the United States, over which was extended only the mineral laws of the United States; preserved the *status quo* as to use and occupancy for other than mining purposes, until Congress should act, and declared that nothing in the act should be construed to put in force, in said district, the general land laws of the United States. Section 2387, Revised Statutes, was

not operative in Alaska until March 3, 1891 (26 Stat., 1099), and no entry of land for townsite purposes could be made before the passage of said act. The entry in contest was made under said act of March 3, 1891. Section 11 of that act provides

That until otherwise ordered by Congress lands in Alaska may be entered for townsite purposes for the several use and benefit of the occupants of such townsites by such trustee or trustees as may be named by the Secretary of the Interior for that purpose, such entries to be made under the provisions of section twenty-three hundred and eighty-seven of the revised statutes as near as may be, etc.

Section 16 of the same act is as follows—

That townsite entries may be made by incorporated towns and cities on the mineral lands of the United States, but no title shall be acquired by such towns or cities to any vein of gold; silver, cinnabar, copper, or lead, or to any valid mining claim or possession held under existing law. When mineral veins are possessed within the limits of an incorporated town or city and such possession is recognized by local authority or by the laws of the United States the title to town lots shall be subject to such recognized possession and the necessary use thereof, and when entry has been made or patent issued for such townsites to such incorporated town or city, the possessor of such mineral vein may enter and receive patent for such mineral vein and the surface ground appertaining thereto: *Provided*, that no entry shall be made by such mineral claimant for surface ground, when the owner or occupier of surface ground shall have had possession of the same before the inception of the title of the mineral vein applicant.

Looking to the provisions of the act of May 17, 1884, and of the act of March 3, 1891, it seems to have been the purpose of Congress to permit and authorize mineral prospecting and mining upon lands owned by the United States, and merely occupied by others, for some purpose other than mining, provided that such mining operations did not interfere with such occupancy. There is no complaint that the mineral claimant in his discovery and development work interfered with the occupancy of any person in possession at the date of the passage of the act of May 17, 1884, or at the time the work was done. The townsite application and entry made pending the mineral location, and with a view to obtaining patent to the entire interest in all the land included in said mineral location, puts the townsite in the attitude of asserting the non-mineral character of all of said land, and of assuming the burden of establishing that fact by proof.

One other fact appearing from the record seems to require mention here. There appears to have been a government reservation for naval purposes, with three buildings erected upon it, made prior both to any occupancy for residence purposes and to the mineral location, which is included both in the mineral location and the townsite entry. So far as appears neither party can lay any just claim to this area, but further data would be necessary to adjust the rights of the parties so as not to interfere with this reserved area, which is not now proposed. The illegality, however, of allowing the entry which includes it, to go to patent as it now stands is apparent. These preliminary questions being disposed of, it remains to be considered, whether or not the townsite has

successfully carried the burden of establishing the non-mineral character of the land, by proof, the application being for non-mineral land.

On the hearing, the townsite assumed the burden of proof and introduced ten witnesses, whose testimony was addressed to the character of the land, and of the developments on it by the mineral claimant. Much of this testimony was negative in its character, and based upon limited inspection and examination. It appears from undisputed testimony that near the southeasterly end of the claim there is a shaft twenty-five to thirty feet in depth and a tunnel thirty to forty feet in length, running northwesterly, and some stripping along the formation from the surface, and that these showed gold and silver in stringers of quartz in varying quantities. The presence of what is termed stringers of mineral bearing ore is not seriously disputed, but the chief controversy is as to whether there is a vein, and whether the ore is in sufficient quantity, and of a quality to pay for mining. The witnesses for the townsite (most of whom made but one short visit to the shaft and tunnel) state that they saw nothing which they would term a vein, and give it as their opinion that the claim is valueless as a mine, but most of them decline to swear that there is no vein there or upon the claim. The opinions expressed in nearly every instance are based upon the slight examinations made during a single short visit. One of these witnesses, Mr. Thorpe, swears positively that no vein or lode exists upon the claim. The substance of the testimony of most of the witnesses for the townsite is that from present developments they do not believe that a vein or lode exists on the claim, but that that fact can only be determined by further development. The mineral claimant introduced eight witnesses. Some of these had been upon the claim frequently, and some of them had worked in the shaft. One of these witnesses, Richard A. Matschman (pp. 230-235 of record), states that he saw and desired to locate this claim thirteen years ago, and expresses the opinion that it is a valuable mineral claim and warrants further development. He describes the bottom of the shaft as then disclosed as showing three or four stringers covering about half the shaft, the rock being quartz, bearing free gold, and some silver. Also that he had seen rock in place bearing free gold. John G. Tripp the contractor, who was doing contract work in the shaft, at the time of the hearing, testifies that there is gold bearing rock clear across the bottom of the shaft, in some of which gold can be seen with the naked eye, and that he has, at different times and different places on the claim, seen quartz bearing free gold. He states that at that time there was a lode or vein in the bottom of the shaft about four feet wide, struck four or five days prior to that time, and expresses the opinion that it would pay to operate the mine. Two witnesses, E. H. Perry and William Nelson, were afterwards called to rebut this testimony, who stated that a few days previously they had gone down into the shaft and did not see any vein or lode in the bottom. It was about seven o'clock in the evening and a part of the bottom of the shaft was covered with water. Some others of the witnesses testified to seeing

quartz at different times on the claim which showed gold to the natural eye. Samples of ore properly identified accompany the record. As these have been submitted to no test here, they can serve no purpose. The record shows the results of a number of assays of ore taken from the claim. The townsite claimants had two assays, though only one is produced. As to the one not produced, Duncan (one of the witnesses) said it showed nothing of any value. The other was made by Valentine, a jeweler, and showed a value of twenty cents in gold per ton.

One of the assays put in proof by the mineral claimant showed thirty-one dollars of gold and twenty-two and a half ounces of silver per ton. The second one dollar and sixty-five cents in gold and three and eight-tenths ounces of silver. The third one, made for Mr. Kerr and of different specimens, showed of one of them eight dollars and forty-seven cents of gold and twelve and one-quarter ounces of silver per ton, and of the other two dollars and twenty seven cents of gold and forty-four ounces of silver per ton. The evidence indicates that the specimens used for the assays were taken from the dump and bank as average specimens of the quartz. This cannot be considered as conclusive evidence of the value of the ore remaining, but tends to show the then mineral character of the vein or stringers. It appears from the testimony that the claim in question known as the Bonanza, is on a definite mineral belt, and in near proximity to other mines. Olson, McCulty and Matschman, all name the Willoughby, the Traction, the Early Bird and the Sea Gull as lying along the same mineral belt, one of these being not more than five hundred feet from the Bonanza tunnel or shaft. It cannot be said that the testimony offered by the mineral claimant, taken as a whole shows a defined vein of mineral, in quantity and quality such as to make it a present paying mine, but it is strongly suggested that with further development it would be a paying mine. The testimony offered by the two sides, which was intended to show the present character of the land is pretty nearly balanced. It is to be observed that the mineral claimant is not putting in issue any right of hers as a purchaser from the locators of the claim, to be now passed upon, but is protesting against the townsite entry being passed to patent, and insisting that the townsite claimant be held to proof of the non-mineral character of the land, which fact has been alleged by said claimant. The townsite has suggested a failure upon the part of the mineral claimant to comply with the law fully as to the survey of the location and the annual assessment work required. In the recent case of the Aspen Consolidated Mining Company v. John R. Williams, it was said—

Considerable evidence was introduced upon the question of the compliance with law by the mineral claimants in various and sundry particulars and especially in reference to the annual assessment work required. That question, however, is not material to the present controversy inasmuch as it could not avail the agricultural entryman, even if it were shown that there was a failure in these respects. They are matters so far as this case is concerned between the government and the mineral claimants (23 L. D., 48).

No inquiry is now necessary as to whether the mineral claimant has complied with the law in the present case in respect to the matters referred to, or has not.

It is apparent that if it should now be decided on the showing made, that the character of the land is non-mineral the effect would be to withdraw and seal from mining enterprise what reasonably promises to be a valuable mine with further developments. In one of the later decisions rendered here, where a like condition of affairs appeared, a rule was announced, which seems to be applicable to this case. In the case of *Castle v. Womble* (19 L. D., 455), the Secretary said—

After a careful consideration of the subject it is my opinion that where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine, the requirements of the statute have been met.

Interpreting the testimony offered by both sides in the light of this rule, it must be held that the land involved is *prima facie* mineral in character, and not subject to unrestricted entry for townsite purposes.

Your office decision is reversed, and the townsite entry will be canceled as to the land covered by the mineral location.

SCHOOL INDEMNITY—MINERAL LANDS—FORFEITED RAILROAD LANDS.

STATE OF CALIFORNIA.

The act of February 28, 1891, amending Sections 2275, and 2276, R. S., is applicable to all the public land States, and operates as a repeal of all special laws theretofore enacted, so far as in conflict therewith; and under the provisions thereof the State of California is entitled to select indemnity for school sections lost to the State by reason of their mineral character.

The decision of the Department in the case of the State of California, 15 L. D., 10, overruled.

The return of sections sixteen and thirty-six by the surveyor-general as mineral land is sufficient evidence of its mineral character to entitle the State to select indemnity therefor, in all cases where said return is not overcome by competent evidence to the contrary.

Lands lying within the limits of a railroad grant forfeited by the act of September 29, 1890, are subject to selection as indemnity for school lands lost in place.

Secretary Francis to the Commissioner of the General Land Office, October 29, 1896. (W. M. W.)

By your office letter of April 18, 1896, you submitted to the Department for consideration three questions respecting the right of the State of California to select, as indemnity in lieu of lands returned as mineral lands by the surveyor-general, certain tracts of land within the limits of a railroad grant forfeited by the act of September 29, 1890.

Said questions are as follows:

First. Whether the State is entitled to indemnity for school sections lost to the State by reason of their mineral character.

Second. Whether the return of said sections by the surveyor-general as mineral land is sufficient evidence of its mineral character to authorize the State to select indemnity therefor.

Third. Whether lands lying within the limits of a railroad grant forfeited by the act of September 29, 1890, are subject to selection as indemnity by the States for school lands lost in place.

These questions will be considered in their order.

(1) On the 28th day of February, 1891, Congress passed an act amending sections 2275 and 2276 of the Revised Statutes (26 Stat., 796).

Section 2275, as amended by said act, embodies the conditions under which States, in whose favor sections sixteen and thirty-six have been or shall be granted, reserved, or pledged for the use of schools or colleges, in the States or Territory in which they lie, other lands may be selected in lieu of lands lost in sections sixteen and thirty-six. In regard to mineral lands lost in said sections, it is provided:

And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land.

In view of this language, it is clear that the State is entitled to select indemnity for sections sixteen and thirty-six lost to the State by reason of their mineral character, if the act is applicable to the State of California.

In the case of the State of California, 15 L. D., 10, Secretary Noble held that section 2275 of the Revised Statutes, as amended by the act of February 28, 1891, is not applicable to the State of California; that said State takes its right to indemnity school land under the act of March 3, 1853 (10 Stat., 244), as construed by the 6th section of the act of July 23, 1866 (14 Stat., 218). It is not necessary, in passing on the question here presented, to enter into a discussion of these acts, further than to say that they were both special acts, and confined in their operation to the State of California.

In construing a statute the first and chief purpose is to ascertain the intention of the law making power in enacting the law. The Congressional Record shows that when the act of February 28, 1891, was considered in the House, Mr. Payson, who was chairman of the House Committee on Public Lands, said, among other things:

The bill simply covers that condition which has been found to exist in the Department by which certain States or Territories suffer the loss of these lands which happen to be in fractional townships and where no adequate provision for indemnity selection is made in their stead. . . . This bill is of great importance to the people of the public land States of the northwest. It has been asked for, as I have said, by the Secretary of the Interior and the Commissioner of the General Land Office for several years. While somewhat voluminous in its details, there is really no change of existing law except in one particular, and that is that it gives to the school fund of the different States and Territories an increase in the land allotted for that purpose in case of reservations made by Congress for schools or colleges; that is, general grants of land for schools and colleges and other similar reservations. (See Congressional Record, Vol. 22, pp. 3464, 3465.)

The report of the House Committee on Public Lands was unanimous in favor of the passage of the bill, saying:

That the facts and reasons for the passage of this bill fully appear in the Senate report thereon, No. 502, of this Congress, which is appended hereto.

The Senate report says:

The sections of the Revised Statutes proposed to be amended by this bill are those which embody the general law with respect to the selection of indemnity lands in lieu of the sixteenth and thirty-sixth sections of each township granted to the States, and reserved to the Territories, for school purposes.

In the administration of the law, it has been found by the Land Department that the statute does not meet a variety of conditions, whereby the States and Territories suffer loss of these sections without adequate provision for indemnity selection in lieu thereof. Special laws have been enacted in a few instances to cover in part these defects with respect to particular States or Territories, but, as the school grant is intended to have equal operation and equal benefit in all the public land States and Territories, it is obvious the general law should meet the situation, and partiality or favor be thereby excluded. . . . The provision for indemnity for mineral lands is in no sense an additional grant to the States. The intent of Congress has always been to give every school section or its equivalent area. . . . Recognition of the right to indemnity for mineral school sections does not, therefore, add an acre to such grant, as the United States retain the mineral sections and dispose of the same under the mineral law. . . . The bill as now framed will cure all inequalities in legislation; place the States and Territories in a position where the school grant can be applied to good lands, and largest measure of benefit to the school funds thereby secured. (See Cong. Rec., Vol. 22, p. 3465.)

The bill, with amendments, was referred to the Department, and by it referred to the Commissioner of the General Land Office for report. On February 7, 1890, Commissioner Groff, in his report to the Secretary of the Interior, used this language:

The only increase in the amount granted by this bill over the original, so far as I can see, is in making the right to select in lieu of mineral lands applicable to all the States and Territories, instead of confining it to a few, as heretofore.

Secretary Noble, in transmitting the Commissioner's report to the Senate Committee on Public Lands, said: "I concur in the views of the Commissioner, and recommend passage of the bill."

The general rule of construction of statutes is that an earlier special act is not repealed by a later general act by mere implication. The legislature is usually presumed to have only general cases in view, and not particular cases which have been already provided for by special act. This presumption does not prevail where there is something which shows that the attention of the legislature had been turned to the special act, and that the general one was intended to embrace the special cases within the previous law; or something in the general act making it unlikely that an exception was intended as regards the special act.

An intention to supersede local and special acts may be gathered from the designs of an act to regulate, by one general system or provision, the entire subject matter thereof, and to substitute for a number

of detached and varying enactments one universal and uniform rule applicable to all cases. See Endlich on Interpretation of Statutes, Secs. 223 and 231.

Applying these rules in construing the amendatory act of February 28, 1891, by taking into consideration the history of said act, the reports of the committees of Congress, the report of the Commissioner of the General Land Office, and the concurrence in his views by the then Secretary of the Interior, as well as the language used in said act, it is clear that Congress, in passing said act, intended that it should be applicable to all public land States alike, and intended that it should operate as a repeal of all special laws theretofore passed, in so far as they conflicted with its provisions.

This construction finds support in the departmental instructions issued on April 22, 1891 (12 L. D., 400), wherein said act was construed as repealing the provisions in the act of February 22, 1889 (25 Stat., 676), admitting North Dakota, South Dakota, Montana, and Washington, in so far as said act conflicted with the act of 1891, *supra*. See also *State of Nebraska v. The Town of Butte*, 21 L. D., 220.

In the case of *Johnston v. Morris*, 72 Federal Reporter, 890, the United States circuit court of appeals held, that the act of February 28, 1891, *supra*, was intended to provide a uniform rule for the selection of indemnity school lands, and is applicable to all States and Territories having grants of school lands. And that the State of California is entitled to make indemnity selections in the place of lands lost from its school sections by reason of being mineral lands.

In view of what has been said I am of opinion that the act of February 28, 1891, amending sections 2275 and 2276 is applicable to the State of California; and that under said act the State of California is entitled to select indemnity for school sections lost to the State by reason of their mineral character.

The case of the State of California, 15 L. D., 10, in so far as it conflicts with the views herein expressed, is hereby overruled.

(2) The Manual of Surveying, 1894, p. 11, section 99, paragraph 7, is as follows:

Every surveyor shall note in his field-book the true situations of all mines, salt licks, salt springs, and mill-seats, which come to his knowledge; all watercourses over which the line he runs may pass; and also the quality of the lands.

In the case of *Sutton v. State of Minnesota*, 7 L. D., 562, the Department held that the field notes of survey are presumptively correct, and should be taken as true until disproved by competent evidence. Also see *John W. Moore*, 13 L. D., 64.

In the case of *Johnston v. Morris*, *supra*, the circuit court of appeals for the 9th circuit held, that the return of the surveyor-general that sections sixteen and thirty-six were mineral land is sufficient to entitle the State to make selection in lieu of such mineral land.

In view of this decision, and of the uniform rulings of this Depart-

ment as to the effect of the return of surveyors, it is held that the return of sections sixteen and thirty-six by the surveyor-general as mineral land is sufficient evidence of its mineral character to entitle the State to select indemnity therefor in all cases where said return is not overcome by competent evidence to the contrary.

(3) The first section of the act of September 29, 1890 (26 Stat., 496), declares the forfeiture to, and the resumption of the title by, the United States of all lands heretofore

granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain.

In so far as the question under consideration is concerned, it is clear that forfeited railroad lands under said act occupy precisely the same position as any and all other public lands of the United States, and are subject to like disposition as public lands that never have been granted by Congress, or otherwise reserved or disposed of by the government.

The 6th section of said act provides:

That no lands declared forfeited to the United States by this act shall by reason of such forfeiture inure to the benefit of any State or corporation to which lands may have been granted by Congress, except as herein otherwise provided; nor shall this act be construed to enlarge the area of land originally covered by any such grant, or to confer any right upon any State, corporation, or person to lands which were excepted from such grant.

In the first place, it is clear that this section refers solely to rights which a State or corporation might seek to acquire by reason of any grant made by Congress for railroad purposes; that no State or corporation shall acquire any right or title to lands, forfeited under one railroad grant, under any other grant to it for railroad purposes.

The evident purpose of Congress was to forever remove from the claim of either a State or corporation any claim under a forfeited grant to all lands covered by such grant, and to restore them to the public domain, free, unincumbered and unfettered from all grants to such State or corporation for railroad purposes. This construction has been applied by the Department on principle in construing a statute somewhat similar in its terms to the act of September 29, 1890, *supra*. Ontonagon and Brule River R. R. Co. (13 L. D., 463, 476).

There is nothing in the act of September 29, 1890, *supra*, tending to show that Congress intended by it to affect in any respect the school grants theretofore made to the respective States.

Section 2275 of the Revised Statutes, as amended by the act of February 28, 1891, specifically appropriates and grants to the public land States and Territories "other lands of equal acreage," and says they

may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States.

In the case of the State of Oregon, 18 L. D., 343, the several acts of Congress relating to the subject of school land indemnity were carefully examined and reviewed in connection with the act of February 28, 1891, amending section 2275. On page 348, it is said:

It is to be observed that in all these laws there are no words of exception, save in the last cited, and that is of mineral land, so it follows that selections may be made of any public lands subject to disposal by Congress. Mineral lands had previously been excepted by construing the mineral laws *in pari materia* with school grants, but now they are specifically mentioned in amended section 2275, R. S. The power of Congress to provide for the disposal of the remaining alternate sections within railroad grants can not be disputed, for they are public lands, and as such subject to its disposal. In fact, they have been disposed of and are being disposed of under the public land laws, so, if the intent be clear, as announced in the laws providing for school indemnity selections, and I think it is, that the law was meant to allow selections of school lands lost in sections sixteen and thirty-six, acre for acre, regardless of price, whether single minimum, or double minimum, then it follows that lands within the granted limits of a railroad are subject to selection, if not mineral.

In said case it was further said, on page 350:

In view of the growing liberality of Congress in the disposal of the public lands, I can not believe that it intends any backward step to be taken, particularly with respect to the grants for the benefit of the public schools.

Concurring in these views, it is accordingly held that lands lying within the limits of a railroad grant forfeited by the act of September 29, 1890, are subject to selection as indemnity by the public land States for school lands lost in place.

RAILROAD GRANT—TERMINAL LINE—ADJUSTMENT.

NORTHERN PACIFIC R. R. Co.

The terminal line of the Northern Pacific grant at Duluth must be fixed at right angles to the last section of twenty five miles of the road.

Between Thomson and the city of Duluth the Northern Pacific company will not be entitled to indemnity for any lands to which the Lake Superior and Mississippi company may have been entitled under its grant.

All selections by the Northern Pacific company of lands east of the terminus established at Duluth should be canceled.

Secretary Francis to the Commissioner of the General Land Office, October 29, 1896. (F. W. C.)

With your office letter of September 26, 1896, is transmitted for the consideration and approval of this Department a diagram prepared under the decision of this Department of August 27th last, wherein the city of Duluth, in the State of Minnesota, was held to have been the eastern terminus or initial point of the Northern Pacific Railroad grant. Said decision held, upon the showing made, that there had been a confederation, consolidation or association between the Northern Pacific Railroad Company and the Lake Superior and Mississippi Railroad Company as contemplated by the provisions of section 3 of the act of July 2, 1864 (13 Stat., 365).

Between Thomson and Duluth the two grants are upon the same line. There had been a previous grant to the State of Minnesota for the Lake Superior and Mississippi Railroad, which was a grant of the alternate sections, designated by odd numbers, to the amount of five alternate sections per mile on each side of the line of said railroad within the State of Minnesota. This grant was made by the act of May 5, 1864 (13 Stat., 64), which provided for the adjustment of the road in twenty mile sections. The grant for the Northern Pacific Railroad provides for the adjustment in twenty-five mile sections.

Your office letter states,

as the terminal for the prior grant had already been established, that terminal, in fixing the final eastern terminal of the Northern Pacific grant, has been retained, but has been extended to meet the requirements of such grant.

I am unable to approve of the terminal as established, which, under the uniform rulings of this Department, should be at right angles to the last section of road. For the terminal established to the Lake Superior and Mississippi grant the last twenty miles was made the basis to which the terminal was adjusted, while under the Northern Pacific grant it is necessary to take the last twenty-five miles as the basis in adjusting the terminus, and I have to direct that a new terminal be established as the eastern terminus of the grant in accordance with the direction given.

The act of July 2, 1864, provides:

That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act.

As before stated, under the construction of this Department the line of both roads is the same between Thomson and Duluth. A line of the same character as a terminal line should therefore be established upon the Lake Superior and Mississippi Railroad at Thomson; and between the line thus established, and the eastern terminus of the Northern Pacific grant, when established under the directions herein given, the Northern Pacific Company will not be entitled to indemnity for any lands to which the Lake Superior and Mississippi Railroad Company may have been entitled under *its* grant.

This seems to me to be the purpose of the language above quoted, the intention of Congress evidently being to provide against making a double grant where two land grant railroads were found to be upon the same general line. This can only be arrived at by charging to the Northern Pacific all lands received by the company to which the first grant was made opposite the portion of the lines which are similar.

You request instructions as to the action which should be taken upon selections by the Northern Pacific Railroad Company lying east of the terminus established at Duluth, that is, whether they should be canceled outright or held for cancellation subject to appeal.

I can see no good reason for holding them for cancellation, the Department having fully considered and determined upon the eastern terminus, and all selections found east thereof will be canceled.

As to the lists to which you refer which were held for cancellation prior to August 27, 1896, it is presumed that the same refer to selections east of the terminus as established, and that the cases are now pending before this Department on appeal from your action. If this be so, the proper course to pursue will be to advise the Department of the particular facts in each case, to the end that such appeals may be speedily disposed of.

Herewith is returned the diagram submitted, for correction in accordance with the directions herein given.

APPLICATION FOR SURVEY—RES JUDICATA.

G. A. BURNS ET AL.

A decision of the Department directing a hearing on an application for survey of lands lying between the shore and meander line of a lake, in which the doctrine of riparian ownership is considered and held not applicable to the matters involved, renders such question *res judicata*, and the Department will not thereafter consider the same in the disposition of the case on the facts submitted at the hearing.

Secretary Francis to the Commissioner of the General Land Office, October 29, 1896. (E. M. R.)

This case involves a quantity of land estimated to contain about 1202 acres, lying in sections 2, 3, 4, 9, 10 and 11, of T. 57 N., R. 17 W., of the 4th p. m., Duluth land district, Minnesota, on and around the margin of Cedar Island lake, or Ely lake.

The petitioners claim that they are and have been for a long time, *bona fide* settlers upon different portions of the said land and ask that the same be surveyed and platted in order that they may make entry under the homestead laws.

On the other hand, the defendants claim that under patents issued, and swamp land grants made by the government, they have become by mesne conveyances, owners of the following fractional sub-divisions delineated on the map filed in your office, to wit, lots 1, 2, 3, 4, 5 and 6, of Sec. 2, containing 147.10 acres; lots 1 and 2, of Sec. 3, containing 74.75 acres; lots 1, 3, 5, 6, 7 and 8, of Sec. 4, containing 224.37 acres; lots 1, 2, 3 and 4, of Sec. 9, containing 148.10 acres; lots 1, 2, 3 and 4, of Sec. 10, containing 139.26 acres; and lots 1, 2 and 3, of Sec. 11, containing 125.80 acres, aggregating 859.38 acres, in the township aforesaid, forming a cordon of contiguous sub-divisions exterior to the lake aforesaid, and distant from its margin or water line, from one mile to a quarter of a mile at different points.

They claim that as the patentees of the above described 859.38 acres, they are entitled to the 1202 acres lying between said subdivisions and the lake.

January 28, 1895, a decision was rendered in this case (20 L. D., 28), ordering a hearing to be had to determine the facts involved in the controversy, and on April 8, 1895, a motion for review of that decision was denied (20 L. D., 295).

A hearing took place before the United States surveyor-general in Minnesota, in June, 1895; a number of witnesses were examined and the deposition of Simon J. Murphy was taken and considered.

On June 21, 1895, the surveyor-general transmitted his report upon the record, in which he finds:

I am of opinion and report, that the land between Lake Ely, as it actually exists; and the meander line of Cedar Island lake as noted in the field notes of Deputy Howe and as platted upon the government map, was actually in existence as high, rolling, and heavily timbered land, of good agricultural quality, at the time of the pretended survey of Deputy Howe in 1876. I have the honor to recommend that a survey of said land be directed as prayed for in the petition in this proceeding, for I am of opinion that said land was government land in existence at the time of the pretended survey, which has never been surveyed by the government.

On October 31, 1895, your office decision affirmed the recommendation of the surveyor-general and directed him to enter into a contract for the survey of the land in controversy, from which action the defendants appealed.

It is clearly shown by the record that no portion of the interior of this township has ever been surveyed by a government surveyor. The report of Deputy Howe in 1876 was absolutely and unqualifiedly false, and the courses and distances therein given did not represent an actual survey and had no stronger foundation in fact than his imagination. Consequently, the meander line of Cedar Island lake was never actually run, and the 1202 acres of land that now exist, did then exist, between the meander line established by him and the true meander line of said lake, and was never a portion of Cedar Island lake, but was high land, rolling and heavily covered by timber.

The Department has had some difficulty in arriving at a correct conclusion on the question as presented.

The hearing in this case went to two points: whether the physical facts as alleged in the submitted affidavits actually exist on the ground; and second, to establish fraud in the original survey and meander of Cedar Island Lake as executed by Deputy Howe.

The plat made in pursuance of the survey by Deputy Howe in 1876, was adopted and approved by the government as the official plat of this township. All the land in this township between December, 1879, and March, 1887, has been patented. Prior to the issuance of such patents, to wit, in 1879, complaints were made to your office as to the correctness of the survey as made and on June 11, 1879, despite such complaints, an investigation was denied and the plat approved.

On January 19, 1895 (20 L. D., 28), this Department rendered a decision in this case overruling your office decision of October 6, 1893, in

which it was held in reference to the decisions in the cases of *Mitchell v. Smale* (140 U. S., 371), and *Hardin v. Jordan* (idem., 401), that—

The doctrine announced in those cases is not applicable to the one at bar, in that there is no question of riparian ownership here; there has been no recession of the waters of the lake; hence no accretions beyond the meander line, but it is insisted that the land between the meander line and the shore line is not, and never has been, a lake-bed, and by reason of the fraudulent survey, an area of about 1,200 acres of land has been included in the lake that is and was actually government land, and subject to homestead entry as such at the time the official map is alleged to have been made; that the rule that attaches accretion or reliction to the riparian title cannot be applied to this case, for the reason that meander lines were not run to and connected with the true shore line, but were so described as to leave a large area between these two points.

I am disposed to think this contention of counsel is sound. The showing made here is amply sufficient, in my judgment, to justify the belief that the survey by Howe was a palpable fraud upon the government; that there was no attempt made to make the meander lines conform to the shore line; and that government land does and did exist at the time the survey was made, reported and approved.

Under these facts, as they appear, I do not think the doctrine of riparian ownership is applicable to the question involved.

While the *ex parte* statements submitted are not sufficient in themselves to warrant an order for a re-survey, yet they are deemed sufficient to require a hearing to determine whether the physical facts actually exist on the ground, and also to establish the alleged fraud in the survey. This determination renders it unnecessary to discuss at this time any other question suggested.

Motion for review of this decision having been filed on April 8, 1895, the Department denied the motion for review in which it was said (305 L. and R., 486):

Review of this decision is now asked by *Murphy et al.*, who claim to own some of the abutting lots, and their contention is that the Department is without jurisdiction in this matter, for the reason that the land has been patented.

I deem it unnecessary to discuss this question at this time at any length, for the reason that all matters may be presented at the hearing and may be then fully considered in the light of all the facts.

It is only necessary to say that the Department does not seek to obtain jurisdiction over the patented lands; it is only those lands which it is alleged the government was deprived of by a fraudulent survey that can be affected by this hearing. The other question of riparian proprietorship was for the purpose of ordering a hearing, fully considered in the first instance, under the showing made, and it was determined that this doctrine did not apply to the case at bar.

An opportunity, however, was, by the order, given to all parties to be heard, so that all questions might be presented and considered in the final determination.

It is unnecessary to argue at length as to whether these decisions made the question of riparian proprietorship *res judicata*.

The only questions submitted by the original decision for hearing were the questions of fact as has been set out. The legal questions involved became *res judicata* by reason of the decision, nor can it be said that anything contained in the decision on review affected this status because the motion for review was denied. It is true it was said—"That all questions might be presented and considered in the

final determination" but clearly what must have been meant was all questions other than of riparian proprietorship; in other words, the questions of fact as to whether the survey was fraudulent and as to the actual existence of this land between the meander line and the true shore line of the lake. It could not have meant that the question of riparian proprietorship was left open because in the very motion for review it says:

The other question of riparian proprietorship was for the purpose of ordering a hearing fully considered under the showing made and it was determined that this doctrine did not apply to the case at bar.

The doctrine of *res judicata* is one recognized by all judicial tribunals and the correctness or incorrectness of a ruling made in such a case will not be considered.

A decision of one executive officer is binding upon his successor, except upon the grounds that would be sufficient for the ordering of a rehearing. *United States v. Bank of Metropolis* (15 Pet., 377); *Union Logging Co. v. Noble* (147 U. S., 165); *Stone v. U. S.* (2 Wall., 525); *Ex parte Michael Dermody* (11 L. D., 504).

The Department will not therefore go into a discussion of the question of riparian proprietorship and it appearing that counsel for the defendants admit that the facts alleged as a basis for the original ordering of a hearing are in fact true, the decision of your office appealed from is affirmed.

RAILROAD GRANT—LANDS EXCEPTED—JURISDICTION.

NEEDHAM *v.* NORTHERN PACIFIC R. R. Co.

An application to enter, erroneously rejected and pending on appeal, serves to defeat a railroad grant on definite location as to the land covered thereby.

Where lands have been erroneously awarded to a railroad company by decision of the General Land Office, the Secretary of the Interior may review such action without regard to the manner in which the matter is brought before him.

Secretary Francis to the Commissioner of the General Land Office, October 29, 1896. (W. A. E.)

The tract here involved, viz., the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 19, T. 13 N., R. 19 E., North Yakima, Washington, land district, is within the limits of the withdrawal of June 11, 1879, on amended general route of the branch line of the Northern Pacific Railroad, and on definite location of the road, as shown by map filed May 24, 1884, it fell within the primary or granted limits of said road.

February 6, 1891, John H. Needham filed homestead application for said tract, which was rejected for conflict with the railroad company's claim.

On appeal, the action of the register and receiver was affirmed by your office on May 22, 1895.

Needham then attempted to appeal to the Department, but for some reason that does not clearly appear, he did not file said appeal until after the time allowed therefor had expired. Your office accordingly declined to forward the appeal, whereupon Needham filed application for writ of certiorari.

It appears that on January 29, 1884, one John C. McCrimmon filed application to make timber culture entry for this land; that his application was rejected for the reason that the land had been withdrawn for the benefit of the railroad company; that he appealed and his appeal was pending before your office on May 24, 1884, when the map of definite location was filed; and that on March 21, 1885, your office affirmed the action of the register and receiver in rejecting his application.

It has been held by the Department that the withdrawal on amended general route of the Northern Pacific Railroad was without sanction of law and invalid. *Northern Pacific R. R. Co. v. Miller*, 7 L. D., 100; *Northern Pacific R. R. Co. v. Cole*, 17 L. D., 8.

The right of the company to the land in question did not attach, therefore, until May 24, 1884, the date of definite location, and at that time McCrimmon's application to make timber culture entry was pending before your office.

In the case of *Weeks v. Bridgman*, 159 U. S., 541, certain lands in Minnesota fell within the primary limits of a railroad grant, as shown by map of definite location filed December 30, 1857. Prior to that time, to wit, on August 7, 1857, one George F. Brott applied to file pre-emption declaratory statement for these lands, his application was rejected, he appealed, and his appeal was pending before your office at date of definite location. Held, that his pending application excepted the land covered thereby from the operation of the grant. It was said by the court:

The line of the road was definitely fixed December 30, 1857; the lands within the place limits then subject to the grant were thereby segregated from the public domain; and the grant took effect thereon. But under the granting act, lands to which pre-emption rights had attached, when the line was definitely fixed, were as much excepted therefore as if in a deed they had been excluded by the terms of the conveyance. And this was true in respect of applications for pre-emption rejected by the local land office and pending on appeal in the land department at the time of definite location, since the initiation of the inchoate right to the land would prevent the passage of title by the grant, and the determination of its final destination would rest with the government and the claimant.

McCrimmon's timber culture application was filed at a time when the land was legally subject to entry. It was made in proper form and was accompanied by an affidavit showing that the applicant was qualified to enter. The only ground on which it was rejected was that the land had been withdrawn for the benefit of the railroad company. His appeal from the rejection was pending before your office at the date of definite location of the road. In its essential features this seems to be a parallel case with the one just cited. The filing of a valid applica-

tion to make entry, at a time when the land was legally subject to entry, gave to McCrimmon an inchoate right to the land—a right that was still existing at the date of definite location of the road—and, as said by the supreme court,

the initiation of the inchoate right to the land would prevent the passage of title by the grant, and the determination of its final destination would rest with the government and the claimant.

It thus appears that the tract in controversy is now public land of the United States, subject to entry, and that the local office and your office erred in rejecting Needham's application to make homestead entry therefor.

In the case of the Sioux City and Pacific R. R. Co. *v.* Wrich, 22 L. D., 515, it was held that the Secretary of the Interior is charged with the adjustment of railroad grants, and should withhold from other disposition lands granted for such purpose, even though the grantee may fail to appeal from an erroneous adverse decision of the General Land Office.

It follows as a corollary from this ruling that where lands have been erroneously awarded to a railroad company by decision of your office, the Secretary of the Interior may review such action without regard to the manner in which the matter is brought before him. (See in this connection the case of Knight *v.* United States, 142 U. S., 181.)

You are accordingly directed to certify the record to this Department.

RAILROAD GRANT—WITHDRAWAL—ACT OF APRIL 21, 1876.

BRISKEY *v.* NORTHERN PACIFIC R. R. Co.

The provisions of section 1, act of April 21, 1876, protect a homestead settlement right acquired within the limits of a railroad grant prior to the time when the notice of withdrawal is received at the local office.

Secretary Francis to the Commissioner of the General Land Office, November 12, 1896. (W. F. M.)

The land involved in this case is in the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 13, township 24 N., range 17 E., in the land district of Waterville, Washington, and lies within the primary limits of the grant to the Northern Pacific Railroad Company as shown by the map of general route, branch line, filed August 15, 1873, and by the map of definite location filed December 8, 1884.

On March 7, 1893, George W. Briskey made homestead application for the land, alleging settlement in 1885.

A hearing was held to determine its status at the date of the withdrawal on general route and definite location. The register and receiver found for the plaintiff, who has brought the case here on appeal from

the decision of your office, reversing that of the local office and rejecting his homestead application for conflict with the company's grant.

The rights of the company under the withdrawal of August 15, 1873, have been held to have been abandoned (*Morrill v. Northern Pacific R. R. Co.*, 22 L. D., 636), and notice of the withdrawal on account of definite location was not received at local land office until January 7, 1888, long after Briskey's settlement in 1885.

The remedial features of the act of April 21, 1876 (19 Stat., 35), have been so extended by this Department as to protect persons who have settled on lands within the limits of any grant prior to notice of the withdrawal at the local land office (*Kimberland v. Northern Pacific R. R. Co.*, 8 L. D., 318), and though in that case a filing had been made of record after the said notice, and is in that respect distinguished from the present case, no difference is distinguishable in the equitable attitude of the parties.

I think, therefore, that Briskey is protected by the act, *supra*, and the decision of your office is accordingly reversed.

PERRY ET AL. v. HASKINS.

Motion for review of departmental decision of July 7, 1896, 23 L. D., 50, denied by Secretary Francis, November 12, 1896.

RAILROAD GRANT—DESERT ENTRY—SETTLEMENT CLAIM.

NORTHERN PACIFIC R. R. CO. ET AL. v. CANADAY.

A desert land entry made prior to the receipt of notice of withdrawal at the local office, by an actual settler, is protected under the provisions of section 1, act of April 21, 1876; and the operation of the statute is not defeated in such case by the fact that the entry was made after the passage of the act.

An adverse settlement claim will not defeat a desert entry if due priority of right is not shown thereunder.

A claim of occupancy and settlement is not effective as against a railroad grant if the claimant is not a qualified settler.

Secretary Francis to the Commissioner of the General Land Office, November 12, 1896. (I. H. L.) (J. L. McC.)

On March 15, 1886, Ira Canaday made desert-land entry for the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 27, and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 34, T. 22 N., R. 21 E., Waterville land district, Washington.

On February 12, 1889, he applied to make final proof; which, after due notice, was made April 15, 1889.

Upon making proof he was confronted by protests from the Northern Pacific Railroad Company, and from one Alfred Thomas.

By your office letter of June 12, 1889, a hearing was ordered to determine the rights of the parties. The hearing was had on August 11, 1890. All parties were represented.

As the result of the testimony taken at said hearing, the local officers recommended the acceptance of Canaday's final proof. Both Thomas and the railroad company appealed to your office.

On May 20, 1895, your office affirmed the decision of the local officers in favor of Canaday.

A motion for review was filed; but your office, on August 26, 1895, announced that it found no reason for disturbing its previous decision.

Both Thomas and the railroad company have appealed to the Department.

I.—Canaday and the Railroad Company.

The claim of the Northern Pacific Railroad Company to the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 27, conflicting with Canaday's claim, will be first considered.

The land is within the forty-miles limit of the branch line of said company's road, as shown by the map of definite location filed December 8, 1884. It was also embraced in the withdrawal on the map of general route, filed August 15, 1873; but it fell outside of said withdrawal on the map of amended route, filed June 11, 1879. It was "listed" by the company, per list 2, on April 8, 1893.

The railroad company alleges, in substance, that inasmuch as Canaday claims by virtue of a desert-land entry, he could acquire no right by virtue of settlement made prior to entry; that the withdrawal of 1873 was of continuing force and effect, and reserved said land from settlement and entry; hence that the settlement of Canaday in 1883, and his desert-land entry of 1886, were alike illegal—the first because of the withdrawal on general route; the second because of withdrawal on definite location.

The Department has decided, in the case of *Morrill v. The Northern Pacific Railroad Company* (22 L. D., 636), that the route of 1873 was abandoned by the company, and the Department duly notified thereof as early as 1876; and that the withdrawal of 1873 can not be pleaded as against parties who settled upon or entered lands prior to the filing of the map of definite location. Canaday's settlement (in 1883) was made before, and his desert-land entry (on March 15, 1886,) was made after, the date of the filing of the map of definite location (December 8, 1884); but notice of the filing of said map was not received at the local office until January 26, 1888; hence until the latter date the land was free from any valid claim by the company as against a prior entryman or settler, and there was nothing to prevent Canaday's claim from attaching by virtue of his entry of March 15, 1886 (*supra*). The fact that it was a desert-land entry does not alter the case, inasmuch as the act of April 21, 1876 (19 Stat., 35), saves "all pre-emption and homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith, by actual settlers," prior to the time when notice of the withdrawal was received at the local office. The fact that said entry was made subsequently to the

passage of said act does not prevent its applicability to the case at bar—Canaday having been shown to be an actual settler. (*Northern Pacific Railroad Co. v. Crosswhite*, 20 L. D., 526; *Offutt v. Northern Pacific R. R. Co.*, 9 L. D., 407.)

For the reasons above given, that part of your office decision which holds for cancellation the company's claim to so much of the land in the odd section (27) as is in contest between said company and Canaday is hereby affirmed.

II.—Canaday and Thomas.

Alfred Thomas, on April 18, 1893, filed application to enter the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 27, and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 34, alleging settlement in October, 1883.

This claim conflicts with that of Canaday as to the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 27, and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 34.

Your office decision appealed from rejected his claim because at the hearing had on August 11, 1890, he had testified as follows:

Q.—Have you ever taken any lands under the United States land laws?—A. Yes.

Q.—Under what law did you take them?—A. Homestead, pre-emption, and timber-culture laws.

The above would seem to be sufficiently explicit; but his application to make homestead entry was accompanied by an affidavit to the effect that he had never before made any entry under the homestead laws of the United States; and his application to your office for a review of its decision of May 20, 1895, and in his appeal to the Department, he insists that he never said he had exercised his homestead, pre-emption, and timber-culture rights, and that if the record so states he had been mis-reported; and he asked for a hearing, asserting that he can show conclusively that he has not exhausted his homestead right.

It appears to me that the question as between him and Canaday can be decided irrespective of the question as to whether or not he had previously exhausted his rights.

In his testimony at the hearing he stated that he "first knew the land in the fall of 1883, about October." In his motion for a rehearing (on the ground of newly discovered evidence) he supported his application by affidavits of several persons, who stated that they saw him in the vicinity of the land in October or November of 1883.

On the other hand, Canaday testified that he first went upon the land, and selected it, in May, 1883—remaining upon it at that time about four days; that he returned in October, said Thomas accompanying him, and took actual possession of the land selected and settled upon in May preceding. This testimony is not denied. He testified further:

Thomas proposed to divide the land. . . . We divided the land and I gave him his choice. He said he would take the S. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 27, and the N. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 34. I then took the S. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 27, and the N. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 34, T. 22 N., R. 21 E.

The above testimony is not denied, and is corroborated by that of a witness who states that Thomas told him that such a division had been made.

In view of the facts shown, the local officers and your office both found that Canaday had established a prior and paramount right to the land in controversy between the two; and I see no reason for disturbing said decision in so far as regards said land.

III.—Thomas and the Railroad Company.

The conflicting claims of Thomas and the railroad company to the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 27 still remain to be considered.

In regard to this branch of the case the local officers said:

From the testimony we find that Thomas went on the land he now seeks to enter in October, 1883, and located a ditch to convey water upon the land, and set up a notice. In the spring of 1884 he fenced about twenty-five acres, and plowed six acres.

The above refers to the entire one hundred and sixty acres which Thomas applied to enter. Then the local officers go on to speak of the specific forty-acre tract now under consideration:

About fifteen acres of the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ was enclosed in said fence, and about one and a half acres put in wheat in the spring of 1884.

Therefore they held that his settlement and occupancy excepted the land from the operation of the grant.

The decision of your office upon this branch of the case was as follows:

Whatever rights Thomas may have had as against the railroad company, by reason of settlement on the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 27, the evidence in support of which, being of the most unsatisfactory character, he has attempted to perfect such claim by application to make homestead entry, alleging that he had not previously exercised his right, while the record before me shows that in 1890 he swore that he did. The said application is accordingly rejected.

In my opinion the local officers were correct in finding that Thomas's settlement and occupancy of the forty acres now in question was such as to except it from the operation of the grant—*provided* he was a qualified settler. Inasmuch as he insists that he has never exercised his homestead right, and that he was misreported in the testimony in which he is represented as saying that he had, I see no way of deciding this branch of the case intelligently with the question of his qualifications left undecided and uncertain. I have therefore to direct that a hearing be ordered, as prayed for by Thomas, at which he shall be afforded opportunity to show whether he has or has not hitherto exhausted his homestead right. In case it shall appear that he has not done so, his application to enter so much of the land claimed by him as has not hereinbefore been awarded to Canaday will be allowed.

The decision of your office is modified as above indicated.

HOMESTEAD CONTEST—SETTLEMENT CLAIM—SECOND ENTRY.

SMITH ET AL. *v.* TAYLOR.

A homestead settlement, made by one who has at such time an existing homestead entry for another tract, must be held valid where the settler is entitled to make a second entry; and a second entry based on such settlement, and allowed prior to the actual cancellation of the first, though irregular, may stand.

Secretary Francis to the Commissioner of the General Land Office, November 12, 1896. (I. H. L.) (E. B., Jr.)

This is a contest for the NE. $\frac{1}{4}$ of section 35, T. 22 N., R. 1 W., Perry, Oklahoma, land district, under the homestead law. The tract is within what was formerly known as the Cherokee Outlet which was opened to settlement and entry under the homestead law at noon of September 16, 1893. It lies three and one half miles north of Perry and twelve and one half miles north of the southern boundary of said outlet.

William J. Taylor made homestead entry No. 12 for the tract on the day of the opening at 2:45 p. m. On September 20, David R. Smith, and on October 9, 1893, William L. Maupin initiated contests against said entry, alleging, each, that he was the first settler on the land. On March 20, 1894, Maupin filed his supplemental affidavit alleging that Taylor had a homestead entry on file at the Guthrie, Oklahoma, land office, for the NE. $\frac{1}{4}$ of Sec. 17, T. 15 N., R. 3 W., at the time he made said entry No. 12. The cases were consolidated and went to trial June 21, 1894. January 15, 1895, the local office decided in favor of Smith holding, that he was the first settler on the tract, and followed up his settlement according to law, that Maupin's claim to the tract was subordinate to those of the other parties, he never having established residence upon the land up to the day of the trial, and that Taylor "obtained no rights whatever by reason of his homestead entry" for the land, in view of the fact that he had then a subsisting homestead entry as alleged by Maupin.

Upon appeal by Taylor and Maupin your office decided, August 10, 1895, that Taylor was the first settler on the land and established his residence thereon, improved and cultivated the same as required by law, and held his entry, though irregularly made, to be intact. It appearing that the entry made by Taylor at the Guthrie office April 30, 1889, had been finally canceled on the records of your office, November 22, 1893, under decisions of the Department dated February 24, 1893, and September 23, 1893 (the latter on a motion for review), awarding the land covered thereby to the successful contestant Nicholas Jackson, on the ground of his prior settlement, your office held that such entry did not invalidate Taylor's entry of the tract in controversy.

Smith and Maupin each prosecutes an appeal to the Department. The numerous assignments of error in these appeals may be reduced to two:

1. Error in holding that Taylor was the first to make settlement on said tract;

2. Error in holding that Taylor was not disqualified to make settlement and entry for the tract involved in this contest by reason of the entry previously made by him at Guthrie.

The testimony is very voluminous, and somewhat conflicting. It shows, however, that Taylor and Maupin began the race for a homestead in the Cherokee Outlet at the hour appointed for the opening from about the same point on the southern boundary thereof, a little west of south from the said tract, and about thirteen miles from where they stuck their stakes thereon, and that Smith began the race from a point on the same boundary a little east of south from the said tract and about fourteen miles from where he struck his stake thereon. They all made the race on horseback. Taylor had an advantage over his competitors in that he was to some extent familiar, while they were not, with the country over which they traveled and had been over the particular region of the tract in controversy just prior to the inhibited period of entry upon these lands, which commenced March 3, 1893. I find the other material facts to be substantially as found by your office and set out in its decision. They need not be recited here in detail.

The precise moment at which Taylor stuck his flag on the land can not be determined, as he had no watch and no one, apparently, saw him in the act. Two Otoe Indians testify that they saw him on or near the tract riding rapidly away from it toward Perry at about one o'clock P. M., as near as they could tell from the sun, on the day of the opening. They had no watch. One of them testifies explicitly to seeing then a flag at about the point where Taylor's was stuck. Taylor arrived at the Perry land office, as is shown by his own testimony and that of U. S. Deputy Marshal Pulse, of whom he asked the time and who aided him in securing a place in the line there, at 1:07 P. M. Smith admits that he saw a flag on tract as he rode by and before he stuck a stake thereon, or laid claim thereto, at about the point where Taylor testifies that he stuck the flag. Smith and his witnesses testify that Smith stuck or attempted to stick his stake at about 12:48 P. M. But his admission as to seeing the flag, and the testimony of the Otoe Indians, as well as that showing the time of Taylor's arrival at the land office, are all strongly in favor of the latter. The conclusions of the local office and your office, that Maupin's rights are subordinate to those of the other parties, are fully sustained by the evidence.

Unless the first entry made by Taylor disqualified him for making settlement on said tract his settlement was prior to that of either Smith or Maupin. He was first on the land and first laid claim thereto in the manner recognized and approved by the custom in Oklahoma Territory, and warranted by the law, and has shown full compliance with the law in the matters of residence and cultivation since. It must be conceded that his second entry, while the first was yet uncanceled—and perhaps his settlement also for the same reason—was irregular. But were both settlement and entry, or either of them, nullities—absolutely void—on that account? The Department does not so hold in view of all the

circumstances of the case. Judgment of cancellation on the ground already indicated had been entered by the Department against his first entry February 24, 1893 (262 L. and R., 359). This judgment would have been executed by the cancellation of the entry upon the records, but for Taylor's motion for review which only suspended its operation. The testimony shows that subsequent to the filing of such motion Taylor manifested an intention to accept and acquiesce in said judgment. In his homestead affidavit filed September 16, 1893, he swears that his application for the tract in contest

is honestly and in good faith made for the purpose of actual settlement and cultivation and in good faith to obtain a home for myself.

This is only consistent with the view that he regarded his former entry as lost to him and to all intents and purposes the same as if then already canceled.

His first entry was defeated through no fault of his, but by reason of a superior right in another to the land covered thereby. It is well settled doctrine that he did not therefore lose his homestead right. The Department has frequently upheld the right to make a second entry in cases where the equities were, to say the least, no stronger than in this case (James M. Frost *et al.*, and cases cited therein, 18 L. D., 145). If the right to make a second entry were not lost to Taylor he certainly was not disqualified to make settlement on the tract. His settlement being valid and prior to the alleged settlements of Smith and Maupin, his right to the tract in controversy must be held superior to their claims. So far as they are concerned, standing upon his settlement alone, he must prevail. The irregularity of his second entry would not defeat his superior right as a settler. If that entry should be canceled for such irregularity it would be without prejudice to his right to make again entry for the same tract. Cancellation under these conditions would be a vain act.

The entry will be allowed to stand. The decision of your office is affirmed.

ALASKAN LANDS—APPROVAL OF SURVEY.

THE LYNDE AND HOUGH COMPANY.

The government is not bound by an erroneous approval of field notes and plat of survey, under section 13, act of March 3, 1891, to issue patent contrary to the provisions of said act requiring land to be taken as nearly as practicable in a square form.

Secretary Francis to the Commissioner of the General Land Office, November 12, 1896. (I. H. L.) (J. A.)

This is an appeal by the Lynde and Hough Company, a corporation, from the decision of your office of July 31, 1895, holding for cancellation the final certificate issued to said corporation December 5, 1893, for

the "tract of land embraced by United States survey No. 55, at and near Humboldt harbor, on Popoff Island, in Alaska, containing 135.07 acres."

The said survey was made on the application of the Lynde and Hough Company to the ex-officio surveyor general of Alaska under sections 12 and 13 of the act of March 3, 1891 (26 Stat., 1095), and covers a narrow strip of land of irregular form running along the coast of Humboldt harbor and of Popoff straits for a distance of about three miles. The survey was approved by the ex-officio surveyor general of Alaska on December 26, 1892, and by your office on June 12, 1893. August 12, 1893, the company filed its application to purchase the land and on the same day gave notice of intention to make final proof. December 5, 1893, final proof taken in California on a commission issued by the local officers was submitted, whereupon the ex-officio register issued final certificate for the land to said company.

July 31, 1895, your office considered the case on the papers transmitted by the local officers and held that the final proof is insufficient for reasons which it is not necessary here to set out, and that final proof for lands in Alaska can not be made before other officers than the ex-officio register and receiver. Your office further held that patent can not issue to said company for the reason that the survey was made in violation of section 12 of said act of March 3, 1891, which provides that the land must be taken as near as practicable in square form. The final certificate issued to the company was therefore held for cancellation.

The appellant contends that the irregularities in the final proof can be cured by supplemental proof and therefore did not warrant the order of cancellation, and that your office is estopped by the approval of the field notes and plat from objecting to the form of survey.

Section 13 of said act of March 3, 1891, after making provision for the survey of lands upon the application of the occupant, and for the transmission of certified copies of the maps and plats of survey to the General Land Office, provides as follows:

That when the said field notes and plats of said survey shall have been approved by the said Commissioner of the General Land Office, he shall notify such person, association, or corporation, who shall then within six months after such notice, pay to the said United States marshal, ex officio surveyor-general, for such land, and patent shall issue for the same.

The issuance of patent for a strip of land like the tract in controversy was not contemplated by the act of March 3, 1891. The provision of section 13 of said act, above quoted, did not estop your office, on an application for patent, from considering the fact that the survey is irregular. The insufficiency of the final proof and its irregular submission does, therefore, not enter into a consideration of the case.

The action of your office in cancelling the final certificate amounts, in effect, to a revocation of the approval of June 12, 1893, of the field notes and plat of survey. The government has control over the public

lands until patent has issued, and it is not bound by an erroneous approval of the field notes and plat of survey under section 13 of the act of March 3, 1891, to issue patent contrary to the provisions of said act. The decision appealed from is accordingly affirmed.

WEEDIN *v.* LANGER.

Motion for review of departmental decision of August 28, 1896, 23 L. D., 248, denied by Secretary Francis, November 12, 1896.

FINAL PROOF—AMENDED RULE 53 OF PRACTICE—PROTEST.

KEAGY *v.* WILCOX.

When final proof is submitted under amended Rule 53 of Practice, pending the disposition of a contest involving the land, it should be held for appropriate action in the event the entry is adjudged valid, and until such time no action can be legally taken thereon by way of proceedings on protest in the local office.

Secretary Francis to the Commissioner of the General Land Office, November 12, 1896. (I. H. L.) (C. J. W.)

In transmitting the motion of Elba O. Wilcox, to set aside the decision of the register and receiver, in which on considering his final proof, they found that he had abandoned the land to which said proof related, and recommended the cancellation of his entry, your office makes the following statement:

I will state that in the matter of a former proceeding had between the same parties on the issue of prior settlement, the land involved (SE. $\frac{1}{4}$ Sec. 4, T. 25, R. 2 W., Perry land district) was awarded to Wilcox, by departmental decision rendered March 28, 1896, and case closed by this office July 22, 1896.

October 28, 1895, Wilcox submitted commutation proof. On the date set for making proof, Keagy filed affidavit of protest, alleging non-compliance with the law as to residence, and the case went to trial on such issue. Decision was rendered by the local office June 12, 1896, recommending the cancellation of the entry, personal service of such decision being made on the parties June 13, 1896. On July 28, 1896, the within motion was filed. It appears that Keagy's motion was never filed. See statement of plaintiff's attorney, and report from the local office, also transmitted herewith. There is no record of receipt by this office. Action on the case is held waiting the disposition of the motion transmitted herewith.

Keagy files motion to dismiss the motion to set aside the decision of the local officers and declare the same final because not appealed from, which is overruled.

The original motion denies the authority of the local officers to take action on the final proof of Wilcox, made pending the contest between him and Keagy then before the Department, and their jurisdictional authority to hear any further testimony in the nature of a contest pending said original case. This position is well taken, and is in

accordance with the ruling of the Department in the recent case of *The State of California v. Reeves* (23 L. D., 377), wherein it was held that pending a contest before the Department, the local office was without jurisdiction to entertain another contest against the same party involving the same land, and that evidence submitted at such second hearing could not be considered in determining the first contest.

Rule 53 of Practice, as amended March 15, 1892 (14 L. D., 250), permits an entryman after trial of a contest before the local office and before the entry is finally adjudged valid to submit final proof and complete the same, with the exception of the payment of the purchase money or commissions as the case may be, but directs that said final proof be retained in the local office to be disposed of after the entry is finally adjudged valid.

Under Rule 53 as it originally stood the local officers could have taken no additional action whatever affecting the status of the land pending appeal from that office, and as the rule is enlarged by amendment, only to the extent of allowing the entryman to submit his final proof to be held in the office for action after the entry is finally adjudged valid, it confers no authority for action on a protest or other additional proceeding against the entry. It follows that the action of the local officers in rejecting the final proof of Wilcox, and recommending the cancellation of his entry based on proof taken in unauthorized protest proceedings, was illegal and should be set aside.

Your office will direct the local officers, after giving due notice of this decision, to consider said final proof as offered by the entryman, and take appropriate action thereon, without reference to the testimony prematurely submitted by protestant, allowing him, if he desires to do so, to be now heard on his protest, and to submit testimony in support of it.

RAILROAD GRANT—ACT OF MARCH 2, 1896.

WASMUND *v.* NORTHERN PACIFIC R. R. CO.

The joint resolution of May 31, 1870, was in the nature of a new grant, and only such lands as were in a condition to pass under the terms of the grant to the company, at the date of the passage of said resolution, were intended to be granted thereby.

Where the title of a purchaser of lands excepted from a railroad grant is confirmed by the act of March 2, 1896, demand should be made upon the company for the minimum government price of the land, with a view to judicial proceedings for the recovery of the value thereof as contemplated by said act.

Secretary Francis to the Commissioner of the General Land Office, November 12, 1896. (I. H. L.) (F. W. C.)

With your office letter of November 7, 1895, you transmitted the papers in the case of *Carl Wasmund v. Northern Pacific Railroad Company*, involving the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of

Sec. 1, T. 19 N., R. 4 E., Olympia land district, Washington, on appeal by Wasmund from your office decision of May 25, 1895, in favor of the company.

This tract is within the primary limits of the grant for the altered branch line and also opposite that portion of the main line of said company extending northward from Portland, Oregon, to Puget Sound, to aid in the construction of which a grant was made by the joint resolution of May 31, 1870 (16 Stat., 378).

The map showing the line of definite location of the main line opposite this land was filed May 14, 1874, and that showing the definite location of the branch line opposite this land was filed on March 26, 1884. The company included the tract in its list of June 30, 1888, upon which patent issued December 13, 1894.

The present case arose upon an application tendered by Wasmund in August, 1885, which was rejected by the local officers for conflict with the grant; from which action he appealed, the papers being forwarded with registered letter on August 29, 1885. Upon the allegations made in said appeal hearing was ordered by your office letter of January 2, 1889, which was duly held, the local officers recommending the allowance of Wasmund's application. From this action the company appealed to your office, and the matter was thus pending at the time the tract was included in a clear list by your office and submitted for approval.

The records show that one W. H. Fleetwood on November 23, 1872, filed preemption declaratory statement for this land, alleging settlement August 1, 1870. Upon his offer of proof thereon the matter was contested by the company and Fleetwood's filing was canceled June 16, 1877, for illegality; your office finding that he was a minor and not the head of a family at the time of his settlement in November, 1870, which was subsequent to the filing of the map of general route of the main line of said company, August 13, 1870, the withdrawal upon which included this land.

Upon the evidence adduced at the hearing ordered upon Wasmund's application, your office decision held as follows:

While the evidence in this case shows that Stilly settled and resided upon this land from the fall of 1868 until the fall of 1870, as what he terms "a squatter," without having made or announced any formal claim thereto; that fact alone, in the absence of affirmative evidence that he was, at the date of the withdrawal made on the map filed August 13, 1870, qualified to assert a claim to the land under the settlement laws, would not be sufficient to except it from the operation of the grant, and there is no evidence in this case to show that Stilly was so qualified at that time, except by an affidavit made by him September 14, 1894, and filed in this office November 27, following, after service of same on October 2, upon the resident attorney of the company.

It is shown by a certified copy of a deed, dated May 30, 1878, that the Northern Pacific Railroad Company on that day conveyed to one Isaac W. Anderson the land in question, reserving for the right of way of its road four hundred feet in width through the same, and by certified copy of another deed, dated December 3, 1881, that said Anderson conveyed same land to Carl Wasmund.

The question of the competency of Stilly's affidavit as evidence to prove his qualifications during his occupancy of this land need not be gone into in this case, as Wasmund has a deed to the land flowing from the company's title, and the land has been patented to the latter, which divested this Department of jurisdiction over it; and reversed the judgment of the local officers in favor of Wasmund, who appeals to the Department.

It appears from the record in the case of *William Fleetwood v. Northern Pacific R. R. Co.*, which is by stipulation a part of the record in the case under consideration, that Fleetwood took the deposition of Stilly before the local officers, which shows that he was a duly qualified settler and was claiming the land as a preemptor at the date of the passage of the joint resolution of May 31, 1870 (*supra*). This renders it unnecessary to pass upon the question as to whether the affidavit of Stilly filed in your office November 27, 1894, can be properly considered as a part of the record in the disposition of this case. With Stilly's qualification established it is clearly shown that this land was, by reason of Stilly's claim, appropriated at the date of the passage of said joint resolution. It is true that Stilly had not filed for the land, but this he could not do because the land was then unsurveyed, the plat of survey of said township not having been filed in the local office until 1870.

In the case of the *United States v. Northern Pacific R. R. Co.* (152 U. S., 284), in referring to the joint resolution of May 31, 1870, it was stated that:

By the resolution of 1870 it was declared that if at the time of the final location of the company's main line or branch there were not enough lands per mile within the prescribed limits, the deficiency could be supplied from lands within ten miles beyond those limits, other than mineral and other lands as excepted in the charter of the company "to the amount of the lands that have been granted, sold, or reserved, occupied by homestead settlers, pre-empted or otherwise disposed of subsequent to the passage of the act of July 2, 1864." It is therefore clear that no public land disposed of after the passage of the act of July, 1864, was intended to be embraced in the grant of May 31, 1870.

In the case of *Corlis v. Northern Pacific R. R. Co.* (23 L. D., 265) it was held, that in determining what lands passed to the altered main or branch line, as provided for by the joint resolution of May 31, 1870, said resolution must be considered as in the nature of a new grant, and that only such lands as were in a condition to pass under the terms of the grant to said company at the date of the passage of said resolution were intended to be granted thereby. Said resolution provided for the selection of indemnity

to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of subsequent to the passage of the act of July 2, 1864.

It is plain that Stilly's claim was included in the exception from the grant provided for under the resolution before referred to, and this being the condition of the land at the date of the passage of said resolution, it is excepted from the grant to said company upon either its

altered main or branch line. This being so, it follows that the cancellation of Fleetwood's filing on account of the grant for said company was therefore erroneous. There is no claim pending before the Department on account of said filing, however, and a further consideration at the present time of any rights on account thereof is unnecessary.

Your office decision holding that the tract passed to the company under its grant is accordingly reversed.

Wasmund not only claims the land under his application presented in 1885, but also holds the tract through mesne conveyances from the company. This being so, as between Wasmund and the United States a suit for the recovery of title would be unnecessary, as his claim would seem to be confirmed by the provisions of the act of March 2, 1896 (29 Stat., 42), I have therefore to direct that demand be made upon the company for the minimum government price of the land, to the end that, should it refuse, steps may be taken looking to the institution of suit to recover the value thereof through the courts, as contemplated by said act.

STONE ET AL. *v.* CONNELL'S HEIRS.

Motion for review of departmental decision of August 4, 1896, 23 L. D., 166, denied by Secretary Francis, November 16, 1896.

JURISDICTION—SECOND CONTEST—EVIDENCE.

STATE OF CALIFORNIA *v.* REEVES.

During the pendency of an appeal the local office has no jurisdiction to entertain contest proceedings affecting the land involved, and evidence submitted at such a hearing can have no effect as against the entry under attack.

Secretary Francis to the Commissioner of the General Land Office, November 16, 1896. (I. H. L.) (A. E.)

On September 12, 1896, Peter Mathiason, by his attorney H. W. Duncan, filed in the local office a motion, alleging errors in departmental decisions, dated July 1, 1896, rendered in a case entitled *State of California v. Albert F. Reeves* (23 L. D., 377). The land involved in the last-named case was the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 18, Tp. 5 N., R. 10 W., S. B. M., Los Angeles, California.

The record relating to this land shows that one Cora L. Mathiason secured the cancellation of desert land entry covering the N. $\frac{1}{2}$ and the SE. $\frac{1}{4}$ of said section above mentioned.

On August 10, 1894, before Mathiason was notified of her preference right by reason of securing the cancellation of the entry on the land, one Albert Reeves applied to make desert land entry of the N. $\frac{1}{2}$ of the section. This application was held to await the expiration of the thirty days within which Mathiason had to exercise her preference.

Mathiason was duly notified of her right on August 16, 1894.

On September 13, 1894, the State of California presented its selection of the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the same section. Action on this was also suspended to await the pleasure of Mathiason.

On the same day, but subsequent to the selection of the State, Mathiason made entry of the SE. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section. This left the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the section vacant.

The local office then notified Reeves, and on October 16, 1894, he came in and made entry of as much land covered by his application as was vacant, which was the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said section.

The State selection for the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ was then rejected. The State then appealed, and from your office decision of December 28, 1894, upholding the local office, it appealed to this Department.

In this appeal the State was represented by one H. W. Duncan, who signed himself as attorney for the State. While this appeal was pending here the Secretary received a letter from Mr. Duncan requesting that action on the case of *California v. Reeves* be deferred until testimony, being taken reflecting on the entry of Reeves, could be forwarded.

In answer to this letter the First Assistant Attorney, under direction of the Secretary, on January 31, 1896, sent the following reply (Miscel. letter book, 323):

I am directed by the Secretary to say to you, in answer to your letter of January 22, 1896, requesting him to defer action on the case of the State of California *v. Albert F. Reeves*, that the case referred to is now under consideration, and should the same result in a decision in favor of the State, the testimony you refer to could not be considered. Should, however, the entry of Reeves be upheld, any evidence indicating that the entry should be canceled must be presented to the officers of the district land office, in accordance with the rules relating to contests.

On February 17, 1896, the Department affirmed the decision of the General Land Office in rejecting the State's selection, and allowed the entry of Reeves to remain intact.

On May 25, 1896, the General Land Office transmitted a motion for review of this last above mentioned decision filed by H. W. Duncan, who signed himself attorney for the State of California. With this motion Mr. Duncan filed what was alleged to be testimony taken in a contest case entitled *Peter B. Mathiason v. Harlan B. Sweet*, assignee of Albert F. Reeves. This was presumably the same testimony referred to by Mr. Duncan in his letter of January 22, 1896, and which the Secretary had directed must be presented to the local land office "in accordance with the rules relating to contests."

This testimony, having been taken when the Secretary had exclusive jurisdiction of all matters relating to the land in controversy, and the local officers no jurisdiction, and not therefore being presented at the local office "in accordance with the rules relating to contests," was not considered. The Department, by decision dated July 1, 1896, referred

to the hearing as "irregular, erroneously allowed, and was without jurisdiction."

Your office now transmits a motion by H. W. Duncan, as attorney for Peter B. Mathiason, asking that the decision of July 1, 1896, holding that the hearing in the case of Mathiason v. Sweet was "irregular, erroneously allowed, and was without jurisdiction," be reviewed.

As no reason is shown wherein this holding was incorrect, the motion must be denied. The reasons for this are as follows:

When the State appealed, and by that act the entry of Reeves became suspended and the local office lost jurisdiction, there was no contestable entry of record, nor did any tribunal have jurisdiction to conduct a hearing. The testimony taken before the local officers was therefore void, so far as it could affect the entry of Reeves. Mr. Duncan, attorney for Mathiason, admits in the motion under consideration that Mathiason was the real party in interest in the first case, therefore it was by Mathiason's appeal that the local office lost its jurisdiction.

It is noticed that a copy of the motion now under consideration is not served upon Reeves, but only on Sweet, therefore so far as the record shows, Reeves has no notice of this proceeding. In view of the conclusion reached, however, this neglect is not material.

The papers are herewith returned, and the judgment rendered in the decisions of February 17, and July 1, 1896, will remain as handed down.

DESERT ENTRY—PRICE OF LAND—ACT OF MARCH 3, 1891.

FREDERICK W. LAWRENCE.

The act of March 3, 1877, did not reduce the price of desert land within the limits of railroad grants to single minimum; nor did the amendatory act of March 3, 1891, operate to reduce the price of such lands embraced within entries under the original act, but on which final proof had not been submitted at the passage of the amendatory act.

Secretary Francis to the Commissioner of the General Land Office, November 16, 1896. (I. H. L.) (E. M. R.)

This case involves the S. $\frac{1}{2}$ and the SW. $\frac{1}{4}$ of Sec. 32, T. 36 S., R. 25 E., Visalia land district, California.

The record shows that on April 2, 1877, Frederick W. Lawrence made desert land entry for the above described tract and final certificate was issued on January 17, 1896.

On April 23, 1896, your office decision was rendered suspending the entry for the reason that only \$1.25 per acre had been paid and holding that unless an additional payment of that amount was made within sixty days, or appeal taken, the entry would be canceled without further notice. From this action Lawrence appealed.

The land embraced by this entry covers four hundred and eighty acres and is situated within the twenty miles limits of the grant to aid in the construction of the Southern Pacific railroad company.

Section 2357 of the Revised Statutes is as follows:

The price at which the public lands are offered for sale shall be one dollar and twenty-five cents an acre; and at every public sale, the highest bidder, who makes payment as provided in the preceding section, shall be the purchaser; but no lands shall be sold, either at public or private sale, for a less price than one dollar and twenty-five cents an acre; and all the public lands which are hereafter offered at public sale, according to law, and remain unsold at the close of such public sales, shall be subject to be sold at private sale, by entry at the land office, at one dollar and twenty-five cents an acre, to be paid at the time of making such entry; *Provided*, that the price to be paid for alternate reserved lands along the line of railroads within the limits granted by any act of Congress, shall be two dollars and fifty cents per acre.

A circular was issued on June 27, 1887 (5 L. D., 708), in which it was stated that the price which desert lands were to be paid for would be the same as established by the pre-emption law; that is, minimum land at \$1.25 an acre and double minimum at \$2.50 per acre. Subsequently, on September 15, 1887 (6 L. D., 145), these instructions were modified. It was said:

The former rulings of the Department which had been in existence from the date of the act (1877) until the date of the present circular, had, while it existed, the force and effect of law so far as rights acquired under it are concerned; was a construction of the law by the head of the Department charged with the execution of it. The law was administered according to this construction.

The ruling then in force was \$1.25 per acre, and in the opinion, *supra*, it was held to be all that was required to be paid, despite the fact that the land was within double minimum limits.

The act of March 3, 1877, under which this entry was made (19 Stat., 377), enacted that any qualified citizen of the United States upon payment of twenty-five cents per acre, might file a declaration under oath, with the proper authorities, that he intended to reclaim a given tract by conducting water thereon within three years, and that at any time within said period, after making proof of said reclamation and the payment of the additional sum of \$1.00 per acre, he should be entitled to receive patent for the same.

It was held by this Department (14 L. D., 74), in instructions issued by Secretary Noble that

the price of desert land entered under the act of March 3, 1877, as amended by act of March 3, 1891, is one dollar and twenty-five cents per acre without regard to the situation of the land with relation to the limits of railroad grants.

The holdings of the Department thus appearing to be conflicting, the supreme court in the case of *United States v. Healy* (160 U. S., 136), proceeded to determine the question and Mr. Justice Harlan in delivering the opinion of the court, says:

Giving effect to these rules of interpretation, we hold that Secretaries Lamar and Noble properly decided that the act of 1877 did not supersede the proviso of section 2357 of the Revised Statutes, and, therefore, did not embrace alternate sections reserved to the United States by a railroad land grant.

It results that prior to the passage of the act of 1891, lands such as those here in suit, although within the general description of desert lands, could not properly be disposed of at less than two dollars and fifty cents per acre.

And in conclusion the court said:

We are of opinion that cases initiated under the original act of 1877 but not completed by final proof until after the passage of the act of 1891, were left by the latter act—at least as to the price to be paid for the lands entered—to be governed by the law in force at the time the entry was made, so far as the price of the public lands was concerned, the act of 1891 did not change but expressly declined to change, the terms and conditions that were applicable to entries made before its passage. Such terms and conditions were expressly preserved in respect to all entries initiated before the passage of that act.

In *ex parte* Holcomb (22 L. D., 604), it was held (syllabus)—

An entry of desert land within railroad limits at double minimum price is not an entry "erroneously allowed" on which repayment of the first instalment of the purchase price can be made, where the entry is canceled for non-compliance with law.

The entry was made in that case on December 24, 1881, and was canceled September 22, 1885, because of failure to make proof within the time required by the act. The contention was that the entry was erroneously allowed under the act of 1877 because that act did not include lands which could not be sold for less than double minimum price.

It will thus be seen that the question at issue has been judicially determined.

The act of 1877 did not fix the price of double minimum desert lands at \$1.25 per acre, or to speak more specifically did not lower the price of lands situated within railroad grants to that price. It was not in conflict with section 2357 of the Revised Statutes; the act of 1877 and section 2357, *supra*, had appropriate fields of action and there being no actual or necessary controversy in giving effect to them both, it was done.

The conclusion is therefore reached that the requirement of your office for the payment of the additional sum of \$1.25 per acre so that the sum total shall amount to \$2.50 per acre, is a proper demand and the decision of your office in so holding is affirmed.

APPLICATION TO ENTER—FINAL REJECTION—REINSTATEMENT. -

FRANK LARSON.

An application to enter properly rejected by final decision of the Department, under the rulings then in force, can not be reinstated with a view to favorable action under a changed construction of the law. The applicant in such case may make a new application if he is qualified, and no intervening rights have attached.

Secretary Francis to the Commissioner of the General Land Office, November 16, 1896. (I. H. L.) (F. W. C.)

With your office letter of September 17, 1896, was forwarded an application, filed on behalf of Frank Larson, for the reinstatement of his homestead application covering the NE. $\frac{1}{4}$ of Sec. 29, T. 134 N., R. 40 W., Minnesota.

Said letter reports as follows in relation to said tract:

The NE. $\frac{1}{4}$ of section 29, T. 134 N., R. 40 W., Minnesota, is within the primary limits of the grant to the Northern Pacific Railroad Company, the right of which attached to lands within said limits by definite location of its line of road November 21, 1871.

The records of this office show that one Charles W. Zenky filed D. S. No. 228, for the said tract June 24, 1870, alleging settlement the same date. He never perfected his claim under this filing and the same is still of record and uncanceled.

On July 10, 1883, one Frank Larson applied to enter the said tract as a homestead, which was rejected by the local officers because the tract was within the limits of the grant to the Northern Pacific Railroad Company.

Larson appealed from that action alleging as ground therefor that the land was excepted from the company's grant by the pre-emption filing of Charles W. Zenky.

Larson's application was examined and rejected by this office October 9, 1889, for conflict with the prior right of the said company.

Larson appealed therefrom; and on September 12, 1891, the Secretary of the Interior affirmed the action of this office and the case was closed against Larson September 19, 1891.

Under the rule of construction prevailing at the time the above recited action was taken upon Larson's application the same was proper, but under the recent decision of the supreme court in the case of *Whitney v. Taylor* (158 U. S., 85), as construed by this Department in the case of *Fish v. Northern Pacific R. R. Co.*, on review (23 L. D., 15), the filing by Zenky being of record, uncanceled, at the date of the definite location of said road, served to except the tract covered thereby from the operation of the grant.

This later construction can not, however, affect the previous disposition made of Larson's application. Said application had never been accepted and permitted to go of record as an entry, consequently there was nothing to reinstate; but as the tract, as it would appear, was excepted from the company's grant I can see no objection to his making a new application to enter this land, if he is duly qualified and no intervening rights have attached thereto.

A similar question was presented for the consideration of this Department in the matter of the application for reinstatement of the application of William A. Reynolds, which under later rulings should have been allowed, but the rejection of which was in accordance with the ruling which prevailed at the date of the action taken thereon. This application was denied in the departmental decision of March 21, 1894 (not reported), and review of said decision was also denied December 6, 1894 (19 L. D., 459).

Larson's application is accordingly denied.

RAILROAD GRANTS—OVERLAPPING INDEMNITY LIMITS—PRIORITY OF SELECTION.

NORTHERN PACIFIC R. R. CO. *v.* ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

Priority of selection determines the right as to odd numbered sections within the overlapping indemnity limits of the St. Paul, Minneapolis and Manitoba Ry. Co., St. Vincent Extension, and the Northern Pacific R. R. Co., and not within the withdrawal on general route of the latter company.

Secretary Francis to the Commissioner of the General Land Office, November 23, 1896. (I. H. L.) (E. M. R.)

This case involves the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 13, T. 130 N., R. 37 W., St. Cloud land district, Minnesota.

The above described tract is within the overlapping indemnity limits of the grants for the St. Paul, Minneapolis and Manitoba railway company, St. Vincent Extension, and the Northern Pacific railroad company.

On June 21, 1895, your office decision was made awarding the tract to the St. Paul, Minneapolis and Manitoba company, from which action the Northern Pacific company appealed.

The record shows that the withdrawal for the St. Paul, Minneapolis and Manitoba company took effect on February 12, 1872. This tract did not fall within the limits of the withdrawal of 1870 upon the general route of the Northern Pacific railroad. The St. Paul, Minneapolis and Manitoba railway company included this tract in its list of selections of July 31, 1884, but did not designate a loss as a basis for its selection. Subsequently, on July 1, 1885, it applied to select 760.05 acres, including this tract and designated a loss in bulk of equal amount. Both of these lists were rejected by the local officers and list No. 9, of the company's selections, in which the losses were arranged tract for tract, was accepted by the local office on October 28, 1890.

May 10, 1892, the Northern Pacific company selected the same tract for indemnity purposes designating losses tract for tract, but this was rejected.

The appeal alleges error as follows:

First. Error to hold that this tract inured to the St. Paul, Minneapolis and Manitoba railway company because it made the first selection thereof for indemnity purpose. Second. Error to hold that the withdrawal of this land upon definite location of November 21, 1874, for the Northern Pacific railroad company was inoperative. Third. Error not to have held that the withdrawal of this land for indemnity purpose on definite location was a legal withdrawal and was in full force and effect when the withdrawal for the St. Paul, Minneapolis and Manitoba railway company was made, and when said company selected said land; hence, that said selection was illegal. Fourth. Error not to have ruled that as between two railroad companies where there is not sufficient land in the indemnity limits to satisfy the land lost in place, no selection of the land is necessary as they pass to the earlier grant. Fifth. Error not to have ruled that as the Northern Pacific Railroad Company is the earlier grant, and there is a deficiency in the indemnity of its grant, this company has the better right to the land.

This Department has determined that the only withdrawal authorized by law, on account of the Northern Pacific grant, was that of 1870, upon general route, and this tract of land was not embraced in said withdrawal, all withdrawals for indemnity purposes were null and void and without effect.

Upon the other questions raised by the appeal, contained in the assignment of errors four and five, it would seem that the contention of counsel was based upon the case of the St. Paul & Pacific railroad company *v.* Northern Pacific railroad company (139 U. S., 1). An examination of that case does not show the position of counsel to be well taken. The lands therein involved were within the limits of the grant for the St. Paul and Pacific railroad company, but were included in the withdrawal of the Northern Pacific R. R. Co. on general route, which withdrawal operated to defeat the claim of the junior company.

This is not the status of the lands involved in this case, and it is unnecessary to further discuss the holding made in the case before the court. It has been a well settled doctrine of this Department and the courts that no rights attach within indemnity limits, except by selection. This land being situated so that it was within the indemnity limits of each road, and without the withdrawal on general route of the Northern Pacific railroad, it was right for your office to hold that the company first selecting has the superior right.

The decision appealed from is affirmed.

BUCKNAM *v.* BYRAM ET AL.

Motion for review of departmental decision of August 28, 1896, 23 L. D., 251, denied by Secretary Francis, November 23, 1896.

PETITION TO VACATE DECISION—RES JUDICATA.

MEE *v.* HUGHART ET AL.

A decision of the Supreme Court in which a departmental construction of a statute is held erroneous does not warrant the Department in vacating and reversing final decisions rendered in accordance with such construction.

Secretary Francis to the Commissioner of the General Land Office, November 23, 1896. (I. H. L.) (C. W. P.)

On January 10, 1895, the Department rendered a decision (20 L. D., 2), denying a petition of Louis Stegmiller, one of the defendants in the case of Edward W. Mee *v.* S. W. T. Hughart and others, to vacate and set aside the decision of the Department of June 18, 1894, in said case, affirming the decision of your office of December 19, 1892, sustaining Mee's contest of soldier's additional homestead entry, made in the name

of said Hughart, July 15, 1889, and recommending the cancellation of said entry, which involves the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 35, T. 63 N., R. 13 W., Duluth land district, Minnesota.

July 11, 1896, the attorneys of said Stegmiller filed a petition to vacate and set aside the decisions of the Department in said case of November 2, 1891 (13 L. D., 484), of June 18, 1894, and of January 10, 1895.

In the decision of November 2, 1891, it was held by the Department that the soldier's additional entry of the land in question, made July 15, 1889, in the name of said Hughart, if made after his death, was a nullity; and that being a nullity it was not confirmed or affected by the proviso contained in the 7th section of the act of March 3, 1891 (26 Stat., 1095). Said decision reversed the decision of your office and granted Mee's application to contest the entry.

The decision of June 18, 1894, affirmed the decision of your office affirming the judgment of the local officers sustaining Mee's contest of said entry.

The petition under consideration calls the attention of the Department to a recent decision of the supreme court in the case of *Webster v. Luther*, 163 U. S., 331, in which that court held that the right of entry given to a soldier who had heretofore entered, under the homestead laws, less than one hundred and sixty acres, to enter enough more to make up that quantity, was assignable before entry.

It is true, as stated in the petition, that the decisions of the Department of November 2, 1891 (13 L. D., 484), and June 18, 1894, were based upon the previous ruling of the Department, in a long line of decisions, that the right to make soldier's additional homestead entry is a personal right and not assignable, which construction of the law is now held by the supreme court to be erroneous.

It is admitted that the decisions of November 2, 1891, and June 18, 1894, were in accordance with the established ruling of the Department; and the fact that such ruling is now held by the supreme court to be erroneous is not deemed a sufficient reason for reversing and annulling decisions which have become final.

The petition must, therefore, be denied.

HILLEBRAND *v.* SMITH.

Motion for review of departmental decision of May 23, 1896, 22 L. D., 612, denied by Secretary Francis, November 23, 1896.

PATENT—DEATH OF ENTRYMAN—SECTION 2448 R. S.

HENRY E. STICH.

Section 2448, Revised Statutes is applicable only where the right to patent exists in the entryman at the time of his death.

Secretary Francis to the Commissioner of the General Land Office, October
(W. A. L.) 16, 1896. (C. J. W.)

Henry E. Stich made homestead entry, No. 158, Guthrie land district, Oklahoma, on April 26, 1889. The entry embraces lots 3 and 4 and the E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 30, T. 19 N., R. 3 E. Pending said entry Henry E. Stich died and Louvenia L. Stich, his widow, continued the occupancy and cultivation of the land. She submitted final proof, and on December 11, 1895, final certificate, No. 1537, was issued thereon to her. Your office, on June 22, 1896, by letter "C" of that date, returned said final certificate to the local officers, directing them to correct the same without erasure by substituting the name of Henry E. Stich, the deceased entryman, for that of Louvenia L. Stich, in whose name the certificate was issued.

Before said correction was made the New England Loan and Trust Company, through its attorney, apprised your office that it held a mortgage against said land, dated after the issuing of the final certificate, and insisting that the rule in the case of Joseph Ellis (21 L. D., 377), which it was supposed your office followed, did not apply in a case like this. In reply, your office adhered to the position taken in the letter of instruction to the local officers, directing that the name of Henry E. Stich should be substituted for that of Louvenia L. Stich in the final certificate.

The New England Loan and Trust Company having filed proof of its mortgage, intervenes and files appeal from your office decision, and alleges error upon the part of your office—

1. In holding that the final certificate and receipt should be changed to read Henry E. Stich, and that patent should issue in his name for the land described, and citing the case of Joseph Ellis (21 L. D., 377,) as authority for so doing.

2. That it was error not to hold that section 2291 of the Revised Statutes gives the widow the exclusive right to continue the occupancy and cultivation of the land, and to make proof and receive patent for the land in her own name.

In the case of Joseph Ellis, quoted by your office, as authority for the ruling in this case, Ellis had made cash entry for the land involved in that case in his lifetime, and the final certificate had issued in the name of John Ellis, instead of Joseph, through mistake. Ellis filed application to have the mistake corrected, but he died without having the correction made. The equitable title to the land was in Ellis upon the payment of the purchase money, and there was no obstacle in the way of patent issuing to him, upon the correction of the certificate. He had earned the title in his lifetime, and hence Sec. 2448, Revised

Statutes, applied. In the case under consideration the facts are altogether different. Stich died without having acquired title, either legal or equitable, to the land entered by him, and no right to patent existed in him at the time of his death, and Sec. 2448, Revised Statutes, is inapplicable to the case. Sec. 2448 is applicable only where the right to patent existed in the entryman at the time of his death. Sec. 2291, Revised Statutes, is intended to cover cases where the entryman died without having perfected his claim or earned title, and in such cases the surviving widow is permitted to continue residence and cultivation and earn title for herself.

Section 2448 is as follows:

Where patents for public lands have been or may be issued, in pursuance of any law of the United States, to a person who had died, or who hereafter dies, before the date of such patent, the title to the land designated therein shall inure to and become invested in the heirs, devisees, or assignees of such deceased patentee as if the patent had issued to the deceased person during life.

Section 2291 is a part of the homestead law, and is taken from the act of June 21, 1866 (14 Stat., 67). It is as follows:

No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law.

There seems to be no conflict between these two sections.

Louvenia L. Stich having submitted final proof on the entry of her deceased husband and obtained final certificate in her own name, it was error to direct the changing of said certificate, so as to substitute the deceased husband's name for hers.

Your office decision is reversed, and said final certificate is held to be proper and valid as originally issued.

RIGHT OF WAY—RAILROAD—CANAL—RESERVATION.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 27, 1896.

Registers and Receivers, U. S. Land Offices.

SIRS: The Honorable Secretary having held, in the case of Dunlap v. Shingle Springs and Placerville R. R. (23 L. D., 67) that "A railroad right of way under the act of March 3, 1875 is fully protected by the

terms of the act as against subsequent adverse rights, and a reservation of such right of way, in final certificates and patents issued for lands traversed thereby, is therefore not necessary, and should not be inserted" (syllabus), and having on October 16, 1896 denied a motion for review of said decision, you will be governed thereby.

The language of the canal and reservoir right of way act of March 3, 1891 (26 Stat., 1095), in reference to this matter, being the same as of the act of 1875, the ruling applies to it as well.

The effect of this decision is to revoke that part of the instructions at the bottom of page 6, circular of March 21, 1892,* for railroads, and in paragraph 26, circular of February 20, 1894,* for canals and reservoirs, relating to the notation to be made in red ink across the face of the certificate issued upon any entry apparently subject thereto, that the same is allowed, subject to the right of way of the road, or the canal or reservoir. The notations on township plats and tract books should be made as heretofore.

It will be observed that the decisions above noted do not refer to cases where right of way has been granted under special acts. In the current annual report of this office will be found a list of approved rights of way in which are designated the cases where the grant has been made under special acts. See pages 266 and 267 report of 1895.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved,
DAVID R. FRANCIS,
Secretary.

STATE SELECTIONS—MINERAL LANDS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 27, 1896.

Registers and Receivers, United States Land Offices.

SIRS: Hereafter where the lands selected by the States, under their grants, are within a mineral belt or proximate to any mining claim, the State will be required to file with the local land officers, with each selection list, a satisfactory non-mineral affidavit, covering each legal subdivision, of land selected. If any of the lands selected are found, upon examination, to be within a township containing any mineral entry, claim or location, you will at once notify the proper State officer as to the specific tracts, and require him to at once publish notice in some newspaper of general circulation (to be designated by you) within the

* See 14 L. D., 338, and 18 L. D., 168, for these circulars.

vicinity of said lands, setting forth that the State has applied for the lands designated, and has filed lists for the same in your office, that said lists are open to the public for inspection, and that a copy of the same by descriptive subdivisions has been conspicuously posted in your office for inspection by persons interested, and the public generally; and that you will receive protests, or contests, within the next sixty days for any of said tracts or subdivisions of land claimed to be more valuable for mineral than for agricultural purposes.

At the expiration of the sixty days, you will make full report to this office as to any protests or contests, or suggestions as to the mineral character of any of such lands, together with any information you may have received in regard thereto.

You will also notify the proper State officer that a failure to make the required publication within thirty days will result in the cancellation of the selections referred to, upon the same being reported to this office.

The notice will be published once a week for ten consecutive weeks.

The original lists, with proper notations as to the lands within mineral townships, will be duly forwarded to this office, without awaiting the publication of notice, that proper action may be taken in respect to the remaining lands.

Circular instructions of July 9, 1894 (19 L. D., 21), so far as the same are made applicable to State selections, are accordingly modified.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved,

DAVID R. FRANCIS,
Secretary.

SUMNER v. ROBERTS.

Motion for review of departmental decision of August 24, 1896, 23 L. D., 201, denied by Secretary Francis, December 3, 1896.

STATE SELECTIONS—CERTIFICATION—ACT OF AUGUST 3, 1854.

THE STATE OF OREGON.

Under the provisions of the act of August 3, 1854, the certification of lands under the agricultural college grant, that in fact passed under the swamp grant, is of no operative effect.

Secretary Francis to the Commissioner of the General Land Office, December 3, 1896. (J. I. P.)

I am in receipt of your office letter "K" of the 26th ultimo recommending the revocation by this Department of its approval of so much of Oregon swamp land list No. 4, approved April 24, 1882, as embraces

or relates to the E $\frac{1}{2}$ lots 5, 6, 7, 8 and the SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 28 and lots 6, 7, 8, 9, 10; SE $\frac{1}{4}$ of NE $\frac{1}{4}$; SE $\frac{1}{4}$ and SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 32, all in Tp. 33 S., R. 19 E., Willamette meridian in said State.

It appears that under date of January 23, 1874, there was approved to the State of Oregon, under the agricultural college grant of July 2, 1862 (12 Stat., 503), a list including the tracts above described.

The governor of the State of Oregon, who was apprised of the conflict in the two grants, has informed the Department that the State has sold the lands as swamp lands for \$1.00 per acre, the statutory price; that the legal price of agricultural college land is \$2.50 per acre, and he requests that said approved list No. 4 be permitted to remain intact and that the approval of list No. 1 of said agricultural college grant, in so far as it relates to the tracts in question, be allowed to stand and that the State be allowed to select other lands in lieu thereof.

You state that inasmuch as the approval and certification of the lands under the agricultural college grant has the force and effect of a patent, that you are of the opinion that such approval was a determination that the tracts were not swamp land, and hence you make the recommendation above stated.

In the case of *English v. Leavenworth, Lawrence and Galveston Railroad Company*, decided by the Department October 3, 1896 (23 L. D., 343), it is held that the certification of land under a railroad grant in accordance with the provisions of the act of August 3, 1854 (10 Stat., 346; sec. 2449 R. S.), is of no operative effect if the land in fact was excepted by the grant, or did not pass under the grant. The question then presents itself whether the certification by this Department on January 23, 1874, of these lands to the State of Oregon under the agricultural college grant of July 2, 1862, had the effect stated in your letter. The act of March 12, 1860 (12 Stat., 3) extended the provisions of the swamp land act of September 28, 1850 (9 Stat., 519) to the States of Minnesota and Oregon. This Department has held so frequently that reference to authority is unnecessary that the act of September 28, 1850, was a present grant, vesting in the state from the day of its date the title to all the swamp and overflowed land then not sold and requiring nothing but the determination of boundaries to make it complete. That being true it is evident that the act of March 12, 1860, *supra*, is of the same character, and from the date of its passage vested in the State of Oregon the title to all the swamp lands within its limits. It follows, therefore, that the lands in question, being evidently of that character, passed to the State under that grant, and hence could not have been passed under the agricultural college grant of July 2, 1862, *supra*.

I am therefore of the opinion that the request of the governor of the State of Oregon should be complied with to the extent that swamp land list No. 4 including the tracts above described, should remain intact, and list No. 1 under the agricultural college grant of July 2, 1862, be canceled as to said tracts, and that the State be advised of this action.

BRAMWELL *v.* CENTRAL AND UNION PACIFIC RAILROAD COMPANIES.

Motion for review of departmental decision of October 3, 1896, 23 L. D., 326, denied by Secretary Francis, December 3, 1896.

SOLDIERS ADDITIONAL HOMESTEAD—LANDS SUBJECT TO ENTRY.

BARBOUR *v.* WILSON ET AL.

The validity of a soldier's additional homestead entry is not affected by the fact that it is made for the benefit of another.

The amendment of sections 2289 and 2290 R. S., by the act of March 3, 1891, does not authorize entry under the homestead law of lands included within the limits of an incorporated town.

Secretary Francis to the Commissioner of the General Land Office, December 3, 1896. (I. H. L.) (A. B. P.)

The land involved in this case is the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ (lots 5 and 6), section 24, T. 8 N., R. 8 E., Helena, Montana. The controversy disclosed by the record appears to be the sequel of the case of *McGregor et al. v. Quinn*, decided by this Department April 5, 1894 (18 L. D., 368), wherein Sioux half-breed strip location, made by one William L. Quinn, for the land in question was canceled. A motion for review of said decision of April 5, 1894, was denied October 10, 1894 (19 L. D., 295).

The record shows that prior to the date of said decision of April 5, 1894, the Castle Land Company became the transferee of the land in question by deed of conveyance executed by one Messena Bullard, its attorney, to whom the land had been conveyed by Quinn the day after his scrip location was made; and had sold and conveyed by deeds of general warranty, to appellant and various other parties, a large number of town lots from said land, the title to which necessarily failed upon the cancellation of said scrip location. That thereupon a number of suits were brought against the company in the local courts, by appellant and other lot grantees, for the purpose of recovering back the money paid by them on account of their lot purchases, on the ground of said failure of title.

It further appears that on October 30, 1894, just twenty days after the denial of said motion for review in *McGregor et al. v. Quinn*, the defendant William Wilson, a resident of Marshall county in the State of Illinois, appeared at the local office, accompanied by W. E. Moses, a professional land scrip broker of Denver, Colorado, and S. W. Langhorne, the attorney for the Castle Land Company, and filed his application to make soldier's additional homestead entry for the land. After some delay, caused by the transmission of the application papers to your office for examination, and their return, Wilson's entry was finally

allowed January 22, 1895. Eight days thereafter he and his wife executed, before a justice of the peace in Marshall county, Illinois, a deed conveying the land, for the stated consideration of one dollar, to said W. E. Moses, and five days later, said Moses and his wife executed a deed before a notary public of Arapahoe county, Colorado, conveying the land to the Castle Land Company for the stated consideration of \$800 cash. Immediately after obtaining said deed from Moses, the company proceeded to set up and did set up its newly acquired title as a defence in all the suits brought against it by its said lot grantees, of whom this appellant was one. It further appears that on August 2, 1895, Arthur P. Heywood instituted a contest against the said Wilson entry upon the alleged ground that the same was made in the interest of the Castle Land Company under a previous agreement by the entryman to convey the title acquired, to or for the use of the company, and was therefore fraudulent.

On August 30, 1895, Heywood filed an application to amend his affidavit of contest by adding thereto the charge that the land in question, when Wilson's

said application and entry were made, was, and now is within the limits of a town incorporated under the laws of the State of Montana, namely, the town of Castle, Montana.

The proposed amendment was disallowed by your office October 28, 1895, for the stated reason that the same presented

a charge, which, if true, would not of itself require the cancellation of the homestead entry here involved.

A hearing had been previously ordered upon the original charge, and the same was now proceeded with, and was finally concluded in November 1895. Notwithstanding the disallowance by your office of the said proposed amendment, evidence appears to have been introduced by the contestant upon that, as well as upon the original charge. The entry was defended by the Castle Land Company but its evidence was confined to the issue raised by the original affidavit of contest. Neither Wilson nor Moses appeared.

The local officers found for the defendants and recommended the dismissal of the contest. On February 13, 1896, the contestant filed a waiver of his right of appeal. Thereupon George H. Barbour filed his application to intervene as a party in interest, accompanied by an appeal from the decision of the local officers. The application was denied by your office, and the appeal disallowed on the ground that Barbour had no such interest as entitled him to the right of appeal. He again appealed but your office declined to entertain or recognize his appeal, and he thereupon filed in this Department his application for certiorari, which on July 1, 1896, was allowed (23 L. D., 12), whereupon the papers in the case were duly transmitted, and are now before me for consideration.

Both the alleged grounds of contest are insisted upon in Barbour's appeal, namely:

1. That the Wilson entry was made in the interest and for the benefit of the Castle Land Company, and
2. That at the date of the entry the land was within the limits of an incorporated town.

The first ground your office held was not sustained by the evidence. As to the second it appears that by your direction the municipal authorities of the town of Castle were notified to file any objections they might have to the allowance of the Wilson entry, and that on January 5, 1895, the certificate of the mayor was filed setting forth that the land in question was not then and never had been occupied for the purposes of trade and business, and that the authorities of the town would not interpose any objection to Wilson's entry. This, your office, on May 11, 1895, held to be sufficient evidence of the fact that the land was subject to homestead entry, and presumably for that reason, the said proposed amendment to the original affidavit of contest was afterwards disallowed as stated.

In my judgment the record clearly shows that Wilson's entry was made for the benefit of the Castle Land Company. As soon as the final action of the Department in the former case of *McGregor et al. v. Quinn* was made known, the said company, through its agents, went to work to procure title to the lands by some other means. To accomplish that purpose the services of said land scrip broker Moses, were procured, and through him Wilson was brought to the local office from his home in Illinois in order to present the disguise of a personal entry. Immediately after making his entry Wilson conveyed the land to Moses, and Moses thereupon conveyed to the Castle Land Company.

It is perfectly apparent from the evidence either that Wilson's right to make soldier's additional entry was purchased by the company through the land scrip broker Moses before the entry was made, or there was an understanding and agreement between Wilson and the company's agents whereby the land was to be conveyed after entry for the company's benefit. The so-called personal entry by Wilson was but an attempt to disguise the real purpose of the transaction.

It has been repeatedly and uniformly held by this Department that the right to make soldier's additional homestead entry is not assignable, but is a personal right to be lawfully exercised only by and for the benefit of the soldier. See *Cleveland et al. v. North et al.* (16 L. D., 484); *Paulson v. Owen* (15 L. D., 114); *John M. Walker* (10 L. D., 354); and also the circulars and decisions cited in the last named case. It seems clear that the entry in question was made in violation of these repeated and uniform rulings, and but for the decision of the supreme court in the recent case of *Webster v. Luther* (163 U. S., 331), the same would have to be canceled as fraudulent.

In that case, however, the court held that the right to make soldier's

additional entry, given by section 2306 of the Revised Statutes, was without restriction, and therefore assignable and transferable; thereby establishing as the law, a doctrine directly the reverse of that so long followed by this Department, as shown by the cases cited. If the right itself is assignable I can see no reason why an entry may not be made by the possessor of the right for the benefit of another; for that would be simply another means of accomplishing practically the same result. In view, therefore, of the doctrine thus announced by the supreme court, whose decision is to be taken as settling the law on this subject, it follows necessarily that said first or original ground of contest is without merit, and even though sustained by the evidence as shown, it cannot affect the validity of the entry in question, and the same, if without objection in other respects, must be allowed to stand.

The evidence introduced by the contestant upon the charge that the land is within the limits of an incorporated town, and therefore not subject to homestead entry, however, is to the effect that the town of Castle was duly incorporated under the laws of Montana in the year 1891, and that the land here in question is within the corporate limits of that town. On this question the defendants did not introduce any evidence, presumably for the sufficient reason that your office had declined to entertain the charge as a part of the contest.

There can be no question that prior to the repeal of the "laws allowing pre-emption of the public lands of the United States" (act of March 3, 1891, 26 Stat., 1095), "lands included within the limits of an incorporated town" were not subject to pre-emption or homestead entry (Revised Statutes, Secs. 2258, 2289; *Root v. Shields*, 1 Wool., 340; *U. S. v. Schurz*, 102 U. S., 278, 401; *Harper v. Grand Junction*, 15 L. D. 124). Lands so situated were reserved from pre-emption or homestead entry, not by the judicial or legislative act incorporating the town, but by the pre-emption and homestead laws themselves, and no action of or proceeding by the municipal authorities of the town could have affected them in any manner. The consent of the town as given in this case, therefore, could not have operated to relieve the tract in question from its state of reservation under the law as it formerly stood, and thereby making it subject to to Wilson's entry.

It is claimed by the defendant company, however, that under sections 4 and 5 of said act of March 3, 1891, which repeals the pre-emption laws, as stated, and amends sections 2289 and 2290 of the revised statutes relating to entry of lands under the homestead law, there is no longer any inhibition against the entry of lands within the limits of an incorporated town, as a homestead. This contention is based upon the facts that such inhibition was originally stated in terms in the pre-emption law only (section 2258 R. S.), and was afterwards carried into the homestead law (section 2289 R. S.), simply by designating the lands subject to entry under that law, to be "unappropriated public lands" upon which a pre-emption claim may have been filed, or which was at the

time subject to pre-emption, and that in the homestead law as amended by said act of March 3, 1891, there is no reference to the pre-emption law or to lands subject to pre-emption; the claim being that by reason of this omission from the homestead law, as thus amended and reenacted, lands within the corporate limits of a town are no longer excluded from homestead entry. I do not think the contention is sound. It will readily be seen that the repeal of the pre-emption law of itself necessarily required the amendment of the homestead law in the particular stated. It would have been absurd for Congress, after repealing the pre-emption law, to have left in the homestead law the reference to "land subject to pre-emption." I do not think it follows from said amendment, however, that lands within the limits of an incorporated town may now be entered under the homestead law. I cannot believe that such was the intention of Congress. It might just as well be contended that lands on which are situated known salines or mines—certainly the former—are subject to homestead entry under the amended law, for the reason that such lands embraced one of the exceptions in the repealed pre-emption law, and no reference thereto is contained in the amended homestead law. The purpose of Congress in making the amendment is apparent, and I do not think a broader scope should be given the amended law than that purpose warrants.

Moreover, as the law now stands it is only "unappropriated public lands" that are subject to homestead treaty, and I do not think that lands included within the limits of an incorporated town can be justly held to come within that category. It would not be in accord with a sound public policy to allow the acquisition by homestead entry, of lands so situated, and thereby likely largely enhanced in value. Moreover the settlement and occupancy of such lands for purposes of trade and business or their use for townsite purposes could, and most likely would, be seriously interfered with if such were the law.

My conclusion therefore is that the amendment of sections 2259 and 2290 of the revised statutes, by said act of March 3, 1891, does not authorize the entry under the homestead law of lands included within the limits of an incorporated town.

Inasmuch however as the defendants without fault of their own have never been heard upon this question, it is proper that time should be allowed them to be so heard if they desire it. You will therefore allow them thirty days within which to file an application for a further hearing upon this question, and if said application be filed, and the same presents a denial under oath of the showing made by defendants' evidence, you will order a hearing to determine that question. If no such application is filed within the time allowed, the entry of Wilson will be canceled.

HANCE ET AL. v. CITY OF GUTHRIE.

Motion for review of departmental decision of August 12, 1896, 23 L. D., 196, denied by Secretary Francis, December 3, 1896.

PAYMENT—EXTENSION OF TIME—COMMUTED HOMESTEAD.

ANNA E. WHITE.

An extension of time in which to make payment on a commuted homestead entry is not authorized by the joint resolution of September 30, 1890, nor by the act of July 26, 1894.

Secretary Francis to the Commissioner of the General Land Office, December 3, 1896. (I. H. L.) (J. L. McC.)

Anna E. White has appealed from the decision of your office, dated September 25, 1895, rejecting her application for extension of time in which to make payment in commutation of her homestead entry, made September 22, 1892, for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 21, and the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 32, T. 24 N., R. 1 E., Seattle land district, Washington.

The proof shows residence on the land since February, 1893; fourteen acres of the land slashed, and four acres under cultivation for two seasons; the improvements are valued at \$1,850.

Your office held that the act of September 30, 1890 (26 Stat. 684), was not applicable to the case, inasmuch as the applicant did not allege a failure of crops as a reason for her failure to make payment for the land.

She has appealed to the Department, contending that relief can properly be extended under the act of July 26, 1894 (28 Stat., 123), extending for one year "the time for making final proof and payment for all lands located under the homestead and desert-land laws of the United States."

The time within which this entrywoman is required by law to make final proof and payment of fees and commissions does not expire until September 21, 1900. If she chooses to pay for the land and obtain title thereto before that date, she does it at her own election. To hold that the act of September 30, 1890, was intended to apply to any case of homestead commutation would be to impute to Congress the doing of a vain thing (Stillman B. Moulton, 23 L. D., 304); and the same is true of the act of July 26, 1894. If she does not wish or is not able to pay for the land in question under the commutation clause of the homestead act, her remedy is in her own hands—she need not commute.

Her application will be denied upon the ground herein indicated, and her commutation proof canceled without prejudice to her rights under the homestead law.

RAILROAD LANDS—ACT OF JANUARY 13, 1881.

MOORE *v.* KELLOGG.

An indemnity selection, made for the protection of one whose claim under the public land laws has been rejected on account of the railroad grant, and who is consequently seeking title through the company, operates to reserve the land, while subsisting, from other disposition, and if finally canceled, the occupant of the land under the company's license is entitled to the right of purchase under the act of January 13, 1881, if otherwise within its terms.

Secretary Francis to the Commissioner of the General Land Office, December 3, 1896. (I. H. L.) (F. W. C.)

The case of Mattie Moore *v.* Norman A. M. Kellogg, involving the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and lot 1, Sec. 29, T. 4 N., R. 19 W., Los Angeles land district, California, is again before this Department upon appeal by Kellogg from your office decision of January 16, 1895, rejecting his application to purchase the above described tract under the provisions of the act of January 13, 1881 (21 Stat., 315).

This land is within the indemnity limits of the grant made by the act of March 3, 1871 (16 Stat., 579), to aid in the construction of the branch line of the Southern Pacific Railroad. It is also within the primary limits of the grant of July 27, 1866 (14 Stat., 292), to aid in the construction of the Atlantic and Pacific Railroad as shown by the map of definite location filed March 12, 1872.

Mattie Moore tendered homestead application August 10, 1888, covering this land; which application was rejected on the ground that the tract was covered by the indemnity selection made by the Southern Pacific Railroad Company, list No. 5, filed May 25, 1883.

The case arising upon this application was duly prosecuted before this Department, resulting in the decision of November 29, 1890 (11 L. D., 534), in which it was held, that lands within the grant to the Atlantic and Pacific Railroad Company are expressly excepted from the grant to the Southern Pacific company, and that the act of Congress forfeiting certain lands granted to the former company, confers no right upon the latter to select the lands. This decision ordered the cancellation of the selection by the Southern Pacific company, and that Mattie Moore be allowed to enter the land under her application on showing compliance with the provisions of the homestead law.

The month following said decision, to-wit, December 20, 1890, Kellogg tendered his application to purchase these lands under the provisions of the act of January 13, 1881 (*supra*), and applied for a hearing in order to determine the conflicting claims of himself and Moore, which was duly ordered; and on January 9, 1891, the local officers rendered a joint opinion holding for cancellation the homestead entry of Moore and allowing the application of Kellogg as applied for. Moore thereupon appealed to your office; said appeal resulting in your office deci-

sion of May 16, 1892, which affirmed the recommendation of the local officers. Moore further prosecuted her case to this Department, her appeal being considered in departmental decision of October 5, 1893 (17 L. D., 391), in which it was held, that the act of January 13, 1881, applies only to settlers upon lands of the railroad for whose benefit the land is withdrawn, and that the act of July 6, 1886, forfeiting the grant to the Atlantic and Pacific Railroad Company, did not give the Southern Pacific Company any rights to lands so forfeited and lying within its indemnity limits.

Your office decision was therefore reversed, Moore's entry permitted to remain intact, and the application to purchase tendered by Kellogg was denied.

A motion was filed for the review of said decision, which was considered in departmental decision of December 4, 1894 (19 L. D., 446). In this motion it was claimed that the land here in question was excepted from the grant to the Atlantic and Pacific Railroad Company by reason of the fact that at the date of filing the map of definite location of said Atlantic and Pacific Railroad opposite the land in question, the same was included within the original limits of the survey of the Sespe rancho Mexican grant, from which it was finally excluded upon the survey and patenting of said grant March 14, 1872, which was subsequent to the definite location of said Atlantic and Pacific Railroad opposite this land.

As this fact was not presented in the record before considered by this Department, and as the record then before the Department did not disclose sufficient facts relative to said Mexican claim on which to adjudicate the question as to the effect of said Mexican grant upon the grant for the Atlantic and Pacific Railroad, the matter was returned to your office and you were directed to investigate the matters set up in said motion relative to said Mexican grant, to the end that the case might be adjudicated. It is under this order that the case was again considered in your office decision of January 16, 1895; from which the present appeal is taken.

Said office decision states, that the tracts here involved

were included in the Sespe rancho tract, No. 2, according to the survey approved by the surveyor general June 17, 1868, but were excluded from said rancho according to the survey of said claims approved by the surveyor general December 5, 1871, and subsequently approved by this office, and upon which survey patent issued March 14, 1872. . . . Said Sespe rancho may be properly placed under what is described by the United States supreme court, in the case of the United States v. McLaughlin (127 U. S., 428), as a grant of quantity, as to one or more leagues, within a larger tract described by outside boundaries, where the donee is entitled to the quantity specified and no more. At the date of filing of the map of definite location of the Atlantic and Pacific Railroad, March 12, 1872, the tracts in question were excluded from the survey of said private claim and were not excepted from the operation of the grant to the company.

When it is remembered that this tract was included within the survey first made and approved by the surveyor general, on June 17, 1868,

there may be some question as to whether the reservation created by said survey would not continue until the final approval by your office of the second survey, which excluded this tract from the grant.

For the disposition of the several applications by Moore and Kellogg, however, I deem it unnecessary to decide the question as to the effect of the reservation under the first survey after the approval by the surveyor general of the second survey and before the final approval of said survey by your office.

It is shown in this case that on February 10, 1879, Kellogg made timber culture entry for lots 2, 3, 4 and 5, and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section 29, which entry was canceled by decision of your office dated April 20, 1880, in which it was held, that said tracts were excepted from the grant to the Atlantic and Pacific Company because within the claimed limits of the said Sespe rancho at the date of the definite location of that road; and being within the indemnity limits of the Southern Pacific Railroad, that they were subject to selection by that company.

On February 24, 1880, Kellogg had also made a homestead entry covering the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section 29, which entry was canceled, as to the portion of the land here in controversy, by your office decision of June 15, 1881, for conflict with the right of selection in the Southern Pacific Railroad Company.

These decisions, adverse to his several entries, appear to have been accepted by Kellogg, who thereupon applied to the Southern Pacific Railroad Company to purchase the land, and received due acknowledgment from said company of his application to purchase.

On May 25, 1883, the said company made selection of the land here in question. Kellogg remained in possession of these lands, making valuable improvements thereon, and was so in possession of the lands when Mattie Moore first applied to enter the same on August 10, 1888. As before stated, upon her application the company's selection was ordered canceled in departmental decision of November 29, 1890 (*supra*), and the following month Kellogg, having exhausted his rights under the general land laws, applied to purchase the tract under the provisions of the act of January 13, 1881 (*supra*). Said act provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons who shall have settled and made valuable and permanent improvements upon any odd numbered section of land within any railroad withdrawal in good faith and with the permission or license of the railroad company for whose benefit the same shall have been made, and with the expectation of purchasing of such company the land so settled upon, which land so settled upon and improved, may, for any cause, be restored to the public domain, and who, at the time of such restoration, may not be entitled to enter and acquire title to such land under the pre-emption, homestead, or timber culture acts of the United States, shall be permitted, at any time within three months after such restoration, and under such rules and regulations as the Commissioner of the General Land Office may prescribe, to purchase not to exceed one hundred and sixty acres in extent of the same by legal subdivisions, at the price of two dollars and fifty cents per acre, and to receive patents therefor.

Admitting that the reservation on account of the Sespe rancho did not serve to except the tract here in question from the Atlantic and Pacific grant, and that consequently the same was not included in the withdrawal order of your office for indemnity purposes on account of the Southern Pacific grant, which, however, was in violation of law, yet the decision of your office recognized the right in the Southern Pacific Railroad Company to make selection of this land. And acting thereon, Kellogg applied to the company to purchase the land; and for his protection selection was duly made, which selection remained of record from 1883 until ordered canceled by departmental decision of November 29, 1890.

It has been repeatedly ruled by this Department that a pending indemnity selection excludes the land covered thereby from entry and bars other disposition of the land. (*Rudolph Nemitz*, 7 L. D., 80; *Northern Pacific R. R. Co. v. Halvorson*, 10 L. D., 15; *Simser v. Southern Minnesota Ry. Co.*, 12 L. D., 386; *Darland v. Nor. Pac. R. R. Co.*, 12 L. D., 195.)

This being so, it must be held that this land was reserved during the years it was covered by the indemnity selection, and upon the cancellation thereof was restored to general disposition. This would seem to be sufficient to meet the requirements of the act of 1881, independently of the question as to whether the land was ever included in any formal withdrawal, and the land must therefore be held to be subject to Kellogg's application tendered in December, 1890. This is in nowise in conflict with the holding in *Roeschlaub v. Union Pacific Ry. Co.* (6 L. D., 750), for there the land applied for was within the primary limits, in which the right attaches without regard to the listing of the land by the company. Here the tract is within the indemnity limits, in which no right is respected prior to selection.

The act of 1881 is a remedial statute and should therefore be liberally construed to provide the remedy, viz: the protection of those in possession of lands, reserved as railroad lands, under license from the company, where the company's claim fails and the party is not qualified to enter the lands under the general land laws.

It is disclosed by the record and recited in the first part of this opinion, that Kellogg first sought to enter this land under the homestead and timber culture laws.

His entries were canceled because the lands were held to be reserved for the Southern Pacific Railroad Company. He continued in the possession and improvement of the lands, amended his homestead to cover other lands, and sought title, through the company, to the lands here in question.

For his protection the company made due selection of the land, which selection, after being of record more than seven years, was canceled, and Kellogg is again forced to look to the government to protect him in his possession and improvements. Surely the act of 1881 was designed to protect such persons.

Departmental decision of October 5, 1893, is therefore recalled and vacated, and Kellogg will be permitted to complete his purchase as applied for, and thereupon Moore's entry will be canceled.

CONTEST—QUALIFICATIONS OF CONTESTANT.

McEVERS v. JOHNSON.

In a contest wherein the contestant alleges a superior right in himself to the land, it is incumbent upon him to establish his qualifications as an entryman.

Secretary Francis to the Commissioner of the General Land Office, December 3, 1896. (I. H. L.) (E. M. R.)

This case involves the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 5, T. 6 N., R. 1 W., Guthrie land district, Oklahoma Territory.

On the 25th day of April, 1889, George P. Johnson made homestead entry for the above described tract, together with the N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of the same section, township and range.

On the 20th day of July, 1889, Theo. L. McEvers made application to enter the NW. $\frac{1}{4}$ thereof, and filed his affidavit of contest against the entry of Johnson as follows:

Before United States Land Office,
Guthrie, Indian Territory,
Purcell, Indian Territory. }

Before me, L. C. Gossett, United States Commissioner for Eastern District of Texas, personally appeared before me Theodore L. McEvers of Purcell, Indian Territory, who being duly sworn upon his oath deposes and says he is well acquainted with the land embraced in H. A. No. 123 made by George P. Johnston, April 25, 1889, for the S. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 5, T. 6 N., R. 1 West, Indian Meridian.

That your affiant settled upon said land legally and in good faith April 22, 1889, after 12 o'clock, noon.

That at the time of his settlement and establishing a residence on said land no other person than himself had made residence or any settlement thereon or claimed any interest therein.

That your affiant has had a continuous residence on said land since he made settlement April 22, 1889, and has made valuable improvements thereon.

That defendant George P. Johnston well knew your affiant was a prior occupant of said lands, and had a prior right thereto at time he filed H. A. No. 123 as aforesaid.

That for a long time after your affiant made residence on land above described defendant George P. Johnston was claiming other than the land in controversy.

That defendant is not a qualified homesteader under homestead laws and act of Congress approved March 2, 1889, and these facts your contestant is ready to prove at such time as may be named by the Register and Receiver of the United States Land Office at Guthrie, Indian Territory.

Wherefore your affiant asks that a time may be set for a hearing in said case, and that your affiant be permitted to prove the above with other facts why the said H. A. No. 123 made by George P. Johnston, April 23, 1889, be canceled and forfeited to the United States on your contestant paying the expenses of the hearing of said cause.

(Signed)

THEODORE L. McEVERS.

Subscribed and sworn to before me this 17th day of May, 1889.

(Signed)

L. C. GOSSETT,

(SEAL)

United States Commissioner.

Also appeared at the same time and place Elbert P. Scott and William S. McEvers who being duly sworn say that they are acquainted with the above described land and have heard read the above affidavit and have personal knowledge that the facts stated in said affidavit are substantially true and correct.

X. ELBERT P. SCOTT,

X. WILLIAM S. MCEVERS.

Subscribed and sworn to before me this 17th day of May, 1889.

(Signed)

L. C. GOSSETT,

United States Commissioner.

Filed July 20, 1889.

It will thus be seen that the two material charges contained in this affidavit were the prior settlement on the part of McEvers and the disqualification on the part of George P. Johnson, the defendant.

Upon the issues thus joined the case went to trial.

The local officers decided that McEvers was the prior settler and recommended the cancellation of Johnson's entry as to the tract in controversy.

On February 19, 1895, your office affirmed the action of the local officers.

On March 26, 1896, this Department, following the concurring decisions of your office and the local office, affirmed your action.

On June 9, 1896, the case being before the Department upon review, it being alleged that in the affidavit of contest filed by McEvers and in the evidence contained in the record there was nothing to show that McEvers was a qualified settler upon the land, it was held—

It is not asserted in the papers filed to obtain a motion for review that in fact McEvers was disqualified as a settler, and in the absence of such affirmative assertion by the petitioner, the Department would not be justified in granting the review. If the petitioner is prepared to make any showing of the disqualification of McEvers the Department will then entertain the question of review of the decision complained of.

On September 1, 1896, a decision was rendered entertaining the motion, it appearing that

the affidavits of Wm. W. Ansley and C. P. Smith, are furnished to the effect that McEvers had violated the act and the President's proclamation opening these lands to settlement.

Counsel for the petitioner urge that

said affidavit of contest was wholly insufficient in law to raise any issue upon which the homestead entry of said Johnson could be lawfully canceled, nor was there any sufficient testimony introduced on the hearing of said cause that would justify the cancellation of said homestead entry.

The province of an affidavit of contest is to state a cause of action. The contest on its face alleged two causes of action as has been already set out. Ordinarily speaking, the qualifications of a contestant do not enter into a case for the entry must stand or fall upon the rights in the entryman. Was the entry made in good faith? Was the entryman qualified at the time of making such entry? Has he done anything since making his entry that must result in a forfeiture of the entry? It

follows, therefore, that even though the contestant be himself not qualified the contest would not fail on account of such disqualification. The contestant stands in the position of furnishing information to the government and as the silent third party in all causes before this Department in relation to the public lands, the government may proceed to act upon the information so furnished and can cancel the entry.

But it appears that there is nothing to show that George P. Johnson is a disqualified entryman. He is over twenty-one years of age; the head of a family; is not the owner of more land than is permitted by the statute allowing entries, and did not violate the act opening these special lands to settlement, and his entry is canceled in so far as it conflicts with that of McEvers, for the sole reason that McEvers was the prior settler upon the tract in controversy, together with the rest of the NW. $\frac{1}{4}$. Such being the case we are brought to a discussion of a different phase of what is the effect of the qualification of the contestant.

It may be said in general that where a contest is brought against an existing entry by anyone, the only question to be considered is whether the entry can stand. This is true of all cases where the contestant alleges no rights in himself, but it is not true where he does so allege superior rights in his own person by reason of any acts of his, and in such cases the contest so initiated is really a suit to try title to land, and the questions of disqualification of the entryman are of no more importance than those of the qualifications of the contestant. They both stand upon the same plane. They both must make a showing of their qualifications and it devolves upon the contestant to establish his qualifications as an entryman under the law.

It does not appear that in this case McEvers has made any such showing. An examination of page 12 of the record discloses that he testifies as to his other qualifications but not that he did not violate the acts of Congress and the President's proclamation in opening the Territory of Oklahoma to settlement.

In the alleged affidavit which accompanied his papers at the time of making application to enter this land, prior to the hearing in this cause, it appears that such affidavit was not sworn to.

It does not seem to be just that the entry of Johnson should be canceled because of the prior settlement of McEvers, if it be true that McEvers was in fact a violator of the law pertaining to Oklahoma Territory.

While there is no specific finding upon the question of the disqualification of Johnson, yet it must be assumed that it was found that he was not disqualified, otherwise it would have become incumbent to cancel his entire entry, which was not done.

A number of witnesses depose that they saw McEvers within the Territory during the prohibited period, on or near the tract in controversy. In answer to this, the contestant submits the affidavits of various witnesses who testified that during this period the said McEvers

was sick from malarial fever and was confined to his room. The petitioner further presents the affidavits of others that McEvers was not sick during such period, but was daily in attendance of his duties as restaurant proprietor in the town in which he lived. The credibility of the two witnesses (Ansley and Smith) upon whose testimony the motion for a rehearing was entertained, is attacked; many deponents appearing upon either side. The contestant further shows by recent affidavits that some of the affiants for the petitioner who deposed that they saw the contestant within the Territory during the prohibited period, were unworthy of belief, and that other witnesses who testified to the veracity of Ansley and Smith did so under a misapprehension of what they were signing.

All of this raises questions of fact which the Department is not at present in position to pass upon. This can best be done and the truth more accurately arrived at, by submitting all of the evidence to its course, under the regular machinery of the Department.

The case is therefore remanded to your office, and you will order a further hearing to pass upon questions involved.

APPLICATION TO ENTER—RESIDENCE.

BAKER ET AL. v. RAMBO.

A homestead applicant is not required to establish residence on the land involved prior to the allowance of his application.

Secretary Francis to the Commissioner of the General Land Office, December 3, 1896.
(I. H. L.) (J. L. McC.)

George E. Baker and Henry C. Allison have appealed from the decision of your office, dated November 28, 1894, sustaining the action of the local officers in dismissing their respective contests against the homestead entry of James R. Rambo for the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 3, and the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 10, T. 21, R. 4 E., Perry land district, Oklahoma.

Rambo applied to make said entry on October 31, 1893; but his application was suspended, and not allowed until April 24, 1894.

On May 2, 1894, Baker filed affidavit of contest against so much of said entry as embraced the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said Sec. 3, and Allison filed affidavit against so much of said claim as embraced the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 10, alleging in substance abandonment and failure to reside upon the tract. Baker alleged settlement and residence since November 12, 1893; and Allison since November 8, 1893.

The local officers, and on appeal, your office, dismissed said contests, for the reason that they do not state sufficient grounds, if proven, to warrant the cancellation of the entry, the same not having been subject to contest for abandonment at the time said affidavits were filed.

The appellant's several allegations of error are in substance included in the one which contends that your office erred

in holding that the defendant was not required to establish his residence on the land involved, pending action on his application to make homestead entry, when the record fails to show any reason why his application was suspended.

In the case of *Goodale v. Olney* (12 L. D., 324), the Department held that

Olney was not bound to reside upon the land after the local officers had rejected his application, pending final action thereon in your office. If an applicant were required to reside on the land embraced in his application pending final decision thereon, he would, in case of an adverse decision, lose his labor and improvements placed thereon.

This doctrine has since been reaffirmed in the cases of *Rice v. Lenzshek* (13 L. D., 154), *Hall et al. v. Stone* (16 L. D., 199), and many others.

The decision of your office was correct, and is hereby affirmed.

MINING CLAIM—LODE WITHIN PLACER—LOCATION.

WILSON CREEK CONSOLIDATED MINING AND MILLING CO. *v.* MONTGOMERY ET AL.

A lode or vein is not "known to exist" within a mining claim from the recorded notice of the location thereof, in the absence of a prior discovery of a valuable vein or lode therein.

Secretary Francis to the Commissioner of the General Land Office, December 3, 1896. (I. H. L.) (E. B., Jr.)

In the case of the Wilson Creek Consolidated Mining and Milling Company *v.* W. S. Montgomery *et al.*, the Department decided September 11, 1896 (unreported), that the Hall City Placer claim, for which said Montgomery and others made Pueblo, Colorado, mineral entry No. 24, April 4, 1894, was valuable for placer mining purposes, and did not contain within its limits any valuable mineral bearing lode or vein at the date of the placer application, May 20, 1893.

Said company has filed a motion for review of this decision, assigning four grounds of error, none of which contain anything not heretofore carefully considered here in the case. The third ground of alleged error should, however, receive some consideration, both to correct misstatement of fact and an erroneous application of the case cited therein.

It reads—

3. In ignoring the third specification of error set up in the appeal from the Commissioner's decision, which specification is as follows:

In each of the lode claims now in controversy, a discovery and location were made, and the certificate of location duly recorded before the date of the placer location and application. Therefore it was error not to hold that the placer applicants must be presumed to know that lodes were known to exist therein at the date of the placer application. See *Noyes v. Mantle* (127 U. S., 348-354), wherein it is held that—

Where a location of a vein or lode of mineral or other deposits has been made under

the law, and its boundaries have been specifically marked on the surface, so as to be readily traced, and notice of the location has been recorded in the usual books of record within the district, that vein or lode is "known to exist" within the meaning of that phrase as used in Rev. Stat. Sec. 2333, although personal knowledge of the fact may not be possessed by the applicant for a placer claim. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the applicant with the existence of the vein or lode.

Said third specification was not overlooked nor ignored by the Department in its decision. It is embraced in the following paragraph taken from the statement, in said decision, of error assigned in the appeal—

1. Not to have found from the evidence that valuable known lodes were shown to exist within the placer limits at date of application.

An examination of the language used by the supreme court in the case of *Noyes v. Mantle*, *supra*, in connection with "the law" therein referred to, which is found in sections 2318, 2319, 2320 and 2333, Revised Statutes, will show that the vein or lode held by the court as "known to exist" was one "valuable" for its mineral deposits, and "known" to be such at the date of the placer application. It was only "a vein or lode such as is described in section twenty-three hundred and twenty," when "known to exist" within ground claimed as placer, and not included in the placer application, that the statute (2333 R. S.) excepted from the placer patent. See in this connection, generally, as to the importance attaching to the use of the words "known" and "valuable" in the mining laws, *Deffebach v. Hawke*, 115 U. S., pp. 404 and 5, and *Davis's Administrator v. Weibbold*, 139 Id., 524 and 5).

The location which when duly recorded, the court held to be constructive notice of the existence of a vein or lode, was one "made under the law" and meeting, at the time, all the requirements of the law, that is, among other things, one made after the discovery within its limits of a *valuable* vein or lode (Sec. 2320 R. S.). A mere notice standing of record of a so-called location made regardless of the discovery of a valuable vein or lode, or of a location long since abandoned, was certainly not the notice which the court held "must be deemed sufficient to acquaint the (placer) applicant with the existence of the vein or lode."

The proposition that any recorded notice of a so-called lode location is conclusively presumptive of the existence of a valuable lode or vein within its limits, as would seem to be the contention of this motion, needs, it would seem, in view of the law and the history of mining claims and operations, only to be stated to be refuted. In *Noyes v. Mantle*, *supra*, page 351, the court expressly states:

There is no pretense in this case that the original locators did not comply with all the requirements of the law in making the location of the Pay Streak lode mining claim, or that the claim was ever abandoned or forfeited.

It was of such a location that the court very properly used the language quoted in the motion. No such location, for any ground within the placer limits, was shown to exist at the date of the placer application. The motion is denied.

PRACTICE—APPEAL—ORDER OF CANCELLATION.

MURRAY v. SKAGGS ET AL.

An appeal will not lie from the action of the Commissioner in canceling an entry under directions issued in a departmental decision that has become final.

Secretary Francis to the Commissioner of the General Land Office, December 3, 1896. (A. E.)

On June 13, 1896, your office transmitted an appeal filed by Skaggs, one of the parties to the above entitled cause, from the action of your office on December 19, 1895, canceling the entry of Robert M. McKenzie. The land involved is the SW. $\frac{1}{4}$ of Sec. 32, T. 17 N., R. 2 W., Guthrie land district, Oklahoma.

The record necessary to an understanding of this appeal is as follows:

On April 30, 1889, Robert M. McKenzie made homestead entry of the land above described. On May 30, 1889, William Skaggs filed a contest against the entry alleging prior settlement. On August 20, 1889, William Murray filed contest charging that both McKenzie and Skaggs were disqualified.

After a hearing, the local office, the receiver alone acting, found McKenzie and Skaggs disqualified. This was affirmed by the General Land Office. Skaggs and McKenzie appealed. While these appeals were pending, Skaggs filed a motion before the Secretary for rehearing of the case.

On September 7, 1895, the Department denied the motion of Skaggs for rehearing without prejudice, and considering the case upon the appeals of McKenzie and Skaggs, affirmed your office finding that they were both disqualified.

On November 22, 1895, the Department denied a motion for review filed by McKenzie.

On December 19, 1895, your office promulgated the last above mentioned decision and canceled McKenzie's entry.

On December 27, 1895, your office transmitted a motion for rehearing filed by Skaggs. While this was under consideration, and on January 31, 1896, Skaggs filed an appeal from the action of the Commissioner canceling the entry of McKenzie by letter of December 19, 1895, above mentioned.

On February 10, 1896, the Department denied the motion of Skaggs for rehearing and now has before it the appeal from your office action canceling McKenzie's entry.

The cancellation of the entry of McKenzie after his motion for review had been denied was in accordance with the practice of your office. It was not a matter from which he could appeal, as it was substantially but following the directions of the Department.

The appeal can not therefore be considered, and the same is dismissed.

SECOND CONTEST—RES JUDICATA.

GUERTEN *v.* CHISHOLM.

An entryman is entitled to be heard on an issue raised as to the qualifications of an adverse claimant, though such issue may have been tried and determined as between said claimant and a third party in a prior proceeding.

Secretary Francis to the Commissioner of the General Land Office, December 3, 1896. (I. H. L.) (C. J. G.)

Under date of June 13, 1896, the attorneys for Archibald M. Chisholm filed a motion for review of departmental decision of April 28, 1896, denying his application for a hearing in the above entitled case, involving the SE. $\frac{1}{4}$ of Sec. 35, T. 63 N., R. 12 W., Duluth land district, Minnesota.

On June 27, 1896, the said motion for review was entertained, and the case is again before the Department for consideration. It is unnecessary for the purposes of this decision to repeat here the details of the case. The ground for the denial of Chisholm's application was that a second contest will not be allowed upon the same charges. It was held, in view of the fact that the charge in Chisholm's affidavit has reference to the qualifications of Delina Guerten, a matter already passed upon and determined by the Department in the case of Guerten *v.* Anderson (295 L. and R., 169), that the question involved in Chisholm's application for a hearing is *res judicata*.

Chisholm's interest was recognized in the decision which passed upon Guerten's qualifications, and the local officers were instructed therein to fix a day for a hearing for the express purpose of determining Chisholm's rights. It is alleged by Chisholm that the application of Guerten for the land in controversy was not of record in the local office at the time he made homestead entry thereof. The fact that he was permitted to make entry without specifying that the same was subject to Guerten's entry, and subsequently to commute his said entry to cash, lends force to his allegation. However this may be I am of the opinion, upon further consideration that Chisholm does not come within the technical rules of the doctrine of *res judicata*. He cannot be held responsible for any error that may have been committed by the local office in allowing his entry. He now has an entry of record and cannot be deprived of any rights secured thereby without due process of law, regardless of any question as to Guerten's qualifications that may have been adjudicated at a former hearing between different parties. He was not a party to that suit, and his rights have never been adjudicated.

The motion for a hearing is therefore granted, and the same is hereby directed to be ordered in accordance with the rules of practice and the custom prevailing in such matters in your office.

Departmental decision of April 28, 1896, is modified accordingly.

RESIDENCE QUALIFICATION OF SETTLER—POSTMASTER.

GLOVER ET AL. v. SWARTS

The rule that a postmaster will not be heard to claim residence outside of the delivery of his office is not applicable where it appears that such officer's resignation has been received by the Post Office Department prior to the date of his settlement.

Secretary Francis to the Commissioner of the General Land Office, December 15, 1886. (I. H. L.) (A. E.)

On September 26, 1893, Benjamin F. Swarts made homestead entry of lots 3 and 4 and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 7, T. 26 N., R. 1 E., Perry, Oklahoma, and on October 4, 1893, William Carson filed contest against the entry alleging prior settlement. On October 6, 1893, John B. Glover also filed contest against the same entry alleging prior settlement. Carson failing to prosecute his contest, a hearing was had on March 26, 1894, on the affidavit of Glover.

On February 21, 1895, the local office recommended that the contests be dismissed. On appeal, your office, on August 6, 1895, awarded the entry to Glover on the ground that Swarts was disqualified. Your office reached this conclusion in words following:

It is shown that Swarts was appointed postmaster at Otoe May 3, 1893, and was still holding that office at the date of trial and engaged in attending to the duties of his office as postmaster at Otoe. . . . Even if Swarts was the first settler on the land, and established residence thereon prior to the time that Glover did and said Glover's residence was established after Swarts made entry, the controlling question is whether a person holding the office of postmaster, to which he was appointed before entry, can be allowed to claim residence on the public land beyond the limits of the delivery of his office. This is not an open question.

Your office then held that as section 3631 of the Revised Statutes required every postmaster to reside within the delivery of the office to which he is appointed, and the land in controversy was not within that delivery, that therefore Swarts was disqualified to make entry of the same. This holding was based on the principle laid down in the case of Henry C. Hansbrough (5 L. D., 155). Concluding, your office found that,

the land covered by Swarts' homestead entry is not within the delivery of the post-office at Otoe, where he held the office of postmaster when he made his entry and up to the date of the hearing. Therefore, in view of the decision referred to (5 L. D., 155), your decision is reversed, Swarts' entry is held for cancellation, and the right of entry is awarded to Glover.

From this Swarts appealed, claiming that he was not postmaster at the time he made entry, having resigned and his successor having been appointed. To support this Swarts cites the records of the Post Office Department.

These records, as certified to by the Postmaster General, show that Benjamin F. Swarts resigned as postmaster at Otoe on August 23, 1893,

that said resignation was received at the Department at Washington on September 1, 1893, and his successor appointed on September 13, 1893.

The land in controversy was opened to settlement and entry on September 16, 1893, which was twenty-three days after Swarts had resigned and three days after his successor had been appointed.

Judge McLean, of the United States supreme court, sitting in circuit and considering the case of the United States *v.* Wright (1 McL. C. C., 509) and the question as to when an office is terminated, said:

There can be no doubt that a civil officer has a right to resign his office at pleasure, and it is not in the power of the Executive to compel him to remain in office. It is only necessary that the resignation should be received, to take effect, and this does not depend upon the acceptance or rejection of the resignation by the President.

Applying this ruling to the case under consideration, it is quite clear that Swarts, upon the receipt of his resignation by the Post Office Department September 1, 1893, had the right to abandon his residence within the delivery of the post office at Otoe, and to establish a residence elsewhere, if he chose to do so, notwithstanding the requirement of said section 3631 R. S.; and in view thereof he was not disqualified to claim residence upon the land in question at and from the date of his settlement.

In view of what has been said, your office decision is reversed, and you will allow the entry of Swarts to remain intact.

CONFIRMATION - SECTION 7, ACT OF MARCH 3, 1891.

COSTELLO *v.* BONNIE (ON REVIEW).*

The confirmatory provisions of section 7, act of March 3, 1891, for the benefit of transferees are not limited to cases where the encumbrance has been made of record.

The fact that proceedings have been instituted by the government against an entry, at the date of its encumbrance, does not defeat confirmation thereof for the benefit of a transferee.

Secretary Francis to the Commissioner of the General Land Office, December 15, 1896. (I. H. L.) (J. L. McC.)

Counsel for the transferees of Patrick Costello has filed a motion for review of departmental decision of August 4, 1896, in the case of said Costello against William Bonnie and the Boston Safe and Trust Company, his transferee—reported (23 L. D., 162) as “Castello” *v.* Bonnie—involving Bonnie’s pre-emption cash entry for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 30, and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 29, T. 59 N., R. 17 W., Duluth land district, Minnesota.

The department has already rendered three decisions in this case, in the course of which the facts have been fully set forth; therefore they need not be repeated in detail. The question at issue is whether Bonnie’s entry was in existence on March 3, 1891, so that it was subject to

* Previous decisions herein reported under the title of “Castello *v.* Bonnie.”

the provisions of section 7 of the act of that date, confirming in the hands of *bona fide* purchasers all entries, where the sale was made after such entry and prior to March 1, 1888. The departmental decision of August 4, 1896, sought to be reviewed, held that, inasmuch as the entry had been canceled upon the report of a special agent, without giving the entryman his day in court, such cancellation was improper, and that Bonnie's entry ought therefore to be considered as being, to all intents and purposes, so far as the transferee is concerned, an existing entry, and subject to confirmation under said act. Counsel for Costello alleges that said departmental decision was in error—

(1). In attaching controlling weight to the decision in the case of *Drew v. Comisky* (22 L. D., 174); . . . the record shows that Drew's entry was not made until after March 1, 1888, the controlling date of the confirmatory act of March 3, 1891; while in the case at bar not only had Costello's entry been made, but transfer thereunder to *bona fide* purchasers had also been made, long prior to March 1, 1888.

If there be any validity in the contention that one or the other of the two decisions referred to must be wrong, such inference certainly can not weigh against the entry of Bonnie; for the law expressly confirms entries "which have been sold or encumbered prior to the first day of March, 1888."

(2). In ignoring the fact, nowhere adverted to in the decision for which review is hereby sought that on March 1, 1888 (conceding for the purpose hereof that Bonnie's entry was intact at that date), Costello's entry was also an existing entry, and that *bona fide* transfers had been made thereunder and duly placed of record in the office of the county register of deeds.

(3). In not therefore holding that, inasmuch as there were two entries of record, both encumbered, on March 1, 1888, the equities created by the act of March 3, 1891, were equal, and that the strict letter of the law should therefore prevail.

The Department held that Bonnie's entry, having been improperly and illegally canceled, was to all intents and purposes legally existing on March 3, 1891. But there cannot legally be two entries in existence for the same tract at the same time. Hence the second so-called entry (Costello's) was wrongfully allowed, and was to all intents and purposes no entry whatever; and the so-called transfers thereof made and placed of record were transfers of a nonentity.

(4). In holding the encumbrance of the Boston Safe Deposit and Trust Company to be an encumbrance in good faith, when, as it is shown by the record here . . . that no such encumbrance affecting the land involved herein was of record at any time to date or prior to said date of March 1, 1888.

(5). In giving any status as an encumbrancer to the Boston Trust and Safe Deposit Company, which the record shows was nothing but a secret encumbrancer, no instrument appearing anywhere in the record showing or describing this land and purporting to have been filed in the proper record office of the county where the land is situated.

The act of March 3, 1891, does not require that the encumbrance must be made of record. If in fact the land has been sold or encumbered as set forth in said act the entry is confirmed in the hands of the transferee.

(6). In not holding that the departmental decisions of August 11, 1894, and April 12, 1895, establishing Costello's rights, had become *res judicata*.

The Department has never made a final decision of the case at bar; and your office has never made a decision that has become final. Your office on October 23, 1891, held that the case came within the provision of the confirmatory act of 1891. When the case reached the Department on appeal, the departmental decision of August 11, 1894, directed that it be remanded to the local officers for a hearing. The departmental decision of April 12, 1895 (20 L. D., 311), denied a motion for review of the departmental decision ordering a hearing. When the hearing was had your office ruled against Bonnie—but Bonnie appealed. The departmental decision of August 4, 1896, was rendered in response to said appeal. It will be seen that in none of the decisions above mentioned has a judgment against Bonnie been rendered that has yet become final.

Finally, the motion contends, in substance, that—

(7). At the date of the alleged encumbrance of the Boston Safe Deposit and Trust Company, the Bonnie entry had been canceled of record, and whether or not said cancellation was valid, the entry was then under proceedings by the government calculated to result in its cancellation.

The fact that "the Bonnie entry had been canceled of record" has already been fully discussed, and it has been held that, inasmuch as such cancellation was improper and illegal, the entry should be considered as though legally in existence at the date of the confirmatory statute of March 3, 1891. The further fact that "the entry was then under proceedings by the government calculated to result in its cancellation" does not prevent its confirmation under said act in the interests of a transferee. If the act had applied only to entries against which proceedings had not been instituted, there would have been no need for this paragraph of the act, and its passage would have been a vain and superfluous proceeding on the part of the legislative powers.

The motion for review is denied.

RESERVOIR SITE—WITHDRAWAL—PRE-EMPTION FILING.

MARIA H. WILLIAMS.

A pre-emption filing made subject to a withdrawal under the arid land act of October 2, 1888, that is awaiting action by Congress, may be suspended until such action is taken.

Secretary Francis to the Commissioner of the General Land Office, December 15, 1896. (I. H. L.) (W. A. E.)

By your office letter of October 1, 1889, certain lands in the Salt Lake City, Utah, land district, were withdrawn for reservoir purposes under the act of October 2, 1888 (25 Stat., 526). This withdrawal

included all of section 10 in township 33 south, range 2 west. The letter of withdrawal was not received at the local office, however, until October 7.

In the meantime, on October 4, 1889, Maria H. Williams filed pre-emption declaratory statement for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said section 10, alleging settlement September 27, 1889.

January 7, 1893, she submitted final proof, which was rejected by the register and receiver for the reason that the land covered by her declaratory statement had been reserved for reservoir purposes.

On appeal, your office held that her claim was subject to the reservoir site selection, but pending the approval or rejection of said selection by the Secretary, her filing was suspended.

Appeal from this action brings the case before the Department.

The arid land act of October 2, 1888, provided that:

All the lands which may hereafter be designated or selected by such United States surveyors for sites for reservoirs, ditches, or canals for irrigation purposes and all lands made susceptible of irrigation by such reservoirs, ditches, or canals are from henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act to entry, settlement, or occupation until further provided by law: *Provided*, That the President at any time in his discretion, by proclamation, may open any portion or all of the lands reserved by this provision to settlement under the homestead laws.

This act was subsequently amended by the act of March 3, 1891 (26 Stat., 1095), which provided that reservoir sites located

shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs, excluding so far as practicable land occupied by actual settlers at the date of the location of said reservoirs.

It has been held by the Department in several cases that an entry after the passage of the act of October 2, 1888, of land subsequently designated as a reservoir site under said act is invalid, but may be suspended with a view to its ultimate allowance under section 17, act of March 3, 1891, in the event that the land is not required for reservoir purposes. Mary E. Bisbing, 13 L. D., 45; Newton F. Austin, 18 L. D., 4; Amanda Cormack, 18 L. D., 352.

On August 18, 1894, the Department directed that reservoir site No. 10 (among others), containing the land here involved, "continue withdrawn from disposition to await further action by Congress" (Miscel. Press Copybook 290, p. 494).

The papers transmitted by your office letter "G" of August 31, 1893, are accordingly herewith returned, and Mrs. Williams' filing will remain suspended until the matter of these reservoir sites has been acted upon by Congress.

SECOND CONTEST—RES JUDICATA.

PARCHER *v.* GILLEN.

A contest should not be allowed on an issue that has been considered and finally determined in a prior suit involving the rights of the entryman.

Secretary Francis to the Commissioner of the General Land Office, December 15, 1896.
(I. H. L.) (R. W. H.)

The motion of John Gillen to review and reverse the departmental decision of April 28, 1896, affirming the decision of your office of April 3, 1895, in which you sustained the contest of D. W. Parcher against Gillen's homestead entry, No. 7121, made March 10, 1894, for the N. $\frac{1}{2}$ NW. $\frac{1}{4}$ and lot 1, Sec. 12, T. 39 N., R. 6 E., Wausau land district, Wisconsin, having been filed, and it appearing that proper grounds for entertaining said motion have been shown, and the rules of practice as to service upon the parties and filing of briefs complied with, I have examined the same.

The errors assigned as the basis for the motion may be grouped for more convenient discussion under two heads:

1. Whether Gillen's qualification as an entryman of the tract in question was passed upon in the departmental decision of the case of Gillen *v.* Beebe (16 L. D., 306), and upon the motion for review of the same, as set forth in L. and R. letter book No. 279, p. 319, in such manner as to bring it within the rule of adjudged questions, as held by the Department.

2. Whether Gillen secured any advantage by reason of his alleged entry prior to December 20, 1890, which would bring him within the prohibitive provision of the act of June 20, 1890 (26 Stat., 169).

The tract in question was part of the land withdrawn from market by proclamation of the President, of April 5, 1881, and by the act of Congress of June 20, 1890, restored to the public domain, subject to entry under the homestead law.

Section 3 of this act is as follows:

That no rights of any kind shall attach by reason of settlement, or squatting, upon any of the lands hereinbefore described, before the day on which said lands shall be subject to homestead entry at the several land offices, and until said lands are opened for settlement, no person shall enter upon or occupy the same, and any person violating this provision, shall never be permitted to enter any of said lands, or acquire any title thereto.

The act by its terms was to take effect six months after its approval by the President, and the land thus became subject to entry and settlement on December 20, 1890.

The record in the case of Gillen *v.* Beebe *et al.*, *supra*, shows that Beebe made homestead entry of the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and lots 1, 2 and 3 of Sec. 12, T. 39 N., R. 6 E., Wausau land district, shortly after 9 o'clock A. M., December 20, 1890; that, upon application of John Gillen, a

hearing was ordered to determine his rights as a settler upon the land under his application made January 8, 1891, to enter the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and lot 1 of said section, in which he alleged settlement December 20, 1890, "between the hours of 12 and 1 o'clock A. M. of that day;" and it appearing from the records of the local office that Samuel H. Norton had applied to enter lots 1, 2, and 3, and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section, alleging settlement December 20, 1890, he was also ordered to appear.

As a result of the hearing the local officers decided in favor of the settlers, Gillen and Norton, as against the entryman Beebe, and recommended the cancellation of the latter's entry. As between the settlers it was recommended that an amicable settlement be made between them; and in default of this the privilege of entry be awarded to the highest bidder.

Beebe appealed, and your office by letter of April 9, 1892, affirmed the judgment of the local officers as to the cancellation of his entry, but modified their decision by allowing Gillen "the preference right to the N. $\frac{1}{2}$ NW. $\frac{1}{4}$," and Norton "the preference right of entry to lots 1, 2 and 3." Both Beebe and Gillen appealed; the former assigning error as follows:

In holding that Congress meant the usual day of twenty-four hours in the act of June 20, 1890, when it evidently meant the official land office day, commencing at 9 A. M.

In not finding and holding that John Gillen was disqualified to make entry of the land, because according to the testimony he entered upon the land prior to the day it was opened to entry, to wit, before 9 o'clock A. M., on December 20, 1890, and thereby forfeited all right to enter the same under the act of June 20, 1890.

In not finding and holding that Samuel H. Norton was disqualified to make entry of the land, for the reason that the testimony discloses that he entered on the land prior to the day it was opened for entry, to wit, prior to 9 o'clock A. M. on December 20, 1890, and thereby forfeited all right to enter the same under the act of June 20, 1890.

In holding Beebe's homestead entry for cancellation when he was the first legal applicant therefor and when there was no valid adverse claim to the tract.

In finding contrary to both the law and the evidence.

Gillen alleged as error the awarding to Norton, instead of to himself, of the right to enter lot 1. While Beebe's chief contention and reliance were upon the proposition that the word "day" as employed in section 3, act of June 20, 1890, meant the "business day" recognized in the practice of the local office, and not the calendar day of twenty-four hours, the Department, in its decision upon the appeals, considered the qualifications of all the parties to the controversy to make entry under the act, so far as they were disclosed by the record.

In Beebe's assignments of error the alleged disqualification of Gillen is set forth in substantially similar terms as those used in the case of Norton. Both are charged, upon the testimony at the hearing; with having entered on the land, prior to the day it was opened to entry, to

wit, prior to 9 o'clock A. M., on December 20, 1890, and having thereby forfeited all right to enter the same under the act of June 20, 1890.

After disposing of the specific question as to the proper construction of the word "day," as used in the act, the decision (16 L. D., *supra*,) goes on to say:

Therefore if it is shown that Gillen and Norton were both qualified settlers under said act, it follows that Beebe's entry should be canceled, and if it appears that either was disqualified, then his settlement should be declared ineffective.

No question was raised as to the sufficiency of either Gillen's or Norton's acts of settlement, and their qualifications, under said act, were considered apparently without restriction to the period between 12 and 1 o'clock A. M. of the 20th of December. This view is sustained by the fact that Norton was found disqualified *under the act* to enter said land upon the authorities cited and facts presented in the case, while Gillen was allowed to enter the land he had applied for. This judgment of the Department would seem to be sufficient to warrant the conclusion upon Gillen's part that his qualifications had been passed upon and that he could safely venture upon expenditures for the improvement of the land.

Norton asked for a review of the decision of the Department, and Beebe moved for a rehearing of the case. (L and R. 279, p. 319). Before these motions came up for consideration Norton executed a release of all his rights and interest in lots 2 and 3 to Beebe "for value received," and the contest narrowed down to Beebe and Gillen.

In his motion for rehearing Beebe made oath that he had recently discovered several witnesses who would testify, in case an opportunity is afforded, that John Gillen had entered upon and occupied water reserve land upon the 19th of December, 1890, in violation of law. The names of these witnesses are given and their affidavits filed.

Counter affidavits were filed upon the part of Gillen, in which every material allegation contained in the affidavits of Beebe and his witnesses are denied, and the exact whereabouts of Gillen, from the morning of the 19th of December, 1890, until midnight of that day are stated with great particularity. It is made to appear, by these affidavits, that Gillen and his party were very careful not to go upon the water reserve land prior to December 20, 1890, but that two minutes after midnight of the 19th of said month, he went upon the land in question, and made settlement thereon. That he has since properly resided on the land is not questioned.

In concluding the decision upon Beebe's motion for rehearing it is said:

In the case of Sutton *et al.* v. Abrams (7 L. D., 136), it was held that a new trial will not be granted on the ground of newly discovered evidence, unless such evidence is of that character to necessarily cause the trial court to arrive at a different conclusion. It is not shown to my satisfaction that the newly discovered evidence of Beebe would necessarily have that effect in the case at bar, especially in view of the fact that such evidence would all be contradicted by witnesses called by Gillen,

judging by the affidavits now before me. "So far as the rights of Gillen are concerned there have been concurring decisions in his favor by the local officers, the Commissioner and the Secretary. In such a case it was held in *Matthiessen and Ward v. Williams* (6 L. D., 95), that a reviewing tribunal would not disturb their decision if there was any evidence to support it, and unless it was unquestionably contrary to law.

I think the departmental decision complained of was justified by the evidence then in the case, and I do not think the new evidence which it is proposed to submit, in case a rehearing should be ordered, would make the rights of the parties appear materially different. The motion is therefore denied.

This decision was made February 12, 1894.

On April 3, 1895, in the contest of *D. W. Parcher v. John Gillen*, involving the same land and substantially the same matter as was involved in the case of *Gillen v. Beebe et al.*, *supra*, and upon Beebe's motion for rehearing of the same, as above given, your office held that the action of the Secretary in denying said motion for review on the ground stated, should not be taken as precluding further investigation.

From the evidence in the case you believed that the defendant was on "water reserve" land on December 19, 1890, and said Gillen's entry, No. 7121, was held for cancellation, and your said office decision was formally affirmed by the Department, April 28, 1896.

The length to which controversies between claimants for the public lands should be carried, with a view to the protection of the government on the one hand, and the security of established rights on the other, must necessarily depend upon the circumstances of each particular case.

The policy of the government, as reflected in the decisions of this Department has been to put an end to contention arising from this source, as soon as possible, consistently with the firm maintenance of its laws; and it has become a well-settled rule, that a matter once in issue and adjudicated may not be litigated again, though the parties be different, or, as it is sometimes expressed, an entryman can not be required to defend a second time on a charge already passed upon in one contest. Therefore it is that the Department, as a reviewing tribunal, will not disturb concurring decisions of the local office, the Commissioner and the Secretary, if there is evidence to support them, and they are not unquestionably contrary to law.

John Gillen complains that this rule has been violated by the reopening and readjudication of the question as to his qualifications to enter the land in dispute.

It is not strictly an issue of *res judicata*, because there is not an identity of parties; nor does it appear from the record that the charge, *in totidem verbis*, that Gillen entered the land on the 19th of December was made at the hearing of *Gillen v. Beebe et al.*, which was held upon Gillen's application to determine his rights as a settler thereon, upon his claim that he had made settlement between the hours of 12 and 1 A. M. of the 20th; but the government, which is a party to every controversy of this sort, does not seem to have thus limited the scope of

its inquiry, and having ordered Norton who was also alleging settlement on part of the tract to appear, proceeded to consider the qualifications of the parties "as settlers under the act" (26 Stat., 169), and rendered judgment accordingly.

It was clearly competent, under our rules of practice, in a case of this sort, to consider the general issue upon the specifications of error as set forth in Beebe's appeal; and that this was done is shown by the Secretary's language in denying Beebe's motion for rehearing, in which he says:

I think the departmental decision complained of was justified by the evidence then in the case, and I do not think the new evidence which it is proposed to submit, in case a rehearing should be ordered, could make the rights of the parties appear materially different.

The new evidence Beebe proposed to submit was upon the same question Parcher subsequently raised in his contest for the same land; and, as it was held insufficient to justify a rehearing, it ought not to have been entertained in a new contest. Although Parcher's contest affidavit alleged abandonment there was no evidence to support the charge, and the record of the contest discloses no cause of action that had not accrued prior to the Beebe contest.

I am therefore of the opinion that as the rights of Gillen under his homestead entry, No. 7121, were fully considered and sustained by the concurring decisions of the local officers, the Commissioner and the Secretary, in a former contest, they should not again have been called in question.

In this view of the case it is unnecessary to consider the question presented in the second specification of error.

The departmental decision of April 28, 1896, is accordingly revoked. Parcher's contest will be dismissed, and Gillen's entry remain intact.

RAILROAD GRANT—INDEMNITY SELECTIONS—SPECIFICATIONS OF LOSS.

GRINNELL *v.* SOUTHERN PACIFIC R. R. CO. (ON REVIEW).

A list of indemnity selections in which due specifications of loss are assigned, should not be rejected on account of the company's failure to designate losses for prior selections, as required by the circular of August 4, 1885, but should be suspended awaiting compliance with said requirement; and a list so filed operates to protect the right of the company from the date of its presentation.

The departmental decision herein of April 6, 1895, 22 L. D., 438, recalled and vacated.

Secretary Francis to the Commissioner of the General Land Office, December 15, 1896. (I. H. L.) (F. W. C.)

The case of Emory E. Grinnell *v.* Southern Pacific Railroad Company, involving the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 35, T. 25 S., R. 29 E., M. D. M., Visalia land district, California, is again before this Department for consideration; the motion filed on behalf of the company for review of

departmental decision of April 6, 1895 (22 L. D., 438), having been entered and returned for service, and the same having been returned bearing evidence of service upon Grinnell.

The tract involved is within the indemnity limits of the grant to said company under the act of July 27, 1866 (14 Stat., 292), and was first included in a list of selections filed by the company on December 9, 1885. This list, being designated as list No. 23, contained a proper designation of losses as a basis for the selections included therein, but was rejected by the local officers because the company had not, in compliance with the circular of August 4, 1885 (4 L. D., 90), designated losses for previous indemnity selections made on account of its grant. From this action the company appealed.

Upon consideration of said appeal, by letter of November 4, 1891, your office advised the register and receiver that their action in rejecting the list was not warranted, and they were directed to further consider the same and to require the selecting agent of the company to file a new list; whereupon the company prepared list No. 56, in which the same losses were assigned for the selections as were included in list No. 23. Said list No. 56 was approved by the register and receiver on May 10, 1892.

It appears that during the pendency of the company's appeal from the rejection of its list No. 23, the register and receiver, on January 16, 1888, permitted Grinnell to make homestead entry covering the tract above described, together with eighty acres in the adjoining even numbered section.

On August 15, 1893, Grinnell submitted final proof upon said entry, which was rejected by the local officers for conflict with the company's indemnity selection; from which action he duly appealed to your office.

By your office decision of January 12, 1895, the action of the local officers in rejecting Grinnell's proof for conflict with the company's indemnity selection was approved and Grinnell's entry was held for cancellation; your said office decision holding that the company's rights under its selection lists related back to the date of the first presentation. From said decision Grinnell prosecuted the case by appeal to this Department; said appeal being considered in departmental decision of April 6, 1896 (*supra*), in which it was held as follows:

The question thus presented by the record is: did the company gain any such right by the filing of its list on December 9, 1885, as would bar the allowance of any entry upon a tract included in the list?

By the circular of August 4, 1885 (4 L. D., 90), addressed to the local officers, it was directed—

"Where indemnity selections have heretofore been made without specification of losses, you will require the companies to designate the deficiencies for which such indemnity is to be applied before further selections are allowed."

In referring to said circular, it was held in departmental decision of May 1, 1891, in the case of *Sawyer v. Northern Pacific R. R. Co.* (12 L. D., 450)—

"The subsequent circular of Secretary Lamar, of August 4, 1885 (4 L. D., 90), requiring a basis of loss for such selection, was not designed to invalidate selections

theretofore made, but required the company to designate the losses in lieu of which such prior selections had been made, and directed the district officers not to receive any further selections until such order had been complied with."

It is clear therefore, that if the company had not complied with the circular and specified a basis for selections approved prior to the promulgation of said circular, the local officers were justified in refusing to receive further indemnity selections, and no rights were acquired by the attempt to make further indemnity selections, until the circular had been complied with, which you report was not until October 27, 1888.

It has been repeatedly ruled that there was no authority for an indemnity withdrawal on account of the grant for this company, and that no rights were acquired within the indemnity limits until selection had been made in the manner prescribed.

The allowance of Grinnell's entry on January 16, 1888, was therefore proper.

After a careful consideration of the matter I am of opinion that the former decision of this Department is in error in refusing to accord to the company rights under its selection list presented December 9, 1885, from the date thereof; it appearing that said list was regular and proper, being a selection of lands within the indemnity limits and based upon an actual loss to the grant.

While it is true the circular of August 4, 1885, requires the company to designate the deficiencies for indemnity selections made and approved prior to its date without the designation of losses before further selections are allowed, yet I do not believe its purpose was to estop the company from making further indemnity selections upon a valid basis, and thus protect itself against adverse claims within such limits, until it had complied with the circular, but rather to prevent the enlargement of the grant by continued certification of indemnity lands, until, by the specification of losses for previous selections made and approved, it had been shown that the right to make further indemnity selections existed.

The selection list of December 9, 1885, as before stated, was a regular and proper list, and upon its presentation, accompanied by a tender of the proper commission, it would seem that the company's rights as to such tracts were fully protected, if, upon its subsequent compliance with the circular of 1885, by the specification of losses for previous selections made and approved, the right to the indemnity, as claimed, upon the basis assigned, actually existed.

It is urged on behalf of the company that it had, prior to the allowance of Grinnell's entry, specified a loss for all previous indemnity selections made and approved within the Visalia land district, but this I not believe to be material, as the grant is adjusted as a whole.

While it appears from your report previously made in this case that the company did not until October 27, 1888, complete the assignment of losses as bases for the previous selections made and approved prior to the circular of 1885, yet it has been shown that after complying with said circular, the right to indemnity, as claimed in the list of December 9, 1885, exists. It would therefore seem that the proper action to have been taken by the local officers upon said list of 1885 would have been

to suspend the same awaiting the company's compliance with said circular.

If any irregularity existed in the matter of the selections made by this company, it was in those made prior to the circular of 1885, which it was not the purpose of said circular to hold to be invalid.

In so far as the decision under review holds that no rights were acquired by the attempt to make further indemnity selections, until the circular of August 4, 1885, had been complied with, the same is recalled and vacated, and your office decision holding that the company's rights relate back to the date of the presentation of its first list, is affirmed.

In the decision under review it is further stated that—

Your office decision holds that "there is nothing of record, or in the proof made by Grinnell, showing the initiation of a right or claim to the land prior to or at the date when the company first applied for it."

The proof, however, shows that the land "had been actually settled upon and occupied ever since the spring of 1870."

It is true that the qualifications of the settler are not set forth, and it would be necessary to order a hearing to determine the status of the land at the date of selection, but as I am of the opinion that no rights were acquired by the selection of December 9, 1885, and that Grinnell's entry was properly allowed on January 16, 1888, the question as to the status of the land on December 9, 1885, becomes immaterial.

In view of the action herein taken upon the company's selection, and of the showing made in Grinnell's proof, I have to direct that a hearing be ordered, after due notice, in order to determine the exact status of the land at the date of the presentation of the company's list of selections, on December 9, 1885.

Herewith are returned the papers for your further action in accordance with the direction herein given.

RELINQUISHMENT—PRACTICE—CERTIORARI.

WALTERS *v.* NORTHERN PACIFIC R. R. Co.

A relinquishment takes effect when it is filed in the local office and operates *eo instanti* to release the land from the effect of the filing or entry. The subsequent notation of the relinquishment on the records of the General Land Office is merely a clerical act.

An application for certiorari will not be granted, where it appears that the Commissioner's decision, if before the Secretary on appeal, would be affirmed.

Secretary Francis to the Commissioner of the General Land Office, December 15, 1896. (I. H. L.) (W. A. E.)

The SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 13, T. 13 N., R. 18 E., North Yakima, Washington, land district, is within the limits of the withdrawal upon the map of amended general route of the branch line of the Northern

Pacific Railroad, and on definite location of the road, as shown by map filed May 24, 1884, it fell within the primary or granted limits.

March 15, 1886, John W. Walters, who claims that he has lived on this land since 1880, was permitted to file desert land declaration therefor. He subsequently made proof and final certificate was issued on December 13, 1886. The railroad company, however, protested against the acceptance of said proof, upon the ground that it had acquired said land under its grant.

After various orders and actions by your office and the Department, this case was consolidated with that of the Northern Pacific Railroad Company *v.* Shedrick J. Lowe, involving the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of the same section (which Lowe claimed by purchase from Walters), and a hearing was ordered to determine the status of the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section 13 on May 24, 1884, the date the grant took effect.

As a result of this hearing, which was had on July 25, 1894, the local officers found that at the date of the definite location of the road John W. Walters was residing upon and claiming the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section; that he had, prior to that time, exhausted his rights under the settlement laws; and that consequently his settlement on this land did not except it from the operation of the grant.

Both Walters and Lowe appealed to your office, and the railroad company filed motion to dismiss these appeals, for the reason that they had been served on H. C. Humphrey, an agent of the company at North Yakima, and not on F. M. Dudley, the attorney designated by said company to receive notices and papers relating to the grant.

This motion was sustained by your office decision of May 18, 1895; the appeals were dismissed; and the action of the register and receiver was affirmed.

Subsequently, by your office letter of June 14, 1895, the case was reopened as to Lowe, it having been shown that his appeal had, as a matter of fact, been served upon Dudley, and the usual time was allowed him in which to file further appeal.

Lowe thereupon appealed, and the record in the consolidated case was forwarded to the Department.

On September 6, 1895, Walters also filed appeal, the delay being explained by affidavits tending to show that neither he nor his attorneys had ever been served with a copy of your office decision of May 18, 1895, adverse to him, and that a letter to his Washington attorneys directing them to file appeal miscarried in the mails and was never delivered to said attorneys. Your office, however, declined to forward said appeal, for the reason that as he had not taken proper appeal from the decision of the local officers, appeal did not lie from the action of your office in the matter.

April 16, 1896, Walters filed an application for writ of certiorari, and said application is now before the Department for consideration.

It appears that on October 3, 1896, the Department rendered a deci-

sion on Lowe's appeal, but Walters' rejected appeal and his application for writ of certiorari having become separated from the record in the consolidated case by the action of your office in forwarding Lowe's appeal and declining to forward that of Walters, said application was not considered by the Department at that time.

It was held by the Department in said decision (23 L. D., 331) that Walters' settlement on the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section at the date of the definite location of the road was not sufficient to except the land from the operation of the grant as he had previously exhausted his rights under the settlement laws. It was further held incidentally that notice of an appeal served upon a duly recognized agent of a railroad company is a proper and sufficient service.

As the failure of Walters to come properly before the Department by appeal was due to the erroneous action of your office in dismissing his appeal from the local office and refusing him the right of further appeal to the Department, said departmental decision of October 8, 1896, can not be held binding as to him. It was through no fault of his that he was not represented here at that time. So far, then, as his rights are concerned, this application for writ of certiorari must be treated as if said departmental decision had never been rendered.

The records of your office (of which the Department takes judicial notice) show that Walters had entered land under both the homestead and pre-emption laws prior to the date he claims he settled on the tract in dispute, and consequently had exhausted his rights under the settlement laws. This fact is not denied by him.

He claims, however, that said tract was excepted from the grant by reason of a pre-emption filing therefor, made in 1876, in the name of John W. Miller, and remaining uncanceled at the date of the definite location of the road.

It appears from your office records that Miller's relinquishment was filed in the local office in 1879, but for some reason, which does not appear, the attention of your office was not called to said relinquishment until 1895, when it was formally canceled on the records of your office.

A relinquishment takes effect when it is filed in the local office and operates *eo instanti* to release the land from the effect of the filing or entry. The subsequent notation of the relinquishment on the records of your office is merely a clerical act.

It thus appears that at the date of the definite location of the road, the land here involved was not covered by such a claim as would except it from the operation of the grant, and that if Walters were regularly before the Department on appeal, your office decision awarding the land to the railroad company would have to be affirmed.

An application for certiorari will not be granted where it appears that the Commissioner's decision, if before the Secretary on appeal, would be affirmed. (*Swanson v. Galbraith*, 21 L. D., 109.)

The application is accordingly denied.

LOWENSTEIN *v.* ORNE.

Motion for review of departmental decision of August 28, 1896, 23 L. D., 285, denied by Secretary Francis, December 15, 1896.

SOLDIERS ADDITIONAL HOMESTEAD—ACT OF MARCH 3, 1893.

WILLIAM HALL ET AL.

The act of March 3, 1893, providing for the perfection of title under soldiers' additional homestead entries, made on "certificates of right," was for the protection only of persons holding under the certificates issued by the Commissioner of the General Land Office in accordance with the circular regulations of May 17, 1877.

Secretary Francis to the Commissioner of the General Land Office, December 15, 1896.
(I. H. L.) (W. M. W.)

Thomas J. Groves appealed from your office decision of April 21, 1893, holding for cancellation soldier's additional homestead entry of the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and lot 7, Sec. 2, T. 22 N., R. 20 E., Waterville, Washington, land district, and from your office decision of December 5, 1893, refusing to reconsider said decision. On the 17th of February, 1896, my predecessor rendered a decision in said case, but before the promulgation thereof the same was recalled for re-examination.

Such examination has been made. The record shows that one William Hall made homestead entry on March 7, 1872, for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 2, T. 3 S., R. 5 W., at the Oregon City land office, Oregon, containing 77.62 acres. Final certificate issued thereon October 13, 1874, and patent December 30, 1874.

Hall made soldier's additional homestead entry at the same land office on July 8, 1880, for lots 1 and 3, Sec. 23, and lot 3 of Sec. 26, T. 9 S., R. 3 W., containing 97.85 acres. Final certificate was issued on the date of the entry. No notation showing said additional entry was posted in the tract book containing Hall's original entry.

On May 12, 1892, the local officers at Waterville, Washington, transmitted Hall's application to make a soldier's additional homestead entry for the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and lot 7, of Sec. 2, T. 22 N., R. 20 E., containing 89.50 acres. The tract books of your office failing to show the existence of Hall's first additional entry (said entry being under suspension pending the consideration of the rights of a railroad company to the tract embraced therein), and the applicant making oath that he had never made a prior additional entry, your office on the 5th day of August, 1892, directed the register and receiver of the local office to allow Hall's second soldier's additional application, and the same was allowed by them on the 26th day of August, 1892. Afterwards, the fact that Hall had made a prior soldier's additional entry was discovered, and your office, by letter of April 21, 1893, advised the local

officers that Hall had exhausted his right by his prior entry made at Oregon City, and thereupon the additional entry made by Hall at Waterville, August 26, 1892, was held for cancellation.

On May 22, 1893, counsel for Hall's transferee filed a motion for review of your office decision of April 21, 1893, in behalf of the transferee of said Hall. Said attorneys filed an argument in support of the motion for review, and also an abstract of title showing that on September 9, 1892, Hall deeded the land in question to one Thomas J. Groves. They also filed an application of said Groves to be allowed to perfect title to said land by paying the government price therefor in accordance with the act of March 3, 1893 (27 Stat., 593).

On December 5, 1893, your office overruled Groves's motion for review of your office decision of April 21, 1893, and denied his application to be allowed to acquire title to the land in question under the act of March 3, 1893.

Groves appeals.

Appellant alleges the following errors:

1. In holding said entry for cancellation in the first instance without considering the rights of the transferee Groves, under act of 1893.

2. In assuming, in the absence of any distinguishing words in the said act of 1893, that one form of certificate was intended to be embraced within its provisions and another form excluded.

3. In holding that because the errors and frauds under the special form of certificate employed since February 13, 1883, have been fewer in number than those under the general form of certificate used before that date, no reason exists for applying the statute to the later certificates, and that it was not enacted with reference to them.

4. Error in holding, in effect, that a letter of the Commissioner to the local officers, such as that quoted in Wm. Hall's case, advising them that Hall's application to enter certain land as a soldier's additional homestead had "been examined in connection with the records of this office and no objection thereto are found," is not a certificate, within the legal definition of the term.

"Certificate.—A statement in writing by a person having a public or official status, concerning some matter within his knowledge or authority." (Am. & Eng. Enc. of Law, Vol. 3, p. 59.)

5. Error in concluding from the circumstances, and the language of the act (March 3, 1893,) that it does not apply to all soldier's additional entries made prior to its passage, whether by the soldier in person or by his duly authorized agent.

6. Error in assuming from the circumstances, or anything contained in the act, that it was the intention of Congress to exclude from its operation or benefits a class of special certificates which had been employed for a period of more than ten years before its passage, and without which special certificate no soldier's additional entry had been allowed during that period.

7. Error in rejecting the application of Thos. J. Groves.

The sundry civil appropriation bill of March 3, 1893 (27 Statutes, 572, on page 593), contains the provisions under which Groves, as the transferee of Hall, claims the right to perfect his title to the land in question by paying the government price for it. Said act is as follows:

That when soldiers' additional homestead entries have been made or initiated upon certificate of the Commissioner of the General Land Office of the right to make such

entry, and there is no adverse claimant, and such certificate is found erroneous or invalid for any cause, the purchaser thereunder, on making proof of such purchase, may perfect his title by payment of the government price for the land; but no person shall be permitted to acquire more than one hundred and sixty acres of public land through the location of such certificate, etc.

As to the facts in the case, it is clear that Hall's second soldier's additional entry is in excess of his legal rights. The conveyance by Hall to Groves was actually made for a valuable consideration, and Groves has not transferred the land. From these facts it is clear that, if Hall's soldier's additional entry had been made or initiated upon a certificate of right issued by the Commissioner of the General Land Office, Groves would be entitled to perfect his title to the land in question by paying the government price therefor, notwithstanding the fact that Hall's entry was originally illegal, if such certificate should be found to have been erroneously issued or invalid for any cause. This is so where the entry is made or initiated upon such certificate, either by the soldier or by any good faith purchaser of such certificate. See *Charles Holt*, 16 L. D., 294; *Kisiah Goodnight, Id.*, 319; *Yellow Dog Improvement Co.*, 18 L. D., 77; *John W. Green*, 19 L. D., 465.

The act under consideration is not ambiguous. Its requirements are plain and easily understood. There must be an entry either made or initiated upon a certificate of right issued by the Commissioner of the General Land Office; there must be no adverse claimant; such certificate must be found to have been erroneously issued or invalid for some cause; the purchaser of the land covered by such entry, or the purchaser of such certificate, as the case may be, must make proof of his purchase. When all of these requirements are met, then such purchaser may be permitted to acquire title to the land embraced in the entry upon payment of the government price for it. But no person can be permitted to acquire title to more than one hundred and sixty acres of public land through the location of such certificate. It follows that, if any one or more of these pre-requisites are wanting in any given case, the purchaser is not entitled to perfect his title; they all must concur in order to bring a purchaser within the provisions of the act.

The underlying foundation for the acquisition of title from the government under the act is the certificate of right issued by the Commissioner of the General Land Office. In the absence of such certificate the statute has no application. See *Gregg et al. v. Lakey*, 17 L. D., 60.

The only remaining question to be determined is, whether the entry of Hall was made upon such a "certificate" as the act of March 3, 1893, *supra*, contemplates. In order to determine this question a brief reference to the practice of the land department with respect to issuing certificates of soldiers' rights to make additional entries, and the facts connected with Hall's entry, seems to be proper and necessary.

By circular letter of your office of May 17, 1877, soldiers' additional homestead entries were provided for; and in cases where such rights

at that time remained in the hands of the parties in interest it was provided:

To secure these rights it is required that a full recital of military service be presented to this office, with due proof of the identity of the party making the claim, and with proper reference to his original homestead entry, giving the name of the district office, date and number of entry, and description of the land. In addition, a detailed statement, under oath, must be filed by the party in interest, setting forth the facts respecting his right to make the entry, and containing his declaration that he has not in any manner exercised his right, either by previous entry or application, or by sale, transfer, or power of attorney, but that the same remains in him unimpaired. He must also declare, under oath, that he has made full compliance with the homestead law in the matter of residence upon, cultivation and improvement of his original homestead entry; and should further recite whether or not he has proved up his claim and received a patent of the land.

When these papers are filed and examined, they will, if found satisfactory, be returned, with a certificate attached recognizing the right of the party to make additional entry under the law; and when presented with a proper application at any district land office, either by the party entitled or his agent or attorney, they will be accepted by the register and receiver, and forwarded with the entry papers to this office in the usual manner.

Under this circular the Commissioner of the General Land Office issued certificates reciting that:

In accordance with Official Circular, issued from this office, dated May 17, 1877, I,, Commissioner of the General Land Office, do hereby certify that who made original homestead entry No., at, dated, containing acres, is entitled to an additional homestead entry not exceeding acres, as provided in Section 2306, Revised Statutes of the United States.

Commissioner of the General Land Office.

By circular of February 13, 1883 (1 L. D., 654), the circular of May 17, 1877, was modified, and the practice of issuing soldiers' additional certificates of right was discontinued.

On February 18, 1890, your office issued a circular letter requiring local officers, in cases where parties applied to make entry under section 2306 of the Revised Statutes and the right claimed was not certified under the circular of May 17, 1877, and the certificate presented in support of the claim, the local officers were directed to forward the papers to this office for examination in connection with the official records, after making the notations on your records necessary to show the pendency of the application . . . and await instructions, before taking any further action in the case.

On May 12, 1892, the register at Waterville, Washington, pursuant to the circular of February 10, 1890, forwarded to your office Hall's application to make additional entry of the land in question, and on August 5, 1892, your office informed the local office that Hall's application "has been examined in connection with the records of this office, and no objections thereto are found. The papers are herewith returned for allowance of the entry. . . ." Hall's additional entry was accordingly allowed by the register and receiver on August 26, 1892.

Counsel for appellant insist that the letter of your office of August

5, 1892, should be treated the same, and given the same force and effect, under the act of March 3, 1893, *supra*, as a certificate of right issued under the circular of May 17, 1877.

The certificates under the circular of May 17, 1877, were technically known as "certificates of right," and in character were scrip that could be located by agent or the holder upon unappropriated public land wherever found. Under said circular there were over 5,500 of these certificates issued, covering an area of about 400,000 acres of land.

At the date of the passage of the act of March 3, 1893, *supra*, there were enough of these certificates outstanding to cover something like 10,000 acres of land; many entries had been made or initiated under such certificates by purchasers, by agents and attorneys in fact; the issuance of the certificates was discontinued on account of the many frauds connected with their procurement, location, sales and attempted transfers. The act was evidently passed for the benefit of the purchasers of the certificates of right where entries had been made or initiated upon such certificate, as well as purchasers of the land covered by such entries. It is remedial in character, and in all matters within its purview should receive a liberal construction; at the same time it can not be extended so as to embrace entries not within its letter or spirit. The language of the act is plain and unambiguous. It clearly limits its benefits to entries made or initiated upon certificates of right issued by the Commissioner of the General Land Office. The "certificates" of right referred to in the act are evidently the "certificates" of right issued under the circular of May 17, 1877. The language of the act clearly confines and limits its benefits to entries made or initiated under this particular kind of certificates. It does not in spirit or letter cover statements made by your office, such as made in the case at bar in regard to Hall's soldier's additional application.

It is clear that said act has no application to a soldier's additional entry when made in person, unless it should appear that such entry has been made or initiated upon a certificate of right issued by the Commissioner of the General Land Office under the circular of May 17, 1877.

The Department has heretofore held this to be the proper construction of said act. *Harmick v. Butts et al.* and *Harmick v. Sheppard et al.*, 20 L. D., 516.

For the foregoing reasons, your office decisions appealed from are hereby affirmed.

The departmental decision rendered in this case on February 17, 1896, is hereby recalled and set aside, and the foregoing decision is substituted for that of February 17, 1896.

RAILROAD GRANT—INDEMNITY WITHDRAWAL.

SOUTHERN PACIFIC R. R. Co. v. KANAWYER.

An executive withdrawal for indemnity purposes is in violation of the terms imposed in the grant of July 27, 1866, and is without effect except as notice of the limits within which the company would be entitled to select indemnity.

Secretary Francis to the Commissioner of the General Land Office, December 15, 1896. (F. W. C.)

With your office letter of October 14, 1896, was forwarded a motion, filed on behalf of the Southern Pacific Railroad Company, for review of departmental decision of August 31, 1896 (not reported), in the case of said company v. Peter A. Kanawyer and others, involving certain lands within the Visalia land district, California.

These lands are within the indemnity limits of the grant to said company and were first applied for on account of the grant as indemnity on October 4, 1887. The lists of that date were first rejected by the local officers because the lost lands assigned as bases for the selections were not in their district, and afterwards because the lost lands were not opposite to those sought to be selected.

Upon appeal your office held the reasons assigned not to be good and directed that the lists be accepted if upon further examination no other reason appeared for their rejection. The local officers thereupon accepted the lists as to certain of the lands covered thereby but rejected the same as to others; from which action the company appealed.

Upon said appeal your office held that the company should present a clear list made up from those tracts not in conflict and include the conflicts in a separate list; in accordance with which a new list was presented as to the conflicts, which is the list now under consideration.

The indemnity withdrawal formerly recognized on account of this grant was revoked, at the same time other indemnity withdrawals were revoked, by order of August 15, 1887. Although the lands were by the terms of the order of revocation held to be subject to settlement, the local officers were directed not to allow any entries of such lands until after due notice by publication. Prior to such revocation, and indeed before the revocation of the indemnity withdrawal, in some instances entries had been allowed for the lands in question. The claimed rights under said entries antedated the first presentation of the indemnity list covering these tracts, by the company, to-wit, on October 4, 1887.

The grant in question was made by the act of July 27, 1866 (14 Stat., 292), which contains a provision for the withdrawal of lands upon the filing of the map of general route similar to that contained in the grant to the Northern Pacific Railroad Company, made by the act of July 2, 1864 (13 Stat., 365).

In the case of the Northern Pacific Railroad Company *v.* Miller (7 L. D., 100) it was held that the language in section six of the granting act, which expressly directed that the homestead and pre-emption laws should be "extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company," was a mandate effectually prohibiting the exercise of the executive authority to withdraw any "lands on the line of said road;" and an order, made on definite location, continuing in effect, for indemnity purposes, such a withdrawal is in violation of law and without effect, except as notice of the limits within which the company would be entitled to select indemnity. A similar provision is found in the grant of July 27, 1866 (*supra*).

The decision in the Miller case has been uniformly followed by this Department; and under said decision it must be held that the indemnity withdrawal formerly recognized on account of this grant was in violation of law and of no effect, except as notice of the limits within which the company would be entitled to select indemnity.

Your office decision of December 14, 1893, sustaining the action of the local officers in rejecting the indemnity selection of the Southern Pacific Railroad Company, covering the tracts embraced in the entries of Peter A. Kanawyer and others, was therefore, by the decision under review, affirmed.

The motion urges the following grounds of error:

1. Because the entries of Kanawyer *et al.*, were allowed in 1886 and 1887 while the withdrawal was in full force, and that a *de facto* withdrawal is the equivalent to a *de jure* withdrawal, so that no rights could be initiated which could avail Kanawyer *et al.*, as against the railroad grant.

2. Because this decision we ask reconsidered was rendered subsequent to that of the supreme court of the United States of June 3, 1895, in the case of Spencer *v.* McDougal (159 U. S., 62) which decided that a withdrawal of lands by order of your Department for the benefit of a railroad grant, was effective and barred settlement and entry of such withdrawn lands, notwithstanding the railroad grant did not authorize such withdrawal.

This precise question also was considered by the supreme court of the United States in Wood *v.* Beach (156 U. S., 548).

3. Because the decision in this case is in the face of and directly contrary to that of the Department in Willamette Valley and C. M. Wagon Road Co. *v.* Hagan (20 L. D., 259).

In this case there was no grant of specific lands, nor any provision for a withdrawal. The company was to get three sections out of six to be selected, and no possible right could be acquired prior to selection, and yet it was held that the withdrawal must be respected, and was effective to protect the lands from settlement "as though provided in the act," reversing the decisions in Chapman (13 L. D., 61) and S. P. R. R. Co. *v.* Brady (5 L. D., 407 and 658); See also 12 L. D., 214; 13 L. D., 432.

4. Because the decision is contrary to decisions of the U. S. circuit court for the southern district of California. (Southern Pac. R. R. Co. *v.* Orton, 6 Sawyer, 157; Southern Pac. R. R. Co. *v.* Araiza, 57 Fed. Rep., 98), and supreme court of North Dakota. (Northern Pac. R. R. Co. *v.* Barnes, 51 N. W. Rep., 386), supreme court of the U. S. (Buttz *v.* Northern Pac. R. R. Co., 119 U. S., 72).

In conclusion the motion states that—

The question at issue in this case is an important one, and as we believe the decision we ask may be reconsidered is directly contrary to the adjudications of the courts of the United States to which we have referred, we respectfully ask that argument be allowed upon our motion.

From what has been said it must be apparent that if the withdrawal formerly made on account of this grant for indemnity purposes was in violation of law and of no effect, that no real question is presented as to the authority of this Department to revoke or disregard such unauthorized withdrawal. As early as August 1888 this Department, after a full and thorough investigation of the matter and full opportunity to present the question both orally and by brief, held the indemnity withdrawal in the case of the Northern Pacific Railroad Company, for the reasons before given, to have been made in violation of law and therefore without effect except to mark indemnity limits. Although many times attacked in different ways, the Department has adhered to the position taken in said case. I can therefore see no good purpose in further offering an opportunity for the submission of argument upon this proposition.

The motion under consideration is therefore accordingly denied and herewith returned for the files of your office.

SOLDIERS ADDITIONAL HOMESTEAD—ACT OF AUGUST 18, 1894.

ASPINALL ET AL. v. STOCKS ET AL.

The act of August 18, 1894, providing for the approval of a certain class of soldiers additional homestead entries does not contemplate the confirmation of entries made on land not subject thereto, and hence cannot be invoked for the protection of such an entry made on lands occupied for trade and business.

Secretary Francis to the Commissioner of the General Land Office, December
(I. H. L.) 15, 1896. (P. J. C.)

It appears that on February 28, 1885, John L. Noonan as attorney-in-fact for William Stocks made soldier's additional homestead entry for what was then described as lot 9—by more recent surveys designated as lots 6, 7 and 8, Sec. 7, T. 10 S., R. 84 W., 6 P. M., Glenwood Springs, Colorado, land district. This feature of this controversy has been considered by the Department heretofore, and it was decided on November 7, 1895 (L. & R., 319, p. 342), that the entry of Stocks thus made was not illegal in its inception by reason of having been made under an absolute power of attorney from the entryman. On a motion for review it was decided, April 24, 1896 (L. & R., 330, p. 415), that the record had not been fully considered by your office, and the same was returned for examination on the feature that is now presented. Inasmuch as the details have no direct bearing on the questions now presented it is not deemed necessary to recite them.

On August 20, 1887, Aspinall and six others filed a protest against the entry of Stocks, alleging that the land was claimed and occupied by themselves with others as a town site prior to Stocks' entry; that there were residences, trading-houses, shops, and mills erected thereon, occupied and used, and that Stocks and his transferees were attempting to secure title for the purpose of extorting money from the residents thereon. Your office by letter of October 21, 1887, ordered a hearing on the charges, and as result thereof, the local officers decided, on this point, that "there seems to be no doubt but what there was some occupancy and use of the land before the Stocks' entry was made, but it does not appear to have been of a permanent character at that time," and recommended that the protest be dismissed.

Your office, by letter of June 9, 1896, reversed the action of the local office, holding that the land was occupied and used at that time for residence and business purposes, and was therefore exempt from entry; whereupon Stocks *et al.* prosecute this appeal.

From an examination of the record it is found that in your said office opinion the facts are fairly and sufficiently stated. It is conceded by the local officers that "there was some occupation and use of the land before the Stocks' entry was made," and the only difference between your office judgment and theirs is that they concluded that it was not of a permanent character at the date of the entry. So that as to the fact of the land being occupied for trade and residence purposes there is substantially no difference of opinion.

To go into detail as to what the evidence shows would be simply to reiterate what is recited in your office decision. But to state it briefly it is undisputed that at the date of the entry there was an ore sampling works; about twenty houses owned and occupied by persons and families; stable and out-houses on the land; that feed and potatoes were sold on the premises; that there was a laundry and carpenter shop; and that the land was surveyed into lots and blocks shortly after the entry of Stocks and platted in accord with the town of Aspen with the view of receiving government title thereto.

The contention of counsel that the Stocks entry is confirmed by the act of August 18, 1894 (28 Stat., 397) is not tenable. The statute reads as follows:

That all soldiers' additional homestead certificates heretofore issued under the rules and regulations of the General Land Office under section twenty-three hundred and six of the Revised Statutes of the United States, or in pursuance of the decisions or instructions of the Secretary of the Interior, of date March tenth, eighteen hundred and seventy-seven, or any subsequent decisions or instructions of the Secretary of the Interior or the Commissioner of the General Land Office, shall be, and are hereby, declared to be valid, notwithstanding any attempted sale or transfer thereof; and where such certificates have been or may hereafter be sold or transferred, such sale or transfer shall not be regarded as invalidating the right, but the same shall be good and valid in the hands of *bona fide* purchasers for value; and all entries heretofore or hereafter made with such certificates by such purchasers shall be approved, and patent shall issue in the name of the assignees.

It is not in my judgment contemplated by this statute that any entries made with soldiers' additional homestead certificates should be confirmed, except where under departmental decisions or instructions their transfer had been prohibited. It was only intended thereby to validate the transfers of the certificates and confirm entries made by attorneys-in-fact. The statute does not contemplate the confirmation of such entries upon land not subject to entry. The land in question was not subject to such entry because it was used and occupied for trade, business and residence purposes by the inhabitants thereof.

Your office judgment is therefore affirmed, and the papers transmitted by your office letter "N" August 20, 1896, returned for such further action as may be appropriate in view of the protest of the Aspen Consolidated Mining Company.

It is so ordered.

MINING CLAIM—NOTICE—POSTING.

PARSONS ET AL. *v.* ELLIS (ON REVIEW).

In the notice posted on a mining claim the book and page of the record should be given of the location on which the official survey is made, and failure to comply with this requirement will necessitate new notice.

Secretary Francis to the Commissioner of the General Land Office, December 15, 1896.
(I. H. L.) (P. J. C.)

Motion for review of departmental decision of July 7, 1896 (23 L. D., 69), was filed by E. D. Parsons *et al.*, and on consideration thereof the same was entertained. Notice has been served under the rule, and the matter now comes up for consideration.

It appears that Charles W. Ellis, by W. S. Morse, his attorney-in-fact, filed application for patent for the Pine Mountain lode claim, survey 1146, Prescott, Arizona, land district. The period of publication expired December 3, 1894. On December 5th following, E. D. Parsons *et al.* filed their protest and adverse against the entry, and the local officers rejected the same as an adverse, because it was not filed within the period of publication, but accepted it as a protest, and ordered a hearing. As a result thereof they recommended that the application to purchase filed by Ellis be rejected. On appeal, your office reversed their action; whereupon the protestants appealed. A motion to dismiss this appeal was filed, on the ground "that the protestants as such have no right of appeal, occupying the position of *amicus curiæ* merely, and not being parties in interest." This motion was sustained, and it was held (syllabus):

A protest against a mineral application, filed after the period of publication, will not be considered by the Department on appeal, unless it is shown that the protestant has an interest in the ground involved, and that the law has not been complied with by the applicant.

The errors assigned in the motion for review that are deemed of sufficient importance for consideration are:

1st. The record shows that the law was not complied with by the applicant for patent in that he failed, in the notice of his application given, to give the name or names of adjoining claimants on the same or other lodes, as required by paragraph 29, Mining Regulations, December 10, 1891, and specifically held to be necessary in the case of *W. H. Gowdy et al. v. The Kismet Mining Co.*, rendered May 23, 1896 (22 L. D., 624), in which case new notice was required because of such failure.

2nd. The record shows, in the finding of the register and receiver, as well as the paper on file, that the application for patent fails to set forth a copy of notice posted on the mine, and the proof of posting notice and diagram shows that the notice was signed by E. C. Babbitt and W. S. Morse and not by the applicant Ellis.

3d. The record clearly shows that the notice was intentionally and fraudulently misleading, in that it referred to the book and page of the original location record as a part of the description of the land, and the basis of the claim, while the description by metes and bounds contained in the notice was totally and wholly different from that in the original location, and embraced more than six acres of the claim of the protestants, together with all of their improvements.

It will be observed that the errors complained of are not directed to the correctness of the original decision upon the sole point therein discussed and decided. The position taken in that decision is not questioned and the conclusion arrived at is, in my judgment, unassailable.

The attention of the Department is now specially directed, however, to what is considered a fatal defect in the application for patent, a defect clearly apparent in the record made by the applicant himself, and it is suggested that there is such a plain violation of the regulations that, even as between the government and the entryman, entry should not be permitted.

The abstract of title of the Pine Mountain lode, as furnished by the applicant, shows that it was located by one S. A. Davidson, February 25, 1878, and was "duly recorded in book F, 6, of mines, records of Yavapai county, Arizona, at page 420," on March 28, 1878. Through mesne conveyances, C. W. Ellis became the owner of the claim, February 1, 1894, and on June 25, 1894, he filed an "amended notice of location," in which it is stated that,

this amended or additional notice is made for the purpose of more definitely locating the claim by metes and bounds, and is without waiver of any rights claimed under the original location as recorded in book F, 6, page 420, of the records of Yavapai county.

This amended notice is recorded "in book 41 of mines, pages 48-49, records of Yavapai county, Arizona."

The official survey of the claim was made from the amended notice of location. In the application for patent the claim is described: "Said lode claim was duly located on the 25th day of February, 1878." In the notices published in the newspaper and posted in the local office, it is stated that:

The location of this mine is recorded in the recorder's office of Yavapai county, Arizona, in book F, 6, of mines, page 420. The adjoining claimants are, Fortune Mine on south.

In the notice posted on the claim the place of record is given as "the office of the recorder of Yavapai county, at Prescott, in the county and territory aforesaid."

It will be noticed that no paper filed in the local office, except the field notes, nor either of the notices published or posted, contains any statement as to where the record of the amended location, upon which the official survey was made, can be found, but all refer to the record of the original location.

Paragraph 29, Mining Circular, provides that:

The claimant is then required to post a copy of the plat of such survey in a conspicuous place upon the claim, together with notice of his intention to apply for a patent therefor; which notice will give the date of posting, the name of the claimant, the name of the claim, mine, or lode; the mining district and county; whether the location is of record, and, if so, *where the record may be found*; the number of feet claimed along the vein and the presumed direction thereof; the number of feet claimed on the lode in each direction from the point of discovery, or other well-defined place on the claim; the name or names of adjoining claimants on the same or other lodes; or, if none adjoin, the names of the nearest claims, etc.

Then follow paragraphs in regard to posting, etc., and in relation to the publication of notice. Then this:

35. The notices so published and posted must be as full and complete as possible, and embrace all the *data* given in the notice posted upon the claim.

36. Too much care can not be exercised in the preparation of these notices, inasmuch as upon their accuracy and completeness will depend, in a great measure, the regularity and validity of the whole proceeding.

The necessity for a strict compliance with these regulations is discussed in *Gowdy et al. v. Kismet Gold Mining Company* (22 L. D., 624), and it is not deemed necessary to reiterate the same here.

It is certainly contemplated by paragraph 29 that the notice posted on the claim must contain information where the record of the claim may be found. Simply referring to the record in the office of the recorder of the county, as in the case at bar, is not, in my judgment, sufficient. The book and page of the record should be given of the location upon which the official survey is made. It is not contemplated that those owning land in the vicinity of the claim for which patent is sought should be put to the trouble and expense of searching records to ascertain the location. The applicant is the moving party, and upon him is cast the burden of showing all the data by which parties interested may readily make such examinations as will enable them to determine whether there is a conflict between the claim applied for and others in the neighborhood. The necessity for doing this with accuracy is emphasized by paragraph 36.

A better illustration of the evil results of a failure to comply with the regulations could not be presented than that suggested by the case at bar. It may be well to say in this connection that the Department does not consider the affidavits and statements of the protestants as evidence in this matter, but simply uses them as an illustration in the

same manner it would a hypothetical case. The Morning Star lode claim, located in 1882, and throughout part of its length, laid next to and parallel with the Pine Mountain, as originally located and recorded in book F, 6, at page 420. There was apparently no surface conflict between these two claims as thus located. By the amended survey, however, it is charged that the Pine Mountain was so swung around as to include about six acres of the Morning Star. Now, in the application for patent, and the notice posted and published, there is no mention of this amended location or reference to the record thereof, but by everything that by law and the regulations was intended to convey notice to the world, the old record was given. By this deception any one was likely to be deceived and lulled into quietude in the protection of his rights.

But whether that was the result in this case or not is wholly immaterial at this stage of this proceeding. It is clear that there was not a compliance with the regulations in the matter of giving notice "where the record may be found," and in this there was fraud upon and misrepresentation to the government sufficient to require a republication and reposting of the notices.

The further objection that W. S. Morse, who acted as attorney-in-fact for Ellis, the entryman, was also the chainman who assisted in making the survey of the Pine Mountain lode, in violation of the rules, is without merit. There is no evidence in the record that Morse was the attorney-in-fact of Ellis at the time the survey was made, July 19, 1894. The power of attorney from Ellis to Morse is dated August 23, 1894, more than a month after the survey.

It is urged by counsel for the applicant that review of the former decision should not be granted, for the reason that all the matters suggested by the motion were presented and discussed in the first instance, and there being no new points of fact or law presented, the motion should fail.

It is true that the defect in the notices was presented and discussed in the appeal to the Department, and in the briefs of counsel. It will be observed, however, that this feature of the case was not discussed or referred to in the original decision. This was probably due to inadvertence when the case was originally under consideration, the attention of the Department being absorbed in the question that was decided. It was not charged specifically in the protest that there was a violation of law in the matter of the application for patent, but protestants seemed rather to rely on the fact that the applicant had fraudulently swung his claim around so as to include protestants' ground. From this fact, which was not of itself sufficient to warrant an appeal under the circumstances, the Department may have overlooked the importance of the other questions suggested.

But be that as it may, under the supervisory powers invested in the Secretary of the Interior in disposing of the public domain, he may,

even on his own motion, correct errors that appear in the record and require a compliance with the law on the part of those seeking government lands.

In so far as this motion seeks a revocation of the former decision, the same is overruled, and the order will be that the applicant be required to make new publication and posting of notices, in conformity with the rules.

It is so ordered, and the papers are herewith returned.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

DURRELL ET AL. *v.* WINDOM.

The right of purchase accorded by section 5, act of March 3, 1887, extends to indemnity lands as well as those within the primary limits, and this is true of lands which at the date of purchase from the company had not been selected, as well as of those which had.

Lands sold to purchasers in good faith as part of a railroad grant, but in fact excepted from the operation thereof, are within the purview of said section.

An application for the right of purchase under said section may be entertained at any time after it is ascertained that the land involved is excepted from the grant, and without waiting for the final adjustment of the entire grant.

The fact that a purchaser from a railroad company does not, prior to his purchase, examine the records of the Land Department in order to ascertain the character of the company's title, is not sufficient to defeat his right of purchase under said section as a "bona fide purchaser."

The good faith of a purchaser from a railroad company is not affected by the fact that he is a stockholder therein; nor by the further fact that he gave preferred stock of the company in exchange for the land.

The successful contestant of an entry acquires no preference right that can prevail as against the right of a bona fide purchaser under said section.

Secretary Francis to the Commissioner of the General Land Office, December 15, 1896. (I. H. L.) (J. L. McC.)

I have considered the case of Joseph M. Durrell and John E. Greene *v.* Ellen T. Windom, involving the SE. $\frac{1}{4}$ of Sec. 19, and the SE. $\frac{1}{4}$ of Sec. 21, T. 148 N., R. 52 W., Fargo land district, North Dakota.

John Bowers made timber culture entry of the SE. $\frac{1}{4}$ of Sec. 21 on October 1, 1879. Harrison L. Wiard made timber culture entry of the SE. $\frac{1}{4}$ of Sec. 19 on October 2, 1879. On January 17, 1895, John E. Greene filed contest against the entry of Bowers, and on the same date Joseph M. Durrell filed contest against the entry of Wiard. Hearings were ordered; Bowers and Wiard made default; and in each case decision was rendered by the local officers in favor of contestant. Your office affirmed said decisions on September 9, 1895; and said entries were shortly afterward canceled.

The lands are within the indemnity limits of the grant for the Northern Pacific railroad company, and were selected by said company per list No. 6, on March 19, 1883; and are also included in amended list No. 6, filed October 12, 1887 and February 23, 1892.

On May 21, 1895, the company's selections of said tracts were held for cancellation because of conflict with the prior and then subsisting entries of said Bowers and Wiard. An appeal was taken by the company to the Department, which, on December 6, 1894, affirmed the decisions of your office (See L. & R. copybook No. 298, pp. 18 and 54). The company's selections were canceled on March 7, 1895.

On May 11, 1895, Ellen T. Windom, executrix of William Windom, deceased, filed application to purchase said tracts under the fifth section of the act of March 3, 1887 (24 Stat., 556), and gave notice of her intention to submit proof in support of her claim on June 28, 1895. On the date appointed testimony was submitted in her behalf. Greene and Durrell, contestants of Bowers' and Wiard's timber culture entries, were represented by counsel.

Afterward Durrell (on September 28, 1895), and Greene (on October 5, 1895) applied to purchase under the homestead laws the tracts claimed by them respectively; but the local officers rejected their applications because of Mrs. Windom's pending application to purchase under the act of March 3, 1887.

On January 4, 1896, the local officers rendered a decision holding that William Windom was not a *bona fide* purchaser; also that the application to purchase was premature, inasmuch as the grant to the company had not been finally adjusted; hence they rejected the application to purchase.

Mrs. Windom appealed to your office, which, on June 22, 1896, held that the local officers were in error as regards both grounds upon which they based their decision, and decided that Mrs. Windom should be permitted to purchase.

From said decision of your office both Durrell and Greene have filed appeals, basing the same upon numerous allegations of error. Counsel for said appellants contend that,

the tracts being in the indemnity limits, and forming no part of the grant, it was error to hold that they are of the class of lands subject to purchase under the act of March 3, 1887.

Mr. Attorney General Garland, on November 17, 1887 (6 L. D., 272), rendered an opinion holding that the right of purchase accorded in the fifth section of the act of March 3, 1887, extends to indemnity lands as well as to those within the primary or granted limits, and the Department has since uniformly so held. This is true of lands which at the date of the purchase had not been selected, as well as of those which had. (See *Pierce et al. v. Musser-Saunrey Co.*, 19 L. D., 136.)

Appellants contend that it was error to hold that the tracts in controversy ever belonged to the Northern Pacific Railroad Company.

Certainly they did not; if the lands had belonged to the company the act would not apply. Section five, under which Mrs. Windom desires to purchase, expressly provides:

That where any said company shall have sold to citizens of the United States, or persons who have declared their intention to become such citizens, as a part of its grant, lands *not* conveyed to and for the use of such company, . . . or where the lands so sold are for any reason excepted from the operation of the grant,

the purchaser from such company can acquire title by purchase from the United States. This covers literally the case at bar, where the railroad company sold to Mr. Windom lands that were "excepted from the operation of the grant" by the timber-culture entries of Bowers and Wiard.

Appellants contend that the application to purchase was premature—or at least the grant in so far as it relates to the tracts in controversy—has not been "finally adjusted."

The section under which Mrs. Windom applies to purchase is part of an act relating specifically to grants that have not been "finally adjusted." It provides:

That the Secretary of the Interior be, and is hereby, authorized and directed to immediately adjust, in accordance with the decisions of the supreme court, each of the railroad grants made by Congress to aid in the construction of railroads, and heretofore unadjusted.

Sec. 2. That if it shall appear, upon the completion of such adjustments respectively, or sooner, etc.

The direction to take certain action upon the adjustment of the grant, "or sooner" controls the entire act. Indeed, it would seem somewhat inconsistent that this act, entitled, "An act to provide for the adjustment of land-grants" should be construed to apply only in cases where the adjustment had already been completed. The correct rule in this respect is enunciated in the case of *Nicholas Cochems* (11 L. D., 627, syllabus):

An application to purchase under section 5, act of March 3, 1887, made by one claiming under a grantee of a railroad company cannot be entertained until it has been finally determined that the land in question is in fact excepted from the grant.

In the case at bar "it has been finally determined that the land in question is in fact excepted from the grant," by the timber-culture entries of Bowers and Wiard. That having been "finally determined" there was no occasion for further delay in applying to purchase or in acting upon such application. It can hardly be seriously contended that an applicant to purchase, having under the act in question a right superior to more recent applicants to enter, must sit idly by and witness without protest the patenting of the lands to others not legally entitled thereto. Indeed, it is better for these appellants that the application to purchase be made and decided now, than to postpone it until sometime far in the future, when the entire grant shall have been finally adjusted, and then put them to the trouble and expense of defending in a suit for the cancellation of such patent.

The Department has heretofore in numerous cases allowed applications to purchase under section 5 of the act of March 3, 1887, before the final adjustment of the grant. See *Union Pacific Ry. Co. et al. v. McKinley* (14 L. D., 237); *Criswell v. Waddingham* (16 L. D., 66); *Union Colony v. Fulmele et al.* (ib. 273); *Jenkins et al. v. Dreyfus* (19 L. D., 272); *Skinvik v. Longstreet et al.* (22 L. D., 32); *Northern Pacific R. R. Co. v. North* (ib. 93); *Hunt v. Maxwell* (23 L. D., 180); *Grandin et al. v. La Bar* (23 L. D., 301).

The appellants assert that the decision of your office was in error in holding that William Windom was a *bona fide* purchaser. This allegation of error, however, is unsustained by any statement or argument on the part of said appellants. The local officers held that he was not a *bona fide* purchaser, and dwelt at length upon the reasons which led them to such a conclusion; but I am not convinced of its correctness. They say:

No investigation was made by Mr. Windom, or by any one for him, as to the Northern Pacific Railroad Company's source of title, nor did he cause to be examined the records of the United States land office at Fargo, or at Washington; he did not know or ascertain whether the railroad company had ever selected the lands; and as a matter of fact, at the date of purchase these lands had not been selected by the Northern Pacific Railroad Company.

The fact that Mr. Windom did not make an exhaustive examination of all records that might possibly contain some information relative to the land in controversy is not sufficient to show that his purchase was made in bad faith. A purchase is made "in good faith", when it is made "in ignorance of any right or claim of a third party". (Amer. and Eng. Cyclo. of Law, Vol. 2, p. 444); again a

bona fide purchaser . . . is one who purchases for a valuable consideration paid or parted with, and in the belief that the vendor had a right to sell, and without any suspicious circumstances to put him upon inquiry. (Ib.)

If the act were to be given the strict and narrow construction contended for by the local officers, and nobody were to be considered a *bona fide* purchaser who could not, and did not, show that prior to purchasing he had examined the records of your office, and the local office, and perhaps the recorder's offices of the several counties through which the railroad runs, and found therefrom that the land he contemplated purchasing in fact belonged to the railroad company, then there could have been no such thing as a *bona fide* purchaser from a railroad company of lands that did not belong to it, and the remedial act of March 3, 1887, would have been a vain and superfluous piece of legislation. In fact, at the date of purchase in the case at bar (in 1878), there was no claim of record or otherwise; the timber culture entries which excepted the land from selection were made in 1879.

The appellants contend that William Windom

being a stock or bond holder of the Northern Pacific Railroad Company, and having traded with himself, one portion of the company's property for another class of property claimed by it, at about one-half the government price for such lands, it was therefore error to hold that he was a *bona fide* purchaser.

A sufficient answer to this allegation may be found in departmental decision of August 29, 1896, in the case of *Grandin et al. v. La Bar* (23 L. D., 301), which is correctly summed up in the syllabus:

There is nothing in the fact that a purchaser of land from a railroad company is a stockholder therein to affect the good faith of such purchaser; nor does the further fact that the preferred stock of the company, that was convertible into lands, was given in exchange for the land, open the transaction to objection on the ground that there was no consideration for the sale.

See also, with reference to the qualifications of a purchaser from a railroad company, departmental decision in the case of *Drake et al. v. Button* (14 L. D., 18).

The appellants further contend that Durrell and Greene being successful contestants of the timber culture entries that at one time covered the land, and having made applications for the respective tracts at the time when they initiated their contests, have earned a preference right to enter the land, which is sufficient to defeat Mrs. Windom's application to purchase.

Section five of the act under consideration is very explicit in stating the character of the claims that will be allowed to defeat an application to purchase; these are:

(1) Lands which, "at the date of such sales, were in the *bona fide occupation* of adverse claimants under the *pre-emption or homestead laws*."

At the date of the sale to Mr. Windom (December 10, 1878), neither of the appellants was in "occupation" of the land "under the pre-emption or homestead laws"; neither of them had applied to enter the land, or had in any other manner initiated even an inchoate right to the same.

(2). Lands are excepted from purchase which had been settled upon subsequently to the first day of December, 1882, and prior to the passage of the act of March 3, 1887 (*Union Colony v. Fulmele et al.*, 16 L. D., 272, 277; *Swineford et al. v. Piper*, 19 L. D., 9; *Northern Pacific R. R. Co. v. North*, 22 L. D., 93). Neither of the appellants alleges actual settlement upon said land between the two dates above named, nor indeed at any time.

The successful contestant of an entry acquires no "preference right" that can prevail as against the right of a *bona fide* purchaser, under section 5 of the act of March 3, 1887 (*Hunt v. Maxwell*, 23 L. D., 180).

The decision of your office allowing Mrs. Windom's application to purchase, and rejecting the applications of Greene and Durrell to make homestead entry, is affirmed.

PRACTICE—APPEAL—REJECTED APPLICATION—RAILROAD SELECTION.

ASHELMAN *v.* NORTHERN PACIFIC R. R. Co.

In a case between an applicant for the right of entry, and a railroad company, claiming under an indemnity selection, where the application to enter is rejected by the local office, on account of conflict with the selection, and the appeal from such action is dismissed for want of regularity by the Commissioner, who in the same decision holds the company's selection invalid, the right of the applicant should be considered when final action is taken on the company's selection.

Secretary Francis to the Commissioner of the General Land Office, December 15, 1896.
(I. H. L.) (F. W. C.)

With your office letter of November 13, 1896, was transmitted an application for writ of certiorari, filed on behalf of Benjamin F. Ashelman, in the matter of the contest arising upon his application to enter the SE. $\frac{1}{4}$ of Sec. 7, T. 132 N., R. 47 W., Fargo land district, North Dakota.

The facts in this case, gathered from your office decision of October 12, 1896, a copy of which has been filed with the application for certiorari, appear to be as follows:

The tract involved is within the indemnity limits of the grant to said company, and was included in the company's list of selections filed March 19, 1883. Several lists have since been filed amendatory of said list of March 19, 1883.

March 27, 1895, Ashelman applied to enter the tract in question under the homestead law, his application being rejected for conflict with the company's selection, from which action he appealed to your office, but did not serve notice upon the company of such appeal, unless service upon W. K. Mendenhall, of this city, be held to be sufficient service upon the company.

In considering this matter your office decision of October 12, 1896, held that the service was insufficient, and therefore dismissed the appeal from the action of the local officers, although in the same decision you proceeded to the consideration of the company's rights under its selection of July 13, 1891, and held said selection to be invalid. The selection is therefore held for cancellation, subject to the right of appeal in the company.

Ashelman has attempted to appeal from said office decision, but in your office letter of October 23, 1896, you refuse to receive the same, holding that as your aforesaid decision dismissed Ashelman's appeal from the action of the local officers for want of proper service upon the company, no appeal therefrom lies.

Following your refusal to accept his appeal, Ashelman made the application for certiorari now under consideration. As to whether the company has appealed from that part of your decision which held its selection for cancellation, the record is silent.

From a consideration of the matter I am of opinion that it is unnecessary to consider the question as to the sufficiency of the service upon the company of Ashelman's appeal from the action of the local officers in rejecting his application to enter this land, in view of that part of your decision which held the company's selection to be invalid.

Should the company fail to appeal therefrom, or should the action taken in your office decision upon appeal be affirmed, it is clear that the company was in nowise injured, even should it be held that no service of the appeal had been made upon it. If the company's selection was invalid, Ashelman was denied a right by the action of the local officers in rejecting his application for conflict therewith, and he should be recognized in his right, if any he gained under his application, from the date of its presentation. Should the company fail to appeal from your office decision Ashelman will be accorded rights under his application as of the date of its presentation; and in the event that the company appeals, its rights in the matter will depend upon the legality of its selection. In that event Ashelman will be made a party to the case and permitted to make any showing desired as against the claimed rights in the company under its selection. This results in restoring to Ashelman his position upon the record, to secure which was the evident purpose of the filing of the writ under consideration.

RES JUDICATA—ILLEGAL ENTRY—PREFERENCE RIGHT.

MOORES *v.* SOMMER (ON REVIEW).

The doctrine of *res judicata*, as between the parties to a controversy, will not prevent the government from cancelling an entry where it is apparent that it cannot be perfected without perjury on the part of the entryman.

Under the supervisory authority of the Department a preference right of entry may be accorded a party through whose efforts an entry is canceled, though he may not be entitled to be heard as a contestant against such entry.

Secretary Francis to the Commissioner of the General Land Office, December 23, 1896. (I. H. L.) (C. W. P.)

On March 19, 1896, you transmitted a motion, on the part of Thomas J. Moores, for a review of the decision of the Department of February 21, 1896, in the case of the said Moores against Christian F. Sommer (22 L. D., 217). Upon examination of said motion the same was by the Department entertained, under date March 23, 1896, for argument as provided by amended rule 114 of Rules of Practice.

The land involved is the NW. $\frac{1}{4}$ of Sec. 27, T. 12 N., R. 3 W., Oklahoma City land district, Oklahoma Territory.

The specifications in this motion are numerous, but it is only necessary to refer to the following:

I.

It was error on the part of said Secretary, when the testimony clearly shows that said Sommer is disqualified, and that said Moores has been living upon, cultivating,

improving and maintaining the tract in controversy—his home—ever since he initiated his claim thereto, to hold, upon the cancellation of Sommer's entry, that said Moores can not be permitted on account of the doctrine of *res judicata*, to make entry for the land and therefore hold it subject to entry by the first legal applicant, and thereby to deprive said Moores of the benefit of his settlement, residence and improvement of the tract involved.

II.

The Honorable Secretary erred in said opinion, upon the cancellation of the entry of said Sommer, in awarding the land to the first legal applicant and thereby depriving said Moores of the benefit of the improvements which he has put upon the tract by giving them to an entire stranger, when upon equitable principles at least, said Moores is justly and fairly entitled to the tract.

III.

The Honorable Secretary of the Interior erred in said opinion in not holding that upon the cancellation of said Sommer's entry—notwithstanding the fact that under technical rules Moores may be precluded from making the entry, still, as a matter of equity and right, the land should be awarded to him on account of rights which he has acquired by the prosecution of the contest involved in this controversy and his settlement and residence upon the tract.

IV.

The Honorable Secretary erred in said opinion in not applying the equitable and liberal rules recognized by the Department in this case in favor of said Moores, on account of the great equities which he has involved in this controversy, and awarding him the tract in dispute rather than giving it to a stranger and thereby depriving said Moores of the fruits of his toil, labor, means and expenditure of money upon the tract and in prosecuting this contest.

V.

The Honorable Secretary erred in said opinion in holding that Moores having failed to appeal from the decision of the Honorable Commissioner adverse to him, is concluded thereby under the circumstances of this case, though Moores may have mistaken his remedy and filed a motion for review in the case to which he was not a party, thereby believing and intending to protect his interests—manifesting and showing his good faith by his efforts, he should not have the doctrine of *res judicata* applied to him in all its rigor in this new and independent contest proceeding instituted by him for the purpose of protecting his rights in the premises.

On April 9, 1896, you transmitted a motion for review on the part of Christian F. Sommer, as follows:

The grounds upon which this application is based are error of fact and law upon which said decision is based, said Sommer having been a duly qualified entryman for the land in question at the time application therefor was filed, and so held by this office and by the Honorable Secretary, upon a full examination of the facts and the law, and there being a broad distinction between the principles laid down by the supreme court in case of *Smith v. Townsend* (in which the undersigned had the honor to represent the appellee), and the facts applicable to this case.

It was admitted by Sommer, in his testimony in his contest against James H. Carter's entry, recited in departmental decision of August 19, 1892, that he was appointed transportation agent of the quartermaster's department, September 22, 1881; that on April 7, 1887, he was ordered to Oklahoma station, and remained there in the discharge of his official duties until after the opening of the territory, and was there on March

2, 1889, the date of the passage of the act opening said territory, and on April 22, when the same was opened by the President's proclamation; that he was on the land in controversy after noon on April 22, and that on the 23d he hauled some building material on it with the intention of building. But he did not build, neither did he make an entry. His first offer to enter the land was on October 28, 1889.

In the decision complained of it was held that these facts disqualified him under the rulings of the supreme court of the United States in the case of *Smith v. Townsend* (148 U. S., 490), and it was further held, that as he could not perfect title to the land, without committing perjury, his entry should be canceled, the doctrine of *res judicata* having no application as between him and the government. And I see no reason for changing the conclusions then reached.

Upon Moores' motion for review, although it was held in the decision complained of that a contest by him did not lie against Sommer's entry, yet, in view of the fact that it was owing to his persistent attempt to contest Sommer's entry that the attention of the Department was directed to its illegality, according to the rulings of the supreme court in the *Smith v. Townsend* case, it would be in accordance with those equitable principles which should govern the Department in the exercise of the supervisory powers of the Secretary to accord to Moores the preference right of entry, and you are directed to permit him to make homestead entry of the land.

The departmental decision of February 21, 1896, is modified accordingly.

BUILDING STONE-PLACER ENTRY-ABANDONED MILITARY
RESERVATION.

SIMON RANDOLPH.

Section 5, act of July 5, 1884, providing for the disposition of abandoned military reservations, may be properly construed in connection with the act of August 4, 1892, to warrant the allowance of a placer application for land containing building stone, in accordance with the latter act.

Secretary Francis to the Commissioner of the General Land Office, December 23, 1896. (I. H. L.) (C. J. W.)

Simon P. Randolph, claiming as one of seven locators, and as assignee of the other six, made mineral application No. 97 for the consolidated claim therein described, on June 29, 1893, at the local land office, Seattle, Washington. The local officers rejected his application, for the reason that the tract applied for was reserved for light-house purposes, under executive order of July 13, 1892. On appeal, your office affirmed the decision of the local officers, and he appealed to the Department.

Pending said appeal, a map of the light-house reservation was filed, from which it appears that it did not embrace the land applied for.

When the case came up for consideration in the Department, it was held, inasmuch as it now appeared that the application did not conflict with the light-house reservation, that the rights of the applicant should be reconsidered under the act of August 4, 1892 (27 Stat., 318), and the case was returned to your office for re-adjudication under existing conditions, but was subsequently recalled, and a further hearing was granted the applicant. Under this state of the record, the case was considered here on October 3, 1896. It was then held that the act of August 4, 1892, did not take building stone without the provisions of the act of 1878 (20 Stat., 89), or add it to the class of substances known as mineral, but provided that lands chiefly valuable for building stone might be entered under the placer mining laws. That is, after discovery of building stone, it may be entered under the placer mining laws, the rights of the entryman attaching from the date of his application to enter. It was, in substance, held that, if on June 29, 1893, when Randolph made application to purchase, and made tender of the purchase money, the land had been subject to entry, or was then subject to entry, he should be permitted to purchase under the placer mining laws. It was further held that his application, accompanied by the tender of the purchase price, might be taken as equivalent to entry. It appeared, however, that the executive order of March 4, 1896, rescinding or modifying the original order of reservation, itself reserved for military purposes the residue of the land not included in the survey for lighthouse purposes, and, as the land applied for was by reason of the first order in reservation at the date of the application, and by reason of the second order was still in reservation, it was held that Randolph acquired no right by his application and tender of the purchase price.

Said decision, although published (23 L. D., 329), was not promulgated, it having been withdrawn for further consideration.

The reservation made by executive order of March 4, 1896, was a continuance of the original reservation made for lighthouse purposes and was on the recommendation of the Secretary of War. This reservation was the only bar to the allowance of Randolph's application to enter and purchase. On November 23, 1896, the Secretary of War addressed a letter to the President, recommending that so much of the military reservation on Sucia Islands, in the Gulf of Georgia, State of Washington, which was declared by executive order of March 4, 1896, as is embraced in the mineral application No. 97, made at the land office at Seattle, Washington, by Simon P. Randolph, for patent on the Sucia Island Stone Mine, as shown by the survey of the mining claim of the said Simon P. Randolph, made under the direction of and reported by the United States surveyor-general for the State of Washington, mineral survey No. 314, be placed under the control of the Secretary of the Interior for disposition under the act of Congress approved July 5, 1884 (23 Stat., 104).

On December 12, 1896, the following order, signed by the President, was endorsed upon the recommendation of the Secretary of War:

The within recommendation is approved. The Secretary of the Interior will cause this action to be noted on the records of the General Land Office.

Randolph's counsel has called attention to this changed state of facts, and invoked supplemental action on the case.

This case is proceeding as between Randolph and the government alone, and there seems to be no valid reason why he may not be permitted to perfect his title under the act referred to, since the obstacle to the allowance of his application has been removed, if the fifth section of said act is applicable.

Said section is as follows:

Whenever any lands, containing valuable mineral deposits, shall be vacated by the reduction or the abandonment of any military reservation under the provisions of this act, the same shall be disposed of exclusively under the mineral laws of the United States.

It seems that Randolph proceeded in the inception of his claim by development and location upon the idea and belief that building stone lands could be acquired under the placer mining laws, at a time when the land was not in reservation, and that he has in all the steps he has taken acted in perfect good faith; that he has discovered, located, and surveyed, and developed a valuable quarry of building stone, at an expense so great as to have exhausted his resources. His equitable claim, to be allowed to perfect his title, is so patent and strong as to forbid the denial of such right, unless it should appear that there is a want of legal authority to allow it. It has been held by the Department that building stone is not a mineral, but that under the act of August 4, 1892, it may be entered under mining laws as though it were a mineral. These apparently conflicting propositions are not to be so construed as to destroy each other, but rather in such a way as that each may stand, in its proper order. It is clear that for the purposes of entry building stone may be treated and considered as though the land wherein it is located contained mineral deposits.

Section 5 of the act of July 5, 1884, provides for disposing of vacated military reservations which contain valuable mineral deposits under mineral laws exclusively. It can not be said that building stone comes within the letter of this statute, but construing this section with the act of August 4, 1892,—the purpose of which was to allow building stone land to be entered under placer mining laws—it would seem to come within its spirit.

The premises considered, and especially in view of the fact that this is a proceeding between the government and Randolph alone, the published, unpromulgated decision of October 3, 1896 (23 L. D., 329), is hereby vacated and set aside, and the present decision substituted therefor; and Randolph will be allowed thirty days from notice of this decision within which to pay the purchase money for the land claimed by him, and your office will direct the local officers upon such payment to issue to him final certificate and duplicate receipt.

HOSMER v. DENNY ET AL.

Motion for review of departmental decision of September 11, 1896, 23 L. D., 319, denied by Secretary Francis, December 23, 1896.

REGULATIONS CONCERNING PERMISSION TO USE RIGHT OF WAY OVER
THE PUBLIC LANDS FOR TRAMROADS, CANALS, RESERVOIRS, ETC.

The following regulations are promulgated under the act of Congress of January 21, 1895, (28 Stat., 635), entitled "An Act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes," which is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of the right of way through the public lands of the United States, not within the limits of any park, forest, military or Indian reservation, for tramroads, canals or reservoirs to the extent of the ground occupied by the water of the canals and reservoirs and fifty feet on each side of the marginal limits thereof; or fifty feet on each side of the center line of the tramroad, by any citizen or any association of citizens of the United States engaged in the business of mining or quarrying or cutting timber and manufacturing lumber.

and the act of May 14, 1896, (29 Stat., 120), entitled "An Act to amend the Act approved March third, eighteen hundred and ninety-one, granting the right of way upon the public lands for reservoir and canal purposes," which is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes," approved January twenty-first, eighteen hundred and ninety-five, be, and the same is hereby, amended by adding thereto the following:

SEC. 2. That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and forest reservations of the United States, by any citizen or association of citizens of the United States, for the purposes of generating, manufacturing, or distributing electric power.

1. It is to be specially noted that these acts differ from the other right-of-way acts of March 3, 1875, and March 3, 1891, in that they authorize merely a permission instead of making a grant, and that they give no right whatever to take from the public lands adjacent to the right-of-way any material, earth, or stone for construction or for any other purpose.

2. The application for permission to use the right of way through the public lands must be filed, and permission granted, as herein provided, before any rights can be claimed under the acts, and should be made in the form of a map and field notes in duplicate of the center line of the right of way or of the tramroad, canal, or reservoir, and filed in the local land office for the district in which the right of way

is located; if situated in more than one district, duplicate maps and field notes need be filed in but one district and single sets in the others.

3. The maps, field notes, evidence of water rights, etc., and, when the applicant is a corporation, the articles of incorporation and proofs of organization must be prepared and filed in accordance with the regulations for railroad, and for irrigation canals and reservoirs under the general right-of-way acts, as in the circulars of March 21, 1892,* and February 20, 1894,* respectively; forms 4 and 6 being modified in the last sentence to relate to the act under which the application is made.

4. An affidavit that the applicant is a citizen must accompany the application; if the applicant is an association of citizens, each must make affidavit of citizenship; a corporation organized under the laws of the United States or of any State or Territory will be presumed to be an association of citizens within the meaning of the act. If not a natural-born citizen, the applicant will be required to file proofs of naturalization. The applicant must also state in the affidavit the purposes for which the right of way is to be used, whether for mining or quarrying, or cutting timber and manufacturing lumber, or for electrical purposes.

5. When application is made for "the use of necessary ground, not exceeding forty acres," the tract should be clearly designated on the map by colored shading or otherwise, its location and extent accurately described by field notes if necessary, and it should be described in forms 3 and 4, by legal subdivision or by course and distance from a corner of the public surveys. The applicant must also make a statement in duplicate of the purposes for which the tract is to be used, which must also contain a showing that the tract is actually and to its entire extent necessary for the purposes indicated. In such cases, forms 7 and 8, pages 12 and 13 of circular of March 21, 1892, should be incorporated in the engineer's affidavit and applicant's certificate (forms 3 and 4), with the changes necessary to make it applicable to the law in question.

6. If the application is satisfactory to the Department, the Secretary of the Interior will give the required permission in such form as may be deemed proper, according to the features of each case. And it is to be expressly understood in every case under the act of 1895, that the permission extends only to the public lands of the United States, not within the limits of any park, forest, military or Indian reservation; that it is at any time subject to modification or revocation; that the disposal by the United States of any tract crossed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission, so far as it affects that tract; and that the permission is subject to any future regulations of the Department. Applications under the act of 1896 may be for rights of way upon forest reservations.

* Reported 14 L. D., 338; 18 L. D., 168.

7. The applicant should mark each of the subdivisions affected by the proposed right of way "V" or vacant, if it belongs to the public domain at the time of filing the map in the local land office, and the same must be verified by the certificate of the register which should be written on the map and duplicate. If it does not affirmatively appear that some portion of the public land is affected, the local officers will refuse to receive the application.

8. When the maps are filed, the local officers will note in pencil on the tract books opposite each tract traversed, that *permission* to use the right of way for a tramroad, canal, reservoir, or for electric purposes, is pending, giving date of filing and name of applicant, noting on each map the date of filing.

9. When the permission is given by the Secretary of the Interior, a copy of the original map will be sent to the local officers, who will mark upon the township plats the line of the right of way, and will note in pencil opposite each tract of public land affected that *permission* has been given, noting the date of permission and the act.

10. Permission may be given under the acts for rights of way on unsurveyed land, maps to be prepared as in the circulars noted.

11. The act approved May 21, 1896 (29 Stat., 127), entitled "An Act to grant right of way over the public domain for pipe lines in the States of Colorado and Wyoming" is similar in its requirements to the right of way act of March 3, 1891, and the regulations of February 20, 1894, furnish full information as to the preparation of the maps and papers. Applicants will be governed thereby so far as they are applicable.

The text of the act is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way through the public lands of the United States situate in the State of Colorado and in the State of Wyoming outside of the boundary lines of the Yellowstone National Park is hereby granted to any pipe line company or corporation formed for the purpose of transporting oils, crude or refined, which shall have filed or may hereafter file with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by said pipe line and twenty-five feet on each side of the center line of the same; also the right to take from the public lands adjacent to the line of said pipe line material, earth, and stone necessary for the construction of said pipe line.

SEC. 2. That any company or corporation desiring to secure the benefits of this Act shall, within twelve months after the location of ten miles of the pipe line, if the same be upon surveyed lands and if the same be upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its line, and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way.

SEC. 3. That if any section of said pipe line shall not be completed within five years after the location of said section the right herein granted shall be forfeited, as to any incomplete section of said pipe line, to the extent that the same is not completed at the date of the forfeiture.

SEC. 4. That nothing in this Act shall authorize the use of such right of way except for the pipe line, and then only so far as may be necessary for its construction, maintenance, and care.

S. W. LAMOREUX,
Commissioner.

Approved, December 23, 1896.

DAVID R. FRANCIS,
Secretary.

SECOND CONTEST—HEARING—OKLAHOMA LANDS.

HERSHEY v. BICKFORD ET AL.

Where a second contest is filed on grounds set forth in the first, with an additional allegation as to the disqualification of the first contestant as an entryman, and the entry under attack is canceled as the result of the first suit, and the contestant therein makes entry under his preferred right, it is not competent for the local office to order a hearing on the second contest as against the entry then of record.

The failure of an intervening entryman to specify any reason, on due opportunity given, why his entry should not be canceled and the preferred right of a successful contestant recognized, warrants the cancellation of his entry, and precludes such entryman from thereafter attacking the entry of the successful contestant on a charge that should have been set up under the rule to show cause.

A person who at the hour of opening Oklahoma lands to settlement is rightfully on reserved land within said Territory (the "government acre") is by reason of such presence disqualified from making the run on the day of opening, but is not necessarily disqualified from thereafter making entry of lands in said Territory, if by his presence therein he secured no advantage over others.

Secretary Francis to the Commissioner of the General Land Office, December 23, 1896. (I. H. L.) (G. B. G.)

The land involved in this contest is the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and lots 12, 13, 18, and 19, Sec. 33, T. 13 N., R. 7 W., Oklahoma land district, Oklahoma Territory, containing 154.54 acres.

On April 23, 1889, one James A. Baum made homestead entry of the land described, excepting lot 13, containing 7.40 acres.

On October 30, 1889, Harvey L. Bickford filed affidavit of contest against said entry, alleging abandonment.

On February 14, 1890, Calvin L. Severy filed affidavit of contest, charging Baum with abandonment, and Bickford with premature and unlawful entry into the Territory.

On May 24, 1890, hearing was had on Bickford's contest against Baum's entry. Baum defaulted, and Bickford proved abandonment. The local officers recommended the cancellation of Baum's entry. Your office approved said recommendation, canceled Baum's entry (on December 11, 1890), and awarded to Bickford the preference right of entry.

On October 6, 1890 (after the decision of the local officers, but prior to that of your office, *supra*), John Hershey filed affidavit of contest

against Baum's entry, charging Baum with abandonment, Bickford with "soonerism," and Severy with fraudulent speculation.

On December 18, 1890, Severy was permitted to make homestead entry, subject to Bickford's preference right.

On December 31, 1890, Bickford presented his application to make homestead entry. The local officers rejected his application because of Severy's prior entry. He appealed to your office, which, by letter of March 9, 1891, directed the local officers to notify Severy that he would be allowed sixty days within which to show cause why his entry should not be canceled. They did so, and on May 7, 1891, his counsel filed in the local office the following:

Now comes Calvin L. Severy, by his attorney, L. P. Hudson, and asks that the Hon. Register and Receiver name a day upon which he may show cause why his homestead entry No. 269 for (describing the land) should not be canceled for conflict with the preference right of H. L. Bickford. As a basis for this application see Hon. Commissioner's letter "H" of March 12, 1891.

The above document contains the following endorsement, signed by the register:

Filed May 7, 1891: and ordered that cause be set for hearing whenever, within the time allowed, entryman shall have filed application for hearing, *stating specific causes* why the entry of Bickford should not be allowed.

Severy failed to file any application "stating specific causes"—or any cause—why Bickford's entry should not be allowed. The local officers (on September 16, 1891,) reported to your office that, although more than the prescribed time (sixty days) had elapsed, Severy had failed to comply with the order, and recommended the cancellation of his entry. Thereupon your office (on October 12, 1891,) directed the local officers to note the cancellation of Severy's entry, and to place the application of Bickford of record. From this order of your office Severy appealed to the Department, which, on October 11, 1892, affirmed the decision of your office. (15 L. D., 358; on review, 16 L. D., 135.)

In pursuance of the above named departmental decisions, Severy's entry was canceled; and on March 8, 1893, Bickford made homestead entry of the land.

The next day (March 9, 1893,) Severy filed contest against Bickford's entry, alleging that he had entered the Territory during the period prohibited by law and the President's proclamation of March 23, 1889.

On April 13, 1893, the local officers, at the request of John Hershey, issued notice of hearing upon his affidavit of contest (filed October 6, 1890, *supra*.) against Baum's entry—which had been canceled twenty-eight months before, as the result of Bickford's contest. Said notice summoned Severy (*et al.*) to appear at said hearing, inasmuch as he claimed "some right or equity in and to said tract, the exact nature of which does not appear."

On the day set for the hearing (May 29, 1893), counsel for Severy

filed a motion that the local officers vacate and set aside said notice, which motion was overruled. Counsel for both Hershy and Bickford moved that Severy's contest be dismissed; which motion, after argument, was granted. The hearing then proceeded as between Hershy and Bickford.

On June 3, 1893, the local officers found and held that Bickford was "disqualified from making legal entry of the tract in dispute by reason of his presence within the Oklahoma lands between March 2, 1889, and noon of April 22, 1889;" and they recommended that his homestead entry be canceled.

From the action and decision of the local officers, as above, both Bickford and Severy appealed to your office.

On January 11, 1894, your office, acting upon said appeals, held that Severy's contest affidavit of February 14, 1890, and Hershy's contest affidavit of October 6, 1890, against Baum's homestead entry, were nullities, so far as Bickford's entry was concerned; nevertheless, your office proceeded to consider Bickford's appeal, and affirmed the decision of the local officers in so far as concerned the cancellation of Bickford's entry.

From said decision of your office Severy, Hershy, and Bickford, all appealed: Bickford contending that his entry ought not to be canceled, and Severy and Hershy contending that, in case it should be canceled, each of them respectively has earned the preference right to enter the land.

II.—Hershy. From the preceding statement of the facts that led up to the hearing, it will be seen that said hearing (on May 29, 1893,) was based on Hershy's affidavit of contest (filed October 6, 1890,) against Baum's homestead entry—incidentally charging Bickford, the prior contestant of Baum's entry, with "soonerism." But long prior to the date of the hearing, Baum's entry, against which Hershy's contest was aimed, had been canceled. Relative to this branch of the case your office decision appealed from says:

The validity of a contest is not affected by the fact that the contestant is not qualified to enter the land (See *Lerne v. Martin*, 5 L. D., 259; *Mitchell v. Salen*, 16 L. D., 403). In *Spitz v. Rodey* (17 L. D., 503), it was held that "the government has no interest whatever in the personality of the individual who initiates a contest." At the time Bickford's contest against Baum's entry was pending, the government was not interested in the question of Bickford's qualifications to enter the land; and all charges brought against him at that time were premature, as it was not known whether or not, in the event of the cancellation of Baum's entry, he intended to exercise the preference right awarded to successful contestants by the second section of the act of May 14, 1880 (21 Stat., 140). No charge could properly be brought against Bickford in advance of his application to enter the land. Nor did the charges filed against him in anticipation of his application to enter the land become invested with life upon his application to enter, filed May 8, 1893. While Bickford's contest against Baum's entry was pending, any contest affidavits setting forth the same charges against Baum that were then in issue between Bickford and Baum, and alleging that Bickford was disqualified to make entry, were, so far as Bickford is concerned, mere nullities. It follows that the affidavit of Hershy, filed

October 5, 1890, while Bickford's contest was pending, was without force and effect, and that your action of April 13, 1892, ordering a hearing on Hershy's contest affidavit, filed October 6, 1890, was erroneous.

From this branch of your office decision Hershy appeals, contending that, however irregular the proceeding that led up to the hearing may have been, yet, inasmuch as the local officers deemed the contest affidavit of October 6, 1890, a sufficient basis for such hearing, and accordingly directed it to be held, and as Hershy at said hearing proved Bickford's disqualification, and paid the fees demanded, he is entitled, under the second section of the act of May 14, 1880, to the preference right of entry—in case Bickford's entry is canceled as the result of said hearing.

Upon the cancellation of Baum's entry, and the restoration of the land to the public domain, Hershy's contest against said entry ceased to exist. His premature and invalid affidavit against Bickford certainly did not survive thereafter. In my opinion, it was not competent for the local officers, in the face of persistent objection, to resurrect an irrelevant affidavit, improperly filed in connection with a disallowed application to contest an entry that had long before become extinct, and use such affidavit as the basis of a hearing against *another entry*.

III.—Severy. Counsel for Severy alleges more than a score of errors in your office decision appealed from, which need not be discussed *seriatim*. They may all be covered by a few general and simple propositions:

(1.) Severy's contest affidavit of February 14, 1880, against Baum's entry (also accusing Bickford with having entered the Territory prematurely), was, for the reasons hereinbefore given in connection with Hershy's similar contest affidavit against Baum's entry, a nullity as against Bickford, and every one else except Baum; it can not, therefore, be properly considered as pending or in existence at any stage of the proceedings subsequently to the cancellation of Baum's entry, against which it was directed.

(2.) Severy's entry of December 17, 1890, was properly canceled upon his refusal, after sixty days' notification by the local officers in pursuance of the order of your office, to specify any reason why his entry should not be canceled; hence it can not be considered as being in existence at any subsequent stage of the proceedings.

(3.) Severy's contest against Bickford's entry, alleging a cause which had previously existed, but which he had persistently refused to specify when ample opportunity was (by direction of your office) afforded him to do so, was properly dismissed, and is not to be considered as being in existence at any subsequent stage of the proceedings. He has "had his day in court."

(4.) It follows that Severy has never at any time had in existence a valid entry, nor a valid contest against any other entry, which gave him any rights whatever in the premises.

IV.—Bickford. The case being closed as regards Hershy and Severy, it remains to consider the case as between Bickford and the United States; for

the government is a party in interest, and entitled to judgment on the facts, however such facts may have been disclosed, and whatever the rights of the private parties to the contest may be as against each other (*Saunders v. Baldwin*, 9 L. D., 391).

The facts relative to Bickford's presence in the Territory during the prohibited period are simple and undisputed.

The proclamation of the President opening the lands in this part of the Territory to settlement, saved and excepted from such opening, "one acre of land in square form in the northwest corner of section 9, T. 16 N., R. 2 W.," for the site of the land office at Guthrie, and "one acre of land in the southeast corner of the northwest quarter of section 15, T. 16 N., R. 7 W.," for the site of the land office at Kingfisher.

For several years prior to the opening, Bickford, at that time a resident of Leavenworth, Kansas, was an employe in the service of the Indian Bureau. The finding of facts by the local officers is as follows:

From a careful examination of the evidence, we find that the defendant had been within the Oklahoma lands for a long time prior to March 2, 1889, engaged in the business of government contractor and flour inspector, and that he remained within said lands during the prohibited period, engaged in said occupation, his contracts not expiring until June or July, 1889. It appears also that at 12 o'clock, noon, of April 22, 1889, he was on the acre reserved for a land office at Kingfisher, O. T., whither he had been called by some of his contract work.

Bickford acknowledges that he was on the "government acre" at Kingfisher at noon of the day of opening. He testified: "I went there and stayed on purpose not to be in the country when it was opened." In his appeal to the Department he acknowledges the correctness of the local officers' finding as to facts. He says:

The Commissioner erred in holding and finding that the presence of the defendant upon the government acre near Kingfisher, O. T., at the hour of 12 o'clock, noon, on April 22, 1889, operated as a disqualification, and brought him within the prohibition of the act of March 2, 1889, said presence being in the line of his duty as government contractor, by virtue of legal permission, and uncoupled with any attempt to take land for more than three years subsequent to noon of April 22, 1889.

In their argument in support of the appeal, counsel for Bickford contend that he was legally outside the prohibited territory because of being inside the limits of the "government acres;" that if this contention is erroneous—if he is to be considered as within the prohibited territory—he was properly and legally there; that he manifestly gained no advantage over any one else, inasmuch as he did not "make the run" on the day of the opening; and that even if it were to be conceded that he was disqualified from "making the run" on the day of opening, he was not "forever disqualified," so that he could not be allowed, years after the opening, to contest Baum's entry for the land in question and make entry thereof himself, upon earning it by procuring the cancellation of the prior entry.

I cannot concur with counsel for Bickford in their contention that he

was outside the territory because he was inside the "government acre;" nor can I concur in the suggestion that inasmuch as Bickford was properly and legally within the territory he was not subject to the prohibition of the statute.

The supreme court of the United States in the case of *Smith v. Townsend* (148 U. S., 490) says:

The general language used in the sections indicates that it was the intention of Congress to make the disqualification universally absolute. It does not say 'any person who may wrongfully enter,' etc., but 'any person who may enter;'—'rightfully or wrongfully' is implied.

I think it, therefore, quite clear that Bickford was disqualified from making the run on the day of the opening, even though, at that time, he were within the "government acre."

It is contended, however, by counsel for Bickford, that conceding that he was disqualified to make the run, he was not necessarily disqualified from making entry years afterwards. I concur in this view. In the case referred to, the supreme court of the United States says that in construing a statute a court may with propriety recur to the history of the times when it was passed, in order to ascertain the meaning of particular provisions of it; that it was well known that as the time drew near to the opening of the territory for occupation, under and by virtue of treaties with the Indian tribes, and in accordance with the law of Congress under consideration, there was a large gathering of persons along the borders of the territory awaiting the coming of the exact moment at which it should be lawful for them to move into it and establish homestead and other settlements, and that the purpose of the act was evidently to secure equality between all who desired to establish settlements in that territory.

Due consideration of the mischief which the law was designed to correct, and of the reason of the remedy provided, will not justify such an interpretation of it as would exclude Bickford from making a settlement nearly two years after the territory was formally opened. His presence on the "government acre" at the time of the opening, secured to him no advantage whatsoever with respect to the settlement ultimately made by him. The equality of opportunity which it was the manifest purpose of the statute to secure to all settlers alike, is not in any degree impaired, imperiled, or involved by an entry made nearly two years after the formal opening. Assuming, therefore, that Bickford's case is within the letter of the statute, it falls without the spirit of it. The distinction between the letter and the spirit of the act was recognized by the supreme court in *Smith v. Townsend*, and it is intimated that the spirit, rather than the letter, of the law should be adhered to.

I very much doubt, however, whether Bickford's case falls within the letter of the statute. Its language is general and comprehensive:—

Any person who may enter upon any part of said lands prior to the time that the same are opened to settlement, shall not be permitted to occupy or to make entry of such lands, or to lay any claim thereto.

Until said lands are opened to settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto.

Assuming that under the first of the foregoing paragraphs Bickford—whether rightfully or wrongfully within the territory prior to the time of opening—was thereby disqualified to occupy or make entry of such lands, or lay any claim thereto, I think it clear that the disqualification is confined to the day of opening, it being manifest that the purpose of the act was to secure equality of opportunity to all persons alike.

The first paragraph does not say that one who enters prior to the formal opening shall *forever* be disqualified, as is provided by the subsequent paragraph.

The second paragraph is much more comprehensive in its terms. It declares that no person shall be permitted to enter upon and occupy the lands until they shall have been opened for settlement by proclamation, and imposes as a penalty upon the person who shall violate the prohibition a perpetual disqualification from acquiring any right to such lands.

Bickford did not enter upon and occupy any part of the territory opened. He was, at the day of opening, rightfully on the "government acre," and remained there until after the hour of opening had passed.

I am unwilling, however, to decide this case upon so narrow and special a ground. It is my opinion that wherever it can be clearly established that no advantage whatsoever was, or could have been, gained by a technical infraction of the law, a person should not be disqualified by reason of such technical infraction.

In the case of *Smith v. Townsend* it appeared that the run was made from a railroad right of way at the day of opening, and that an advantage was, or could have been, derived by reason of that fact. In concluding its judgment in that case the supreme court says:

It may be said that if this literal and comprehensive meaning is given to these words it would follow that anyone who, after March 2, and before April 22, should chance to step within the limits of the territory, would be forever disqualified from taking a homestead therein. Doubtless he would be within the letter of the statute; but if at the hour of noon on April 22, when the legal barrier was by the President destroyed, he was in fact outside of the limits of the territory, it may perhaps be said that if within the letter he was not within the spirit of the law, and, therefore, not disqualified from taking a homestead. Be that as it may,—and it will be time enough to consider that question when it is presented,—it is enough now to hold that one who was within the territorial limits at the hour of noon of April 22 was, within both the letter and spirit of the statute, disqualified to take a homestead therein.

In my opinion the facts now under consideration present a case which should be determined according to the spirit, rather than the letter, of the statute. For the reasons aforesaid, I cannot concur in the conclusion reached by your office that Bickford's entry should be canceled. Your office decision is therefore reversed.

KENDRICH ET AL. v. PERDIDO LAND COMPANY.

Motion for review of departmental decision of August 28, 1896, 23 L. D., 288, denied by Secretary Francis December 23, 1896.

PRACTICE—CERTIORARI—NOTICE OF APPEAL.

ADAMS ET AL. v. NORTHERN PACIFIC R. R. CO.

A writ of certiorari is not a writ of right but lies in the discretion of the Secretary of the Interior, and issues when an affirmative showing is made of substantial injustice in the decision rendered below.

An appeal should not be dismissed on account of insufficient proof of the service of notice thereof, without opportunity given to show that the service was in fact duly made, where the adverse party appears and does not object to the service.

Secretary Francis to the Commissioner of the General Land Office, December 23, 1896. (I. H. L.) (E. M. R.)

This is a petition filed by David W. Adams, asking that the record in the case of Adams *et al.* v. Northern Pacific Railroad Company, involving the SW. $\frac{1}{4}$ of Sec. 9, T. 14 N., R. 42 E., Walla Walla land district, Washington, be certified to this Department for consideration and action to the end that the relief prayed for in the petition may be granted.

The petition shows this land to be within the indemnity limits of the grant to the Northern Pacific Railroad Company by the act of July 2, 1864, as shown by the map of definite location filed October 4, 1880. The N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 9 was selected December 17, 1883, per list No. 2, and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, May 20, 1884, per list No. 3.

October 29, 1887, the petitioner applied to make timber culture entry for the land in controversy, alleging that "on or about the 30th day of November, 1877, he improved and exercised control" over the land he sought to enter, and ever since had it in his possession with the intention of acquiring title thereto under the timber culture laws.

June 4, 1884 Patrick Grady made homestead application, which was rejected, for the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$. Grady did not appeal, but renewed his application on November 5, 1887, claiming settlement in the spring of 1884.

February 23, 1895, a hearing having been had, the local officers rendered a decision, finding that one Cornelius Grady applied to make timber culture entry for the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ on November 3, 1887, and as such tracts were involved in the case of Grady v. Northern Pacific Railroad Company, then pending on appeal, they refused to consider said last named tract in the cause at bar, and further found that Patrick Grady, who had died since his settlement, had not acted in good faith in making settlement and therefore had no such rights as would inure to his heirs, and that the improvements of

Adams were sufficient to defeat the claim of the railroad company, and therefore recommended the allowance of the entry of the petitioner to the said N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$.

June 29, 1896, your office decision was rendered, in which it was said—

From your said decision of February 23, 1895, of which you state that all parties were notified the same day, the Northern Pacific R. R. Co. and the heirs of P. Grady appealed, the first March 27, 1895, and the latter on the 23rd of the same month. Adams filed an appeal from so much of your decision as dismissed the case to the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said Sec. 9, but there is no proper evidence that his appeal was served on the opposite parties. It is accordingly dismissed.

Your office decision affirmed the action of the local officers as to the claims of the Grady heirs, but held that the application of Adams to make timber culture entry must be denied *in toto*, as rights under the law could only be initiated by entry, and the occupation and cultivation of the petitioner could give him no rights, as it did not affirmatively appear that he was qualified to secure title under any of the settlement laws, and awarded the land to the Northern Pacific Railroad Company. The right of appeal was denied to Adams.

Subsequently appeal was filed by Adams, and on September 11, 1896, your office refused to accept the appeal, saying—

Rule 95 of Practice prescribes that "Proof of personal service shall be the written acknowledgment of the party served or the affidavit of the person making the service attached to the papers served and stating time, place, and manner of service." The affidavit of service attached to said appeal (from local office) merely states that on the 25 day of February, 1895, he made "due and legal service" of notice of appeal.

From the affidavit of F. M. Ellsworth, attorney for Adams, it appears that Adams claims the land included in his application by virtue of having tendered an application to enter under the timber culture law, with the regular fees, at the United States land office at Colfax, Whitman County, Washington, in November, 1876, which application was rejected on the ground that the land was within the limits of the grant to the Northern Pacific Railroad Company; that the record of such tender was burned in the Colfax land office; that he again applied to enter under the same law, making a tender of the legal fees at the land office at Walla Walla, which was rejected for the reason that the land was within the reserved indemnity limits of said railroad company; and that subsequently he again, to-wit, on October 27, 1887, applied to enter, under which application hearing was finally had. Further,

that within the time allowed for an appeal in said contest, which date will be shown by the original notice of appeal now in the office of the Commissioner of the General Land Office, this affiant served on C. E. Moulton, the attorney of record of the said Northern Pacific Railroad Company at Colfax, Washington, personally a true copy of the said notice of appeal within the time allowed for an appeal in said case; and that C. M. Kincaid, attorney for the heirs of Patrick and Cornelius Grady, accepted service of the said notice of appeal.

Is the petitioner entitled to the issuance of the writ? A writ of certiorari is not a writ of right, but lies in the discretion of the court

and is issued when an affirmative showing is made of substantial injustice on the part of the court below. Dobbs Placer Mine (1 L. D., 565); Reed v. Casner (9 L. D., 170); and Lyman C. Dayton (10 L. D., 159).

In reference to the question of the service of the notice of appeal, it appears from the argument of counsel for the petitioner that he seems to be under the impression that the objection to the service consisted in the fact that service had been had upon the attorney who appeared in the cause rather than the attorney designated by the Northern Pacific Railroad Company. This does not accord with the reason given in your office decision; the objection therein contained went to the sufficiency of the proof of service. Counsel for the petitioner in his assignment says—

Britton and Gray appeared generally in the said contest before the Honorable Commissioner, for the Northern Pacific Railroad Company; they made no objection to the service, and if any objections were made it was without any notice whatever to David W. Adams or his attorney.

There is nothing in the record to show whether counsel for the Northern Pacific Railroad Company moved to dismiss the appeal of Adams or not, but in the presence of the statement of counsel, *supra*, the Department considers itself justified in assuming that this was not done, and that counsel for the company made no objection and entered a general appearance.

If objection had been made, the petitioner was entitled to notice. Driscoll v. Morrison (7 L. D., 274).

In Hausen v. Ueland (10 L. D., 273) it was held *inter alia*, syllabus—

The defendant by appearing and procuring an order of continuance waives any defect in the service of notice or proof thereof.

Counsel for the petitioner deposes that he personally served upon C. E. Moulton, the attorney of record, a true copy of the notice of appeal within the time allowed by the rules of practice; assuming this to be true, the case last quoted becomes again applicable, as it was there held (syllabus)—

If the fact of service is admitted or not denied, and the service is legal and duly made, the manner in which proof of such service is made is not material.

So also in Allen v. Leet (6 L. D., 669).

The reason of the decision of your office went solely to the sufficiency of the proof of service and therefore, in consideration of the affidavit of the attorney in the cause, that proper service was had, and the further statement that counsel for the Northern Pacific Railroad Company made a general appearance and failed to object to the sufficiency of the proof of service of the notice of appeal, I am of opinion that your office was in error of its own motion to deny the appeal of the petitioner without calling upon or giving him an opportunity to show that the service was in fact made in full compliance with the rule of practice applicable in such cases.

Has the petitioner suffered a substantial injustice by reason of the refusal of your office to forward the appeal by him filed in this cause?

Your office decision states—

The land involved in this case fell entirely outside of the forty mile limits of the withdrawal on general route made August 13, 1870, and within the forty mile limits of the withdrawal on amended general route made February 21, 1872; but fell within the indemnity limits of the road Oct. 4, 1880.

These being the facts, it was held that neither the application to enter this land by Adams, in 1887, nor his prior occupancy of the tract served to operate to defeat the grant to the Northern Pacific Railroad Company. If these facts are all that the record shows, the Department would concur in the judgment rendered below and deny the petition for the issuance of the writ of certiorari; but the affidavit of counsel for Adams set forth that as far back as November, 1876, this petitioner tendered his application to enter this tract under the timber culture law, together with the proper fees, at the land office at Colfax, Washington, which application was rejected by the local officers on the ground that the land was embraced within the limits of the grant to the Northern Pacific Railroad Company, and that the record of such application was subsequently destroyed by fire in the said land office. Another application for the land appears to have been made by Adams prior to the one passed upon by your said office decision, but as to that nothing further need now be said. The alleged application of 1876, and its rejection for the reasons stated, however, in view of the fact that the land was not covered by the company's withdrawal on map of general route of 1870, which under the law was the only authorized withdrawal for its benefit, present a question affecting the rights of the petitioner which in my judgment calls for departmental consideration and action.

In *Ard. v. Brandon* (156 U. S., 537) the reporter's statement of the case in full, as contained in the syllabus, is as follows:

A., being qualified to make a homestead entry, entered in good faith upon public land within the indemnity limits of a railroad grant, but not within the place limits. He demanded at the local land office the right to enter 160 acres as a homestead. This was refused on the ground that the tract was within the limits of the grant, although at that time the land had not been withdrawn from entry and settlement. This was subsequently done, and the land conveyed to the railway company. A. remained upon the land, cultivating it. In an action to recover possession from him, brought here from a state court by writ of error, *Held*, that that application was wrongfully rejected, and that his rights under it were not affected by the fact that he took no appeal.

Mr. Justice Brewer in delivering the opinion of the court said—

He had therefore, on July 14, when he went to the land office, the right to enter the entire 160 acres as a homestead. This right he demanded. He made out a homestead application for the land as described, tendered the application and the land office fees to the register of the land office, but the register rejected the application, giving as a reason therefor that the land was within the granted limits of the Leavenworth, Lawrence and Galveston Railroad, and was double minimum lands, and that eighty acres was the limit of a homestead entry of such lands.

As a fact the register was mistaken and the application should have been accepted.

Mr. Justice Brewer said further:

The law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon. If he does all that the statute prescribes as the condition of acquiring rights, the law protects him in those rights, and does not make their continued existence depend alone upon the question whether or no he takes an appeal from an adverse decision of the officers charged with the duty of acting upon his application.

If it be true that Adams made application to enter this land in 1876, and if his application was rejected for the reasons stated, it may be a question as to whether he is not protected as against the claim of the railroad company under the doctrine announced by the supreme court in the case cited; and without now intimating any opinion upon such question but with a view to its consideration by the Department I deem it proper that the petitioner's prayer should be granted.

You will therefore certify the record in the case to this Department to the end that the same may be examined and such action taken as may appear proper and just.

OKLAHOMA LANDS—CHEROKEE OUTLET—SETTLEMENT RIGHTS.

BRADY ET AL. v. WILLIAMS.

By the proclamation of the President declaring the Cherokee Outlet open to settlement, and providing regulations for the acquisition of settlement rights therein, a strip of land one hundred feet in width immediately within the outer boundary of the entire tract then opened to settlement was set apart for the occupancy of intending settlers; and, if it be conceded that the Secretary of the Interior could thereafter modify said regulation, such action could only be taken after the notice required by the statute.

Persons making the run from said strip of land, so set apart for their occupancy, are not disqualified as settlers by the fact that in entering thereon they passed over an adjacent Indian reservation.

The case of *Cagle v. Mendenhall* (20 L. D., 447) overruled.

Secretary Francis to the Commissioner of the General Land Office, December 23, 1896.

(P. J. C.)

The land involved in this controversy is the NW. $\frac{1}{4}$ Sec. 30, Tp. 26 N., R. 1 E., Perry, Oklahoma, land district, of which Charles A. Williams made homestead entry September 21, 1893. On September 23, October 3, and October 23, 1893, John M. Dahl, John H. McDonald and Michael Brady, respectively, filed contests against the entry, each alleging prior settlement. Hearing was set for March 21, 1894, and on that day Williams's entry was canceled by relinquishment. The trial proceeded as between the three contestants, and as a result the local officers found that McDonald had the superior right to the land, recommended that he be permitted to make entry, and that the other contests be dismissed. They found that Brady was prior in time to McDonald, but that he was

disqualified by reason of having entered the Outlet between August 19, and September 16.

On appeal, your office sustained the action of the local officers. Referring to Brady your office decision says:

Brady's admission that he entered the Territory from the Osage reservation shows that he was disqualified.

In the case of *Cagle v. Mendenhall*, 20 L. D., 447, the Department held that: "the action of the Department in forbidding persons from making the run from any of the reservations on the eastern border of the 'Outlet' was not inconsistent with the act of Congress; and, it being generally known that such instructions had been issued, settlers who acted in obedience thereto should not be defeated in their rights by others who as a matter of fact obtained advantage over them by making the run from adjacent Indian reservations."

Both Brady and Dahl appealed, the former assigning as error his disqualification by reason of having entered the Outlet from the Osage Indian reservation, and the latter assigning errors of fact.

Your office did not pass upon the alleged disqualification of Brady on account of entering the Outlet during the prohibited period, upon which the local officers based their judgment as to him, but relied entirely on the *Cagle* case.

The testimony on this point is that of Brady himself. In response to the direct question as to whether he was in the Territory within the prohibited period, he replied that he was not. His booth certificate to the same effect was presented. On his cross-examination, however, he said he was in there about September 3, and in answer to a number of questions gave that as the date. After his testimony was closed and one or more witnesses had testified for McDonald, he applied to go on the stand to correct an error in his testimony. He did not go on until all the testimony was closed, then, in pursuance of the former request, he testified that he had inadvertently given September as the month, instead of August. I have no hesitancy in saying that the witness was testifying in perfect good faith when he made this latter statement. There is nothing in the case to intimate that he was in the Territory except his inadvertent statement. It is inconceivable that the claimant should go upon the stand and by his own evidence disqualify himself. I am unable to agree with the finding of the local officers that Brady was disqualified by reason of the testimony on this point.

The evidence clearly shows that Brady got on the land about 1:10 P. M.; that McDonald was next there and Dahl was last of the three; that Brady made the run from the east side of the Arkansas river, which divides the Osage reservation and the Outlet, starting at 12:01; that McDonald and Dahl each ran from the north line of the "strip."

It therefore follows that as between McDonald and Dahl, the former is the prior settler, and, if the doctrine of *Cagle v. Mendenhall* is sound and to be followed, that Brady acquired no right to the land by reason of his settlement prior to McDonald. I find myself, however, unable to yield assent to the doctrine announced in that case.

By act of Congress, March 3, 1893 (27 Stat., 640), that part of Oklahoma Territory, known as the Cherokee Outlet, was declared open for settlement on the President's proclamation any time within six months from the date of the act. Among other things contained in the act is this (Sec. 10, p. 643):

No person shall be permitted to occupy or enter upon any of the lands herein referred to, except in the manner prescribed by the proclamation of the President opening the same to settlement; and any person otherwise occupying or entering upon any of said lands shall forfeit all right to acquire any of said lands.

The Secretary of the Interior shall, under the direction of the President, prescribe rules and regulations, not inconsistent with this act, for the occupation and settlement of said lands, to be incorporated in the proclamation of the President, which shall be issued at least twenty days before the time fixed for the opening of said lands.

The proclamation of the President (17 L. D., 230), presumably prepared in accordance with the act, was promulgated August 19, 1893, declaring the land open for settlement at twelve o'clock, noon (central standard time), Saturday, September 16, 1893, and, among other regulations contained in this proclamation was this, on page 239:

A strip of land one hundred feet in width, around and immediately within the outer boundaries of the entire tract of country, to be opened to settlement under this proclamation, is hereby temporarily set apart for the following purposes and uses, viz:

Said strip, the inner boundary of which shall be one hundred feet from the exterior boundary of the country known as the Cherokee Outlet, shall be open to occupancy in advance of the day and hour named for the opening of said country, by persons expecting and intending to make settlement pursuant to this proclamation. Such occupancy shall not be regarded as a trespass, or in violation of this proclamation, or of the law under which it is made; nor shall any settlement rights be gained thereby.

This reservation was "around and immediately within the outer boundaries of the *entire* tract of country;" no limitation or exclusion of any portion thereof. The purpose of this reservation was well understood by all familiar with the vexed questions that so often arose in cases arising out of the former openings to settlement of the Oklahoma Territory, where the question was as to whether an individual was over the line or not at the instant of starting. Also to prevent individuals who owned the lands adjoining the Outlet from obstructing those seeking homes therein by refusing to allow them to congregate on their lands preparatory to making the run. To avoid these complications, the President made this reservation to enable all intending to enter lands to congregate on this strip and thereby get an even start.

By this proclamation, the reservation thus made was on the east side of the Outlet, as well as upon all the other sides. It must be assumed that it was known to the President and the Secretary of the Interior at the time the proclamation was promulgated that the Indian reservations of the Kansas, the Osages, the Poncas and Otoes and Missourias immediately joined the Outlet on the east, yet there is no inhibition in the proclamation from settlers entering from those reservations or the one hundred feet reservation created by the proclamation.

It was this proclamation, made in pursuance of the act of Congress, and containing rules and regulations made by the Secretary of the Interior for the opening and settlement of the land, that was the guide by which all those intending to enter the territory should be controlled. It was formally promulgated, it bore the signature of the President of the United States, and the great seal of State. By it all persons were invited to the one hundred feet reservation, regardless of which part of the land it might be, either in imagination or reality, located. No other public or official pronouncement was made, and the only authoritative, official or legal utterance is contained therein.

The statements made in the case of *Cagle v. Mendenhall* are somewhat misleading. In reference to the instructions issued and publicity given to them, as stated therein, it is only necessary to say that there is no official record in this Department of the same. There were several telegrams sent from the office of the Secretary of the Interior to private individuals, but none to any government officials, in relation to this matter. The instructions of September 5, 1893, referred to, is a telegram from your office to "Emmet Womack, special agent." This is signed by the Commissioner, but does not purport to be given under the authority of the Secretary of the Interior:

In every one of the communications sent from the Department, with the exception of that of September 13, to Ned P. C. Gould, which will be adverted to hereafter, the information is that intending settlers will be prohibited from making the run from "Indian reservations," but there is no mention of the one hundred foot strip, or inhibition from making the run from the same.

If, as before stated, the President's proclamation created the one hundred foot strip on the east side of the Outlet and persons made the run from there in good faith, can it be said that the route they traveled to get to the strip disqualified them from making an entry? I think not. I do not believe it is within the power of the executive branch of the government to fix the qualifications of one making a homestead entry. Congress, the law making power, has done this, and the right of the individual can not be enlarged or abridged by executive order. The only disqualification fixed by Congress was that no one should "acquire any of said lands" who entered upon or occupied any part thereof "except in the manner prescribed by the proclamation of the President opening the same to settlement." The purpose of this was well understood. It was to give all persons, from every part of the country, an even chance to secure a home, and prevent those in the immediate vicinity from securing the choice lands. Following this declaration by Congress, the Secretary of the Interior, under direction of the President, prescribed "rules and regulations not inconsistent with this act" which were incorporated in the proclamation. By this the one hundred foot strip was solemnly set apart for occupancy by the settlers, and there was no direction as to how parties should travel to get to it.

The only theory upon which the Secretary of the Interior could pos-

sibly prevent persons from making the run from these Indian reservations was that, under the laws and treaties with the tribes, white people were not allowed therein, and were trespassers, and could be forcibly and summarily removed as such. But, if, in ignorance of this fact, they actually did get into the reservations, can this in any just and legal sense be said to disqualify the individual from making a homestead entry in the Outlet? I do not so understand it. And if they passed through the Indian reservations and got on to the one hundred foot strip, and made the run from there in good faith, should they be deprived of their homestead rights? I find myself unable to yield assent to such a proposition. If the settler were guilty of a crime either against the United States or the Indians he would not be disqualified from availing himself of the right to make a homestead entry.

A question similar to this, at least bearing upon this proposition, was decided in the case of Madella O. Wilson (17 L. D., 153). By the President's proclamation, the Sisseton and Wahpeton Indian reservation was opened for settlement, and it contained this:

Warning, however, is hereby given that until said lands are opened to settlement, as herein provided, all persons, save said Indians, are forbidden to enter upon the same, or any part thereof.

It seems that the entrywoman entered the reservation prior to the hour of opening, and your office held her disqualified, citing certain Oklahoma cases in support thereof. In reversing your office judgment, Mr. First Assistant Secretary Sims, after comparing the two statutes, said:

Now, I submit that the President of the United States, under this section, has no authority to declare a forfeiture of the right of this woman who went upon the right of way of the Hastings and Dakota Railroad Company a few minutes before the land was subject to entry. There is neither an inherent nor an implied power vested in the executive to visit such a penalty upon the entryman. . . .

While the proclamation warned all people not to go upon the lands until they were opened for settlement, and they were forbidden so to do, yet, there is nothing in the statute which authorized the injunction, or justified the visiting of the penalty of the forfeiture of the right upon her for so doing. Indeed, the proclamation does not attempt to do so.

This doctrine was affirmed by Mr. Secretary Smith in Edward Parant (20 L. D., 53).

Notwithstanding the parties in these two cases were trespassers on the Indian reservations, to the same extent exactly as Brady was, yet it was held that they were not disqualified from exercising their homestead right.

As has been said, Congress fixed the qualifications of a homestead entryman. It empowered the Secretary of the Interior, under directions of the President, to formulate rules and regulations, not inconsistent with the act, under which that right might be exercised. This was solemnly done. Now, has the Secretary, in himself as such, acting alone, the power of abridging or changing those rules?

It will be conceded, if he has such power, that it must be done with the same degree of solemnity, and given the same publicity as the original rules contained in the President's proclamation, and in addition it must be in conformity with the law. The statute, as quoted above, requires that the rules and regulations "for the occupation and settlement of said lands, to be incorporated in the proclamation of the President," "shall be issued at least twenty days before the time fixed for the opening of said lands."

The only declaration of the Secretary that there was no one hundred foot strip on the east of the Cherokee Outlet was a telegram sent to Ned. C. P. Gould, dated September 13, 1893. The telegram is not addressed to any officer of the government, but is evidently to a private citizen. It can not, in my judgment, be maintained that this information, given to a private citizen, is sufficient in itself to abrogate the rules and regulations contained in the proclamation. But, conceding for sake of argument that it could, then it must be admitted that it was a change in the proclamation, and was in the nature of a new rule. Hence, it follows that at least twenty days' notice before the opening was not given of this new regulation, and it was therefore not in compliance with the statute.

The same may be said of all the telegrams sent.

The earliest one—that to Harding and Riddell—was dated August 28, but nineteen days before the opening.

It appears that A. P. Swineford was the "Inspector" who had charge of the opening of the Outlet.

There is nothing of record in this office to show that he was informed of this attempted change in the proclamation. He was telegraphed to about a number of other matters. For instance, on August 24, he was directed by the Secretary to "require those going upon Strip to do work to give obligation not to appear before those in charge of booths until September 14." (L. & R. Misc. 270, p. 257.) The Secretary of War was notified the same day that it would be necessary for those entering to do work to have permit "from A. P. Swineford, Inspector," to enter. (Id. 258.) Again, on September 11, the Secretary issued an order directing how trains should be run on the railroad, and wired Swineford: "You will see that the accompanying order is given due publicity and properly executed." (Id. 361.) On September 14, the First Assistant Secretary advised Mr. Swineford, in answer to a request for information as to the rights of persons to enter lands, "who have not had the benefit of the homestead laws." In reply he said: "that the matter of making entries in the Outlet is governed entirely by the President's proclamation of August 19, 1893, and the laws therein referred to."

These several instructions to the Inspector are quoted simply for the purpose of showing that in relation to all matters considered of public interest he was required to give publicity to the same, or follow the President proclamation.

It may be said that those entering from the east gained an advantage in securing land on that side over those entering from the north or south. There is, in my judgment, no force in this proposition. It is true, they did not have the same distance to travel, but the same is true of those who were fortunate enough to get desirable lands close to the other points of starting. In other words, all the seekers could not find homes on or near the lines, and some were forced to go further into the interior. If, however, those running from the east did gain an advantage in the distance they had to travel over those from other points, they were there by authority of the proclamation, and under the statute this was all that was required. The contestant Brady took his chances with the others that ran from that point. He had no greater advantage over those than did the others starting from the other lines that made selections close to the place whence they started.

There is nothing in the testimony in this case to show that Brady had any knowledge of or information upon the subject of the dispatches that were sent from this Department. It is certainly going to the extreme to say he should be disqualified when he acted in ignorance of any attempted change in the proclamation. The testimony shows that he had been on the Indian reservations frequently before the opening. The same is true of McDonald. In fact, McDonald at the time was farming some land in one of them on a lease.

I can not escape the conviction that Brady was not disqualified from making the homestead entry by reason of having made the run from the point where he started. He was the prior settler on the land, and is therefore entitled to make homestead entry of the same.

The case of *Cagle v. Mendenhall* is overruled, and your office decision reversed.

DOLLES *v.* HAMBERG CONSOLIDATED MINES CO.

Motion for review of departmental decision of August 8, 1896, 23 L. D., 267, denied by Secretary Francis, December 23, 1896.

RAILROAD GRANT—LANDS EXCEPTED—PRE-EMPTION CLAIM.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

A pre-emptor who makes homestead entry of a part of the land embraced within his filing thereby abandons all right under his pre-emption claim, and though the filing may not, at such time, be canceled on the record, it is thereafter not evidence of the existence of a pre-emption claim, and will therefore not defeat the operation of a railroad grant, as to the tract not included in the homestead entry.

Secretary Francis to the Commissioner of the General Land Office, December 23, 1896. (I. H. L.) (W. C. P.)

I have considered the appeal of the St. Paul, Minneapolis and Manitoba Railway Company from your office decision of March 28, 1895,

refusing its application to list the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 15, T. 127 N., R. 37 W., St. Cloud (formerly Fergus Falls) land district, Minnesota, as passing under the grant for the benefit of said company.

This land is within the primary limits of the grant for the benefit of the St. Vincent extension of said railroad, made by the act of March 3, 1871 (16 Stat., 588).

On March 16, 1868, one Sidney L. Fish, filed pre-emption declaratory statement, covering this and other tracts, alleging settlement December 20, 1867. On June 10, 1871, he made homestead entry for the other lands in his declaratory statement, but omitting from such entry the tract here in question.

On July 20, 1872, G. W. Lampman filed pre-emption declaratory statement for this tract with others, alleging settlement July 15, 1872, but made no effort to perfect such claim.

On December 26, 1891, the company applied to list this tract, which application was rejected by the local officers. Upon appeal to your office their action was affirmed upon the theory that Fish's pre-emption claim of record at the date of the act making the grant to said company served to except said tract from the operation of the grant, the case of *Bardon v. Northern Pacific R. R. Co.* (145 U. S., 535,) being cited in support of that conclusion.

It is urged upon appeal here that the *Bardon* case is not in point, because in this case the grant was not one taking effect at the date of the act making it, but was by the provision of the law to take effect at the future time and only upon the performance of certain acts by the beneficiary thereunder. In support of this contention the decision of the supreme court of the United States in *St. Paul and Pac. R. R. Co. v. Northern Pacific R. R. Co.* (139 U. S., 1), is cited.

By the act of March 3, 1857 (11 Stat., 99), a grant was made to the Territory of Minnesota to aid in the construction of certain railroads. On July 12, 1862 (12 Stat., 624), a joint resolution was passed by Congress authorizing a change of location of one of the lines of road provided for in the act of 1857. By the act of March 3, 1865 (13 Stat., 526), the grant made by the act of 1857 was enlarged and the time for the completion of the railroads extended. The act of March 3, 1871 (16 Stat., 588), authorized another change in the branch line of the St. Paul and Pacific R. R. company to St. Vincent, "with the same provisional grant of lands to be taken in the same manner along said altered lines as is provided for the present lines by existing laws." To this act there is, however, a provision in the following words:

Provided, however, That this change shall in no manner enlarge said grant, and that this act shall only take effect upon condition of being in accord with the legislation of the State of Minnesota, and upon the further condition that proper releases shall be made to the United States by said company, of all lands along said abandoned lines from Crow Wing to St. Vincent and from St. Cloud to Lake Superior, and that upon the execution of said releases such lands so released shall be considered as immediately restored to market, without further legislation.

In construing this act the supreme court said:

The line authorized, or supposed to be authorized, under the act of March 3, 1871, was distant many miles from the line projected in 1869, and the map of its definite location, approved by the Secretary of the Interior, was not filed with the commissioner of the general land office until December 20, 1871. The release required by the act of March 3, 1871 was not made by the St. Paul and Pacific Railroad Company until December 13, 1871, and a formal release to the United States by the company was not executed until the 19th of that month. It was only upon the execution of the release—whether that be deemed to have been the 13th or 19th of December—that the act took effect. The act did not make a grant upon condition subsequent. There was no condition, for a breach of which any forfeiture of a grant could be required, for no grant passed until the consideration for it, the relinquishment of the old lines with the lands along them, was given. The transaction was in the nature of an exchange, by which the right was given to the company to construct new lines with proportional grants, in consideration of its relinquishing certain old lines, with their accompanying lands. The new rights were to vest with the relinquishment of the old rights. The transfer was to be mutual and simultaneous. There was, therefore, no operative grant until there was an effective release, and whichever date be taken—whether December 13 or 19—it was subsequent to the definite location of the Northern Pacific Railroad Company in Minnesota. A map of that location approved by the Secretary of the Interior, was filed, as stated above, in the office of the commissioner of the general land office on the 21st of the previous November. No grant, therefore, was in existence of any lands to any other company, which are claimed by the plaintiff in this suit, at the time of the definite location of its route. (139 U. S., 1-16).

It has been decided that the release presented by the company did not become operative until it was filed in this Department and accepted by the Secretary on December 19, 1871, and that the grant in question became effective on that day. *St. Paul, Minneapolis and Manitoba Ry. Co. v. Bergerud* (23 L. D., 408).

The condition of a tract of land at that date determines whether it passed under said grant. Fish's pre-emption declaratory statement made March 16, 1868 had not been formally canceled upon the records of your office, and his homestead entry for the same land, except the tract here in question, was also of record. That is, the record shows two claims by the same person under the settlement laws. Fish afterwards submitted final proof under his homestead entry, which was approved and final certificate issued.

In the case of *Fish v. Northern Pacific Railroad Company* (23 L. D., 15), the effect of a pre-emption filing of record at the date a grant to a railroad company takes effect, is fully discussed, the conclusion being that an uncanceled pre-emption filing of record at that date serves to except the land from the grant. This conclusion is based, in part at least, upon the decision of the supreme court in the case of *Whitney v. Taylor* (158 U. S., 85). The underlying proposition in these cases is stated in the supreme court decision, where, after referring to other cases involving similar questions, the following language is used:

Although these cases are none of them exactly like the one before us, yet the principle to be deduced from them is that when on the records of the local land office

there is an existing claim on the part of an individual under the homestead or pre-emption law, which has been recognized by the officers of the government, and has not been canceled or set aside, the tract in respect to which that claim is existing is excepted from the operation of a railroad land grant containing the ordinary excepting clauses, and this notwithstanding such claim may not be enforceable by the claimant, and is subject to cancellation by the government at its own suggestion, or upon the application of other parties. It was not the intention of Congress to open a controversy between the claimant and the railroad company as to the validity of the former's claim. It was enough that the claim existed, and the question as to its validity was a matter to be settled between the government and the claimant, in respect to which the railroad company was not permitted to be heard.

It is necessary to apply this rule to the case here presented. It is contended in support of the appeal that by omitting the tract here involved from his homestead entry, "Fish, in law, abandoned all claim and surrendered all the rights he ever had thereto under the pre-emption law"—the case of *Nix v. Allen* (112 U. S., 129), being cited in support of the contention. In that case the court said specifically that one who, having filed pre-emption declaratory statement for a quarter-section of land, afterwards made pre-emption entry for one-fourth of said quarter-section

in law thereby abandoned her settlement on the other three quarters of the quarter section for the purposes of pre-emption and surrendered all the pre-emption rights she ever had in them.

This ruling has been followed by this Department in the case of *Holm v. St. Paul, Minneapolis and Manitoba Ry. Co.* (16 L. D., 251), and the land thus omitted from final proof was held to have passed under a grant taking effect subsequently to the date of such proof. These cases do not, however, cover the exact question involved here.

The act of May 20, 1862 (12 Stat., 392), known as the "homestead law," and afterwards incorporated into the Revised Statutes as section 2289, declares that one possessing certain prescribed qualifications "shall be entitled to enter one quarter-section or a less quantity of unappropriated public lands, upon which such person may have filed a pre-emption claim." The ruling of this Department has been from the first that a transmutation of a filing exhausts the pre-emption right. It has further been held that one who makes homestead entry for a part of the land covered by his pre-emption filing thereby abandons his pre-emption claim. In the case of *Neilson v. Northern Pacific Railroad Company* (9 L. D., 402), it was said:

It is clear, that the making homestead entry of another tract was an abandonment in law of his claim to that part of the tract covered by his pre-emption filing which was not embraced in his homestead entry.

In *Northern Pacific Railroad Company v. Harris* (12 L. D., 351), it was said:

It appears from the record that Harris—May 1, 1880—changed his pre-emption filing and made homestead entry of that part which embraced the land in the even section. In so doing he abandoned his filing for the land in the odd as well as that in the even section, and exhausted his rights and privileges under the pre-emption law.

If the rule laid down in these decisions is to prevail it must be held that the tract in question here was free from claims at the time the grant took effect and passed to the company.

The record in this case showed the filing of Fish, because it had not been formally canceled; that is to say, no formal statement appeared upon the record to the effect that said filing, and the claim evidenced thereby, had been abandoned. The same record showed, however, that Fish had taken such action as constituted, in law, an abandonment of his pre-emption claim. It cannot be said in view of this condition of affairs that the record showed an existing claim. If Fish had filed in the local office a formal relinquishment of his claim and this fact had been noted on the record, but no formal cancellation noted, it would not be held that his claim still existed, or that the record showed its existence. He did not file a formal relinquishment, but he did that which just as unmistakably and effectually evidences his abandonment of all claim under his filing. As a matter of law Fish had abandoned his claim under the pre-emption filing before the grant to the railroad company took effect, and the records of the land department disclosed this fact. Fish afterwards submitted final proof under his homestead entry in 1876, in which it is shown that he had lived on the land covered by it, from June 10, 1871, to the date of said proof. This shows that he had in fact, as well as in law, abandoned all claim to the tract here in question, prior to the date the grant took effect. The tract involved was free from claim when said grant took effect and passed to the company thereunder.

The decision appealed from is reversed.

RAILROAD GRANT—INDEMNITY SELECTION—SECTION 5, ACT OF MARCH 3, 1887.

HUMISTON *v.* NORTHERN PACIFIC R. R. CO. ET AL.

The occupancy of land for the sole purpose of speculating in the improvements thereon does not constitute a *bona fide* settlement that will except the land from indemnity selection.

An indemnity selection must fail in the absence of a valid basis therefor.

The odd-numbered sections within the limits of the Yakima Indian reservation did not pass under the grant to the Northern Pacific company, and afford legal bases for indemnity selections by the company.

The right of a purchaser from a railroad company to perfect title under section 5, act of March 3, 1887, where the title of the company fails, takes precedence over a subsequent adverse timber culture application.

Secretary Francis to the Commissioner of the General Land Office, December 23, 1896.

(I. H. L.)

(J. L.)

This case involves the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 3, T. 15 N., R. 45 E., Walla Walla land district, Washington.

On August 18, 1890, Henry Humiston filed his application to make

timber culture entry of said tracts, which was received, noted, and held by the local officers subject to the claims of the Northern Pacific Railroad Company, who were immediately notified of said application.

On September 2, 1890, the company filed a written protest against said application to enter, alleging:

That its map of definite location was filed on October 4, 1880: (2) That said tracts were embraced in its indemnity selection list No. 2, which was on December 17, 1883, filed in the district office, and approved and certified by the local officers: And (3) that said tracts are within the indemnity limits of the company's grant, and have never been and are not now, subject to any rights or claims adverse to the company's right to select them as indemnity.

A hearing was ordered and had; at which Thomas J. Adams as purchaser of said tracts from the railroad company, was permitted to intervene; and witnesses were examined in the presence of all parties.

On May 8, 1891, the local officers found that said tracts were not subject to selection by the company, and recommended that Humiston's application to make timber culture entry of them, be allowed.

An appeal was taken, and on April 30, 1895, your office found that the tracts in controversy, on December 17, 1883, were not occupied by a *bona fide* settler within the meaning of the settlement laws, and were subject to selection by the company on that date. Consequently, your office reversed the decision of the local officers, and rejected Humiston's timber culture application.

Humiston appealed to this Department and specified as errors:

(1) That the finding of your office that the tracts in controversy on December 17, 1883, were not occupied by a *bona fide* settler, and were subject to selection by the company was erroneous: (2) That the company's selection list No. 2 filed December 17, 1883, was illegal, and ineffective, because no lands lost in place were specified therein as a basis for the selection of the tracts in question as indemnity: (3) That notwithstanding subsequent orders, rules and regulations of the Land Department, the company did not specify any lands lost in place as basis for the selection of the tracts aforesaid, until August 30, 1892,—more than two years after the filing of Humiston's application to make entry: (4) That the lands finally specified as basis for the selection, to wit: odd-numbered sections within the Yakima Indian reservation, were not a lawful sufficient basis, inasmuch as no lands in place were ever lost by the company within said Indian reservation: And (5) that on August 18, 1890, the date of Humiston's application, said tracts were part of the public domain, and legally subject to entry by him.

It was proved that in the year 1887, Thomas J. Adams bought the tracts of land in controversy from the Northern Pacific Railroad company, paid for them, and received a warranty deed therefor. He also bought and paid for the improvements on said land of one S. G. King, who claimed to have been a *bona fide* and duly qualified settler on said tracts, on December 17, 1883, the date of the company's selection. The evidence by a clear preponderance justified your office in finding that said S. G. King was not a *bona fide* settler and that he occupied and held possession of the land solely for the purpose of speculating on the improvements thereon; and in holding that said tracts were subject to the selection made by the company, *Provided*, such selection

were made in accordance with law and the rules and regulations of the Land Department, and prior to the filing of Humiston's application to make entry.

It appears by the records of your office that the original selection list No. 2 of December 17, 1883, designated no bases in support of the selections contained therein: That on October 26, 1887, the company in support of said selections, filed a list of alleged losses in bulk, not arranged tract for tract with the selections, and consisting wholly of odd-numbered sections of land lying within the Yakima Indian reservation which was then unsurveyed: That on August 3, 1892, the company filed an amended list of its selections of December 17, 1883, rearranged so as to designate the losses tract for tract with the selected lands: According to said rearrangement, a "part of section 35, T. 8 N., R. 15 E.," was designated as the basis for the selection of the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 3, T. 15 N., R. 45 E. (part of the land involved herein); and part of section 1, T. 9 N., R. 15 E., was designated as basis for the selection of the other three forties of the land involved.

It further appears that on January 25, 1896, the company filed another amended list from which it omitted "part of section 35, T. 8 N., R. 15 E.," as a basis for the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 3 aforesaid, and substituted in lieu thereof the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 3, T. 6 N., R. 16 E., which was also within the Yakima Indian reservation, and which for other reasons stated in your office letter of October 27, 1896, filed in this case, was not a legal basis for an indemnity selection.

It follows that the company's selection of the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 3, T. 15 N., R. 45 E., is invalid, and must be rejected, because it is not supported by any sufficient basis.

Ever since the case of *Dellone v. Northern Pacific Railroad company*, decided March 2, 1893, and reported in 16 L. D., 229, this Department has held that odd-numbered sections of land within the limits of the Yakima Indian reservation did not pass under the grant to the Northern Pacific Railroad Company, and that they afford proper and legal bases for indemnity selections by the company. It follows, therefore, that the company's selections of the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 3, T. 15 N., R. 45 E., are valid and must be approved, and that Humiston's application to make timber culture entry must be rejected as to the three forty-acre tracts last above described.

It appears by the evidence that the intervenor, Thomas J. Adams, on July 15, 1887, in good faith purchased from the railroad company the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 3, T. 15 N., R. 45 E., (together with the other three forty-acre tracts, above described), for valuable consideration which has been duly paid, and has improved and cultivated the same at great expense. Therefore, your office is hereby directed, to permit said Adams, at any time within sixty days after service of notice that this decision has become final, to make application to

purchase said SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 3, T. 15 N., R. 45 E., from the government under the fifth section of the act of March 5, 1887 (24 Stat., 556); and in the meantime, and until the result of such application shall have been determined, action on Humiston's application to make timber-culture entry of said SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 3, shall be suspended.

Your office decision of April 30, 1895, is hereby modified as indicated by the foregoing directions.

MINING CLAIM—ADVERSE—TIME OF FILING.

GIROUX *v.* SCHEURMAN.

The local officers are not required to transact business out of office hours, and may therefore properly refuse to accept and file an adverse claim tendered out of office hours on the sixtieth day of publication; but if such claim, so tendered, is accepted and filed it must be regarded as filed in time.

Secretary Francis to the Commissioner of the General Land Office, December 23, 1896. (I. H. L.) (P. J. C.)

It appears that George Scheurman made application for patent for the Tough Nut lode claim in Prescott, Arizona, land district; that notice thereof was given by publication, commencing June 14, 1895. The sixty days period within which adverse claims should be filed, as provided by section 2325 (Revised Statutes), expired August 13.

Joseph L. Giroux presented an adverse, which was endorsed as follows: "Filed in U. S. Land Office, August 13, 1895, at 8:30 P. M." Then follows this endorsement:

Rejected as an adverse this 14th day of August, 1895, being filed out of time, but allowed as a quasi contest.

From this action of the register Giroux appealed, and your office, by letter of November 6, 1895, reversed his action, whereupon the applicant prosecutes this appeal.

The General Circular (February 6, 1892), on page 107, in reference to the duties of registers and receivers, says:

They will be in attendance regularly at their offices, keeping the same open for the transaction of business from 9 o'clock A. M., till 4 o'clock P. M., etc.; . . . applications to make entry can not be received by the register or receiver out of office hours, nor elsewhere than at their offices, etc.

The register rejected the adverse doubtless on the theory that the official day closed at 4 o'clock P. M. While this is true, and while he might under the rule have refused to accept and file the adverse after that hour, he did not so refuse, and having accepted and filed said adverse after office hours on the sixtieth day of publication, it will be treated as having been filed in time. In the case of the "Dolly Varden" mine (Copp's U. S. M. L., 262) the adverse claim was presented on

Sunday and accepted by the local officers. Your office reversed this action. On appeal, Mr. Secretary Schurz said:

While it is true that officers are not expected nor required to transact business out of office hours or on Sunday, still there is no law of the United States prohibiting them from doing such business. Nor am I able to find any law of the State of Nevada which prohibits the transaction of ordinary business on the Sabbath day.

Both of said officers might properly have refused to receive such application either out of office hours or on the Sabbath day, but the receiver did receive the adverse claim and filed the same, and by so doing, if suit was commenced within the time prescribed by law, I am of the opinion that the rights of the appellants were protected. Your decision is therefore reversed.

In *Sears v. Almy* (6 L. D., 1), it was held that the entry was "not invalid because allowed outside of office hours."

These cases are cited with approval in *John W. Nicholson* (9 L. D., 54; see also *McDonald et al. v. Hartman et al.*, 19 L. D., 547, and *Kelso v. Janeway et al.*, 22 Id., 242).

Your office judgment is therefore affirmed.

OKLAHOMA LANDS—QUALIFICATION OF HOMESTEADER.

BONNETT v. JONES.

The special provision in section 20, act of May 2, 1890, limiting the right of homestead entry to persons not "seized in fee simple of one hundred and sixty acres, etc.," is not repealed by the general provisions in section 5, act of March 3, 1891, amending section 2289, R. S.

A tax sale in the State of Kansas does not operate to divest the original owner of title until a deed is made thereunder, and, prior to such time, would therefore not relieve an entryman from the disqualification imposed by section 20, act of May 2, 1890, upon persons who are "seized in fee simple of one hundred and sixty acres of land."

Secretary Francis to the Commissioner of the General Land Office, December 23, 1896. (I. H. L.) (W. F. M.)

The land involved in this case is the SE. $\frac{1}{4}$ of section 5, township 16, range 7, in the land district of Kingfisher, Oklahoma, and is embraced in the homestead entry of James Jones, made May 14, 1892, and against which William J. Bonnett filed an affidavit of contest on May 20, 1892, alleging his prior settlement. Upon this issue a hearing was had, and upon the question of fact thus presented the register and receiver found for the contestant. On appeal to your office it was found that "all the evidence tends to show that their settlements should be considered simultaneous," and it was

ordered that each of the parties take one-half of the land according to the legal subdivisions embracing their improvements.

From this decision both parties have appealed here.

The record discloses that on October 15, 1886, Jones made homestead entry of the SE. $\frac{1}{4}$ of section 10, township 31, range 41, in the

land district of Garden City, Kansas, that he commuted the entry to cash on November 12, 1887, and that patent issued therefor on June 23, 1889. The land was sold for taxes on September 1, 1891, and after the expiration of the redemption period of three years provided by the laws of Kansas, a deed was made and delivered September 13, 1894, and filed for record September 24, 1894.

In section 20 of an act entitled "An act to provide a temporary government for the Territory of Oklahoma," etc., approved May 2, 1890, it is provided that

no person who shall at the time be seized in fee simple of a hundred and sixty acres of land in any State or Territory, shall hereafter be entitled to enter land in said Territory of Oklahoma. 26 Stat., 81.

This is a special provision enacted with sole reference to lands in the Territory of Oklahoma. Section 2289, of the Revised Statutes, as amended by section 5 of the act of March 3, 1891 (26 Stat., 1095), provides that

no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory, shall acquire any right under the homestead law;

but there is no theory of construction upon which this general provision can be said to have repealed or modified the special one affecting Oklahoma lands.

Construing the laws of Kansas providing for the sale of lands for the non-payment of taxes, the supreme court of that State has said that

at the time of sale, the purchaser acquires an interest which ripens into a title only on the execution of a deed. The title passes by the deed; till then, it remains with the original owner. This is manifest from the express language of the sections of the statute heretofore referred to. It is also the general voice of the authorities. *Douglass v. Dickson*, 31 Kansas, 310.

It is conclusive, therefore, that Jones was, at the time of his entry, the owner of one hundred and sixty acres of land in the State of Kansas, and was, on account thereof, disqualified to enter land in Oklahoma.

The decision appealed from is reversed, Jones' entry will be canceled, and Bonnett's application will be allowed.

PRACTICE—JURISDICTION—LOCAL OFFICERS—DISMISSAL.

LAMB *v.* ADAMS.

The receiver, acting alone, has no authority to dismiss a contest, and such action cannot be validated by a subsequent joint notice thereof from the register and receiver.

Secretary Francis to the Commissioner of the General Land Office, December 23, 1896. (I. H. L.) (J. L. MCC.)

At 9 A. M., November 2, 1891, there were received at the local office by mail the homestead applications of Marion A. Adams and Wilbert

W. Lamb. The application of the former was for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 3, T. 48 N., R. 11 W., Ashland land district, Wisconsin, and that of the latter was for the SE. $\frac{1}{4}$ of said Sec. 3. The applications were, therefore, in conflict as to the east half and the southwest quarter of the SE. $\frac{1}{4}$ of Sec. 3. There were received also a number of other applications conflicting with those of Lamb and Adams, but either through failure to prosecute their claims or by withdrawal thereof, the other applicants have been eliminated from the case.

The local officers allowed Adams to make entry for the land described in his application.

November 11, 1891, Lamb filed an amended application to enter the SE. $\frac{1}{4}$ of said section. This application was accompanied by affidavit claiming settlement in August, 1890, and continuous residence since that date. A hearing was ordered by the local officers for May 27, 1892, at 10 A. M.

The case was called on the day and hour set for hearing, and the defendant Adams appeared in person and by his attorney. The plaintiff Lamb did not appear, and the receiver on the motion of defendant dismissed the case for want of prosecution. At 10:16 A. M., Lamb appeared with his attorney, who, when he learned that the case had been dismissed, moved for a reinstatement thereof, stating that it was the practice of the Ashland office not to dismiss a case for default that had been set for an hour certain, until the expiration of the entire hour, and that as the case was set for 10 A. M., it should not have been dismissed until 11 A. M. The receiver admitted that the practice had been as stated by Lamb's attorney, and sent for Adams's attorney, who had left the office after the dismissal of the contest and before the appearance of Lamb. Adams's attorney returned to the office and Lamb was called and sworn as a witness.

The attorney for Adams entered a special appearance and objected to the introduction of any testimony, for the reason that the case had been dismissed, and asked for a ruling of the office.

The receiver said: "The receiver does not understand that he has jurisdiction to order the case to proceed at this time." Whereupon counsel for Lamb renewed his motion, reiterating his statement as to the practice of the office.

So far as the record discloses, there was no formal ruling by the receiver, but he allowed plaintiff to call and examine his witnesses.

At the conclusion of his examination of Mr. Lamb, the attorney for the plaintiff invited Adams's attorney to cross-examine the witness. Adams, by his attorney, refused to cross-examine the witness, stating that upon the dismissal of the contest he had sent away some of his own witnesses, and that until it was regularly reinstated according to the Rules of Practice he should refuse to participate in the trial. Upon being asked by the plaintiff to disclose the names of the

witnesses who had gone away, he refused to do so. The plaintiff proceeded with the introduction and examination of his witnesses, each of whom he invited the defendant to cross-examine, but the latter refused. When the plaintiff rested his case he stated that, as the defendant asserted that some of his witnesses had gone away, the plaintiff would agree to a continuance for any reasonable time to enable the defendant to procure his witnesses, if he desired to avail himself of the opportunity. To this proposition defendant's counsel made no response.

June 18, 1892, attorneys for Lamb accepted personal service of notice of dismissal, which notice was as follows:

You are hereby notified that you having failed to appear at the hearing set for March 27, 1892, at 10 A. M., after due service of notice on January 25, 1892, the above entitled case (i. e., Lamb v. Adams) was dismissed by us on motion of attorney for Adams, for want of prosecution. You are allowed thirty days from this date in which to appeal from this decision to Hon. Commissioner General Land Office.

(Signed)

H. L. BESSE, *Reg.*,

R. C. HEYDLAUFF, *Rec.*

Lamb appealed from the above decision, and on April 6, 1893, your office decided that no right was acquired by settlement prior to "mid-night Nov. 1-2, 1891," and that as neither Lamb nor Adams "alleged settlement between that time and 9 A. M., November 2, 1891," at which time said applications were presented, they should have been noted as simultaneously filed and the land put up to the highest bidder.

Appeal was taken to the Department, and on March 19, 1894, the decision of your office was modified, it being held that, as both the original application of Lamb and that of Adams were based on affidavits executed before the land was restored to entry, no rights were acquired thereby; that Lamb, having presented his amended application, based on affidavits executed subsequent to the restoration of the land, should be permitted to have his amended application placed of record.

Subsequently, on March 23, 1896, the Department revoked and recalled the decision of March 19, 1894, and held, under the decision of the supreme court in the case of the Wisconsin Central R. R. Co. v. Forsythe, 159 U. S., 46, that the previous construction of the Department that the land involved was a part of the "surplus Omaha land" was error, and that the land was a part of the forfeited Wisconsin Central land and was restored to the public domain under the act of September 29, 1890; that therefore both the original application of Lamb and that of Adams were based on affidavits properly executed, and that their rights must be determined by their settlement, and the case was remanded to your office for further consideration and decision in the light of the directions therein given.

On August 5, 1896, your office held that, as the action of the register and receiver on June 18, 1892, in dismissing the contest, does not appear to have been taken until subsequently to the time when Lamb's testimony was introduced, Lamb's testimony as to settlement should be

considered, and you found, from an examination of that testimony, that prior to September 29, 1890, Lamb had made settlement on said land, and was a settler thereon on September 29, 1890, and as Adams does not claim settlement prior to 1891, Lamb has shown a superior right, and you held Adams's entry for cancellation, in so far as it conflicts with Lamb's application.

Adams appealed to the Department.

In regard to the proceedings hereinbefore set forth, it is clear that the receiver (alone) was without jurisdiction either to dismiss or to reinstate the contest. When Lamb appeared, with his witnesses, the case was properly pending before the local office; Lamb's testimony and that of his witnesses was properly and regularly taken; and every opportunity was afforded Adams and his witnesses to submit their testimony. By failing to appear and defend Adams placed himself in default. If it be said that it is only a technical default, the answer is, Adams has chosen to stand upon a technicality; his counsel moved the dismissal of the case, objected to its reinstatement, refused to cross-examine Lamb and his witnesses, or to stipulate for a continuance at which the alleged absent witnesses might be heard. Having chosen to rest his case upon a technicality, by that technicality he must stand or fall.

This case is not "on all fours" with that of *Bradford v. Aleshire* (18 L. D., 78), in which the Department held (see syllabus):

Where the local office sustains a motion to dismiss, filed by a defendant who submits no testimony, and such action of the local office is reversed on appeal, the case should be remanded for the further action of said office.

In the case at bar the local office did not sustain the motion to dismiss; that action was taken, or attempted, by the receiver—who, acting *alone*, was incompetent to grant such a motion. The contest was *not* dismissed.

The notice dated June 18, 1892, in which the register and receiver informed Lamb that the contest had been "dismissed by us," for want of prosecution, was wholly ineffective to validate the invalid action of the receiver on the day of the hearing. It was given after the testimony had been regularly taken, and could not operate retrospectively.

For the reasons herein set forth, the judgment of your office in finding that Lamb was the prior settler on the land in controversy, and holding that he should be allowed to perfect his entry for the same, is affirmed.

CAWOOD v. DUMAS.

Motion for review of departmental decision of May 14, 1896, 22 L. D., 585, denied by Secretary Francis, December 23, 1896.

RAILROAD GRANT-INDEMNITY SELECTIONS-REARRANGED LISTS.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO. v. LAMBECK (ON REVIEW).

In the rearrangement of an indemnity list, under the directions issued in the La Bar case, it is not essential that the rearranged list should be signed by the selecting agent of the company.

A railroad company is entitled to six months from date of actual notice of the order issued under the La Bar case in which to file rearranged indemnity lists.

Secretary Francis to the Commissioner of the General Land Office, December 23, 1896. (I. H. L.) (G. B. G.)

By departmental decision of February 17, 1896 (22 L. D., 202), your office decision of September 24, 1894, holding for cancellation the indemnity selection filed by the St. Paul, Minneapolis and Manitoba Railway Company as to lots 16 and 17 of section 7, T. 122 N., R. 31 W., St. Cloud land district, Minnesota, with a view to allowing the homestead application of Joseph Lambeck, was reversed.

Motion for review of said decision was duly filed and entertained by this Department, the same being returned for service March 27, 1896. The motion has since been filed bearing evidence of service upon the company, and at the request of counsel an application for oral argument was granted and the case was duly argued, both parties being represented.

The land involved is within the indemnity limits common to both the main line and the St. Vincent Extension of said road and was included in the company's list of selections made on account of the St. Vincent Extension, filed November 13, 1885. Its list contained also a list of lands alleged to have been lost to the grant equal in amount to the selected lands.

Lambeck's claim depends upon a homestead application presented on September 3, 1891, which was rejected by the local officers for conflict with the company's selection before referred to, from which action he duly appealed to your office.

The motion alleges that,

The Hon. Secretary overlooked the fact, which appears by evidence accompanying the homestead application of appellant, that the land in question was actually settled upon and claimed by a qualified pre-emptor prior to the pretended selection by the appellant railway company November 13, 1885.

Accompanying Lambeck's application to enter this land were two sworn statements made by him respecting settlements on the land involved. One is, that he settled in the month of September, 1887; built a house thereon, into which he moved his family, and has ever since continued to reside therein. The other statement is, that during the years 1884, 1885 and a part of the year 1886, one Pick resided on said land, with his family, and claimed the same as his homestead, and that in 1886 said Pick abandoned the land.

These statements were duly considered when the case was considered upon its merits. They do not sustain the specifications of error for the reason that Lambeck's alleged settlement was made nearly two years after the original selection was filed, and there is nothing to show that Pick was qualified to make homestead entry of the land or that he ever applied therefor.

The case of *Railroad Company v. Griffey* (143 U. S., 32), cited by counsel, has no application to the state of facts set forth in these affidavits. In that case Griffey's right had attached under his filing which had been duly placed of record prior to the date of the attachment of rights under the railroad grant.

In the decision under review it was held that (syllabus):

Indemnity selections accompanied by designation of loss in bulk, made prior to the specific departmental requirement that lost lands should be arranged tract for tract with the lands selected, operate to protect the right of the company as against subsequent applications to enter, made prior to said requirement, and the rearrangement of losses in accordance therewith.

In departmental decision of October 14, 1893 (17 L. D., 406), in considering the case of *La Bar v. Northern Pacific R. R. Co.*, you were directed to—

call upon all railroad companies having pending indemnity selections to revise their lists within six months from the date of your order, so that a proper basis will be shown for each and all lands now claimed as indemnity, the same to be arranged tract for tract in accordance with departmental requirements, and that all tracts formerly claimed for which a particular basis has not been assigned in the manner prescribed, at the expiration of six months, be disposed of under the terms of the orders restoring indemnity lands without regard to such previous claim.

In the decision under review it is stated that:

Under the direction given by this Department in its decision in the case of *La Bar v. Northern Pacific R. R. Co.* (17 L. D., 406), this company was, during the month of December, 1893, called upon to re-arrange its indemnity selections so as to designate, tract for tract, the lands lost in place, in lieu of which selections had been made. Acting under this call the company on June 6, 1894, filed its re-arranged list in which the same losses were used, but re-arranged to show the losses tract for tract with the lands selected in its list filed November 13, 1885.

Your office decision holds that the company's selection as originally presented was invalid, and recognizes the intervening right of Lambeck.

Prior to the decision of this Department in this case of *La Bar v. Northern Pacific R. R. Co.*, *supra*, there was no specific requirement that the lost lands should be arranged tract for tract with the selected lands, the circular of 1879 merely requiring the designation of losses made the bases for the selections.

I am therefore of opinion that the company's rights were duly protected under the selection as made in 1885, and as they have since complied with the requirement in re-arranging their losses so as to show a specific loss for each tract selected, no rights were acquired as against the grant by the presentation of Lambeck's application in 1891.

In effect this decision held that where the company, within the time allowed under the direction given in the *La Bar* case, re-arranges a list filed prior to said order, the rights of the company are duly protected and date back to the filing of the original list. To this decision the Department, after due consideration of the matter, adheres.

It is alleged, however, in the motion under consideration, that the company's re-arranged lists were not filed within the time allowed under the decision in the La Bar case; and further, that the re-arranged lists are not in form sufficient, for the reason that they were not signed by an officer of the company.

Inquiry at your office discloses the following facts:

Acting under the directions given in the La Bar case, your office issued notice to a number of railroads, said notices all bearing date of December 4, 1893.

In the case of the St. Paul, Minneapolis and Manitoba Ry. Co. the notice was addressed to the Land Commissioner of the company at St. Paul, Minnesota.

Said notice was sent by registered mail, and presumably left your office on December 4, 1893, the date of the notice.

Re-arranged lists were filed in your office with letter from the company bearing date of June 6, 1894. Said letter bears the stamp of your office dated June 14, 1894. This letter fully describes the lists and I am of opinion that it was unnecessary that the re-arranged lists be appended with the usual certificates placed on selection lists or signed by the selecting agent, as the same were not new selections, but re-arrangement of the old lists. The original lists were in form sufficient, excepting the matching of the specific selections with the losses, which was not required at the date of the filing of said selection.

It will be noted that the lists were filed after the expiration of six months from the date of the notice issued on December 4, 1893. If the language of the La Bar case were to be strictly followed, the direction therein given might be so construed as to lead to the holding that these re-arranged lists were filed out of time. But it is evident that the language of said order did not fully express the intention of the Department. Under the terms of the order, if taken literally, there might not be any notice whatever actually received by the company, and yet the company would lose its rights unless it re-arranged its lists within six months from the *date* of said order.

In my opinion the railroad company is entitled to six months from date of actual notice of said order in which to re-arrange its lists. But there is not sufficient evidence in the case, relative to receipt of notice and the date of mailing the re-arranged list to your office, to enable me to determine whether or not said list was re-arranged within six months from receipt of notice.

The case is therefore remanded to your office in order that the fact as to whether the company re-arranged said lists within six months from receipt of notice, may be determined. To this end you will take appropriate action; and thereupon your office will dispose of the case in accordance with the views herein indicated.

REPAYMENT—ASSIGNEE—ACT OF JUNE 16, 1880.

LOUIS GIESMAR.

The purchaser of lands at a tax sale, at a time when the legal title thereto is in the United States, does not occupy the status of an assignee of the entryman under the statutory provisions with respect to repayment.

Secretary Francis to the Commissioner of the General Land Office, December 23, 1896. (I. H. L.) (P. J. C.)

In this case the petitioner, Louis Giesmar, is seeking to have repayment made to him of a part of the money paid by one John Minor on cash entries 393, 435, and 436, at New Orleans, Louisiana, in 1822 and 1824.

As the record is presented here, it appears that Minor made cash entry No. 393, of 728.52 acres, on the 10th of May, 1822, and cash entry No. 435, of 172.67 acres, and cash entry No. 436, of 204.60 acres, on the 28th of August, 1824. These entries were made under the acts of Congress of March 3, 1811, May 11, 1820, and February 28, 1823 (2 Stat., 662, and 3 Stat., 573-729), as back concessions to a tract of land which Minor owned on the Mississippi River front, in Acadia parish, Louisiana. The total area of these entries was 1,105.79 acres, and the aggregate amount paid was \$1,382.26, the price being \$1.25 per acre. Duplicate receipts and certificates were issued for each of these entries, but the petitioner alleges that they can not now be found.

At that time there was no official plat of the township in which these entries were situated, and they were surveyed separately, on irregular lines, and described by metes and bounds, by a deputy surveyor, as provided in section 5, of the said act of Congress of March 3, 1811 (2 Stat., 662). Subsequently complaint was made that each of these entries conflicted in part with the prior private claim of Etienne Coumo, and on the 14th of October, 1829, they were suspended by the Commissioner of the General Land Office pending the filing of a township plat.

Minor died in 1830. In the same year a plat of the township was made, upon which Minor's entries were designated as section 30, and their aggregate area, exclusive of the Coumo claim, shown to be 630 acres. On the 14th of May, 1878, patent was issued to Etienne Coumo for the Coumo claim, including the portions covered by Minor's entries, but there was no action on the Minor entries, and they remained suspended.

There were various conveyances, and on the 18th of February, 1891, the petitioner, Louis Giesmar, became the owner and final transferee of the Minor entries, and also of Minor's front lands.

A survey was made in 1891, and a plat thereof approved June 23, 1892, which described the Minor entries, exclusive of the portions that had been patented to Coumo as aforesaid, as follows: Cash entry No. 393, Lots 1 and 4, Sec. 63, 399.24 acres; cash entry No. 435, lot 1, Sec. 62,

50.40 acres, and cash entry No. 436, lots 1 and 4, Sec. 61, 135.02 acres, all in township 9 S., range 2 E., and containing in the aggregate 584.66 acres. And on the 14th of August, 1893, patents were issued to Geismar for these last mentioned areas, and on the 18th of March, 1895, he filed his petition in the General Land Office for repayment to him of the sum of \$651.41, which Minor had paid for those portions of his entries, aggregating 521.13 acres, which had been patented to Coumo, as above recited. On the 23d of March, 1895, the Commissioner of the General Land Office denied the petition. Geismar filed a motion for review, which was overruled on the 30th of April, 1895, and then he appealed to the Department.

The abstract of title from Minor to Geismar is as follows:

John Minor died unmarried and without direct heirs, leaving a will, under which he bequeathed one half of these entries and of his front lands, both together constituting what is now known as "Waterloo Plantation," to William J. Minor, and acknowledged that the other half belonged to his brother, Stephen Minor. Soon afterwards Stephen conveyed his half to William, which made William owner of the whole. On the 23d of November, 1867, William granted a special mortgage on the whole plantation to Classon and Company, of New Orleans, to secure a loan of \$30,000. This debt was not paid, and by agreement between the parties in interest the property was sold for taxes on the 2d of December, 1871, by C. F. Smith, tax collector of Ascension parish, and purchased by William A. Gordon as agent for William Lorenzen. On the 28th of March, 1877, the said Lorenzen executed and acknowledged before N. B. Trust, a notary public in New Orleans, a declaration that his purchase of the property through his agent Gordon on the 2d of December, 1871, was with the funds of, and for Marie Von Gableuz, then widow of John F. C. Vles, of Baden Baden, in Germany, which declaration the said Marie Von Gableuz accepted in due form in Germany on the 21st of April, 1877; and on the 19th of April, 1879, the Auditor of the State of Louisiana passed his act of sale, ratifying and confirming to the said Marie Von Gableuz the said tax sale of the property of December 2, 1871. And before John J. Ward, a notary public in New Orleans, on the 18th of February, 1891, the said Marie Von Gableuz, then wife of Baron Werner Von Schweinitz, of Germany, sold and conveyed the property for \$20,000 to the petitioner, Louis Geismar.

Section 2, act of June 16, 1880 (21 Stat., 287), reads as follows:

In all cases where homestead or timber culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and can not be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excess paid upon the same upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land

Office, and in all cases where parties have paid double minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to the heirs or assigns.

This statute contemplates that repayment shall be made to the party who made the entry, his heirs or assigns.

Geismar is not an heir, nor is he an assign of the entryman Minor, there being no privity of interest existing between him and the entryman.

It will be observed that Geismar, in 1891, obtained his alleged interest in or claim to the land, for which he is now seeking repayment of the money paid by Minor in 1822 and 1824. But prior to Geismar's purchase, and in 1878, the government issued its patent for part of this identical land to Coumo, which was equivalent to the cancellation of the Minor entries to that extent, or at least was sufficient to render them nugatory after that date.

In Adolph Emert (14 L. D., 101), it was held (syllabus):

The only person qualified to apply for repayment under section 2, act of June 16, 1880, is the one in whom the title to the land vested at the date of the cancellation of the entry, or the heirs of such party.

See also Joseph H. Harper, 23 L. D. 249; Alpha L. Sparks, 20 L. D., 75.

In the case of Albert G. Craven (14 L. D., 140), Craven purchased the land at administrator's sale. Prior to the purchase, the entry had been canceled. In deciding this question, it was said:

At the time of the alleged sale by the administrator, the land in question was a part of the public domain, and no State court can make a valid decree of title to parties of any part of the public lands, so long as the title remains in the United States. This doctrine is fundamental and needs no citation of authority in support thereof. Mr. Craven has acquired title to this land through purchase from a subsequent entryman who entered the lands shown on the records of your office to be a part of the public domain. His purchase at an administrator's sale long subsequent to the cancellation of said entry gives him no claim against the United States which would warrant this Department in directing a repayment of the purchase money paid by Mr. Montgomery, the original entryman. Ozra M. Woodward (2 L. D., 688).

This case is somewhat analogous to the one at bar in that Geismar's grantor derived her title as the result of a sale of the land for taxes. The legal title to the land at that time, (1871) was in the United States, and it is difficult to understand how any sale for taxes by the State authorities could create in Geismar the status of an assignee of Minor within contemplation of the statute.

Your office judgment is therefore affirmed.

SECOND CONTEST—DEFAULT CURED PRIOR TO NOTICE.

STRANSKY v. SHAUT (ON REVIEW).

A contest filed during the pendency of a prior suit must fail if before service of notice thereunder the entryman without knowledge of such contest has cured his default, and it is neither alleged nor proven that the prior suit was collusive.

Secretary Francis to the Commissioner of the General Land Office, December 23, 1896. (I. H. L.) (C. J. G.)

This controversy is in relation to the NE. $\frac{1}{4}$ of Sec. 14, T. 104 N., R. 70 W., Chamberlain land district, South Dakota.

Under date of May 26, 1896, the attorney for Lizzie A. Shaut filed a motion for review of departmental decision of April 14, 1896 (22 L. D., 466), wherein is reversed the action of your office in dismissing the contest of John A. Stransky against the homestead entry of the said Lizzie A. Shaut for the above described tract.

On July 25, 1896, the said motion for review was entertained, and the case is again before the Department for consideration.

The grounds for the reversal by the Department of the decisions below were, that a former contest against the homestead entry of Lizzie A. Shaut was friendly and collusive; and that she failed to establish and maintain in good faith her residence on the land. It was held that defendant is shown by the evidence to have wholly abandoned said land, as alleged in the plaintiff's affidavit of contest, but the charge of collusive contest was not set out in said affidavit. That feature of the case was brought out at the hearing.

The errors assigned in support of the motion for review are as follows:

1. Because there is a misconception of the testimony and what took place on the trial before the register and receiver.
2. Because the affidavit of contest lays no predicate upon which this contest can be sustained as an attaching contest.

Lizzie A. Shaut made homestead entry for the land in question on April 5, 1890. John A. Stransky's contest affidavit was filed on July 13, 1894. At the latter date there was pending a contest by one Henry F. Thompson against Miss Shaut's entry. Hearing on this contest was set for August 8, 1894. Neither party appeared and the contest was accordingly dismissed. It was because of this circumstance that the charge of collusive contest was made. But the only basis for such a charge is found in Miss Shaut's cross-examination, when, upon being asked: "State if said Thompson did not file a contest against your claim on the ground of abandonment, and if you did not, or Mr. Sanborn for you, pay Mr. Thompson the sum of fifty dollars not to appear?" the attorney for Miss Shaut objected, because "not proper cross-examination," and the objection was sustained. It is stated in the departmental decision of which a review is asked that Miss Shaut refused to answer; but an examination of the record shows that the above is a correct statement of the circumstances, and that what transpired at

the hearing in reference to this particular charge can not be construed to mean that Miss Shaut refused to answer the question asked. Also when Miss Shaut was asked on cross-examination, "if when you returned to the claim, on the 16th of July, you knew that a man by the name of Thompson had contested your claim," it was again stated in said departmental decision that Miss Shaut refused to answer the question. The record shows that Miss Shaut's attorney objected to the question for the same reason that the former objection was raised, and the objection was sustained.

Besides, the first question asked Miss Shaut relative to the Thompson contest would seem in itself to refute the charge of collusion. If the Thompson contest was friendly and collusive, as intimated, why should Miss Shaut wish at all to buy Thompson off, much less to pay him \$50 not to appear? If Miss Shaut really offered to pay Thompson not to appear, that fact would in itself indicate that there was no prior agreement between them. If weight is to be attached to so slight a suspicion, attention might very properly be directed to the fact that on the day the Thompson-Shaut contest was dismissed, Stransky had notice issued on his contest affidavit. From this circumstance it might be inferred that there was some agreement between the contestants of the different suits.

As previously shown, on the day that Thompson's contest was dismissed, notice was issued by the local office on Stransky's contest. Miss Shaut was served with this notice on the same day, and at the time was living on the land in dispute and had been since July 16, 1894.

Departmental decision of April 28, 1896, held that Miss Shaut did not cure the laches which were alleged to exist, by returning to the land on July 16, 1894, three days after Stransky had filed his affidavit of contest. In support of this holding the cases of *Eddy v. England* (6 L. D., 530), *Farrell v. McDonell* (13 L. D., 105), and *Westenhaver v. Dodds* (13 L. D., 196), were cited. The two latter cases follow the ruling of the Department in the case of *Eddy v. England*, the strongest case cited in support of the holding. In that case it was held (syllabus):

An affidavit of contest, filed pending the disposition of a prior contest, should be received and held without further action, until final disposition of the prior suit; but the right of the second contestant will be held to take effect by relation as of the date when his contest affidavit was filed.

The right of a second contestant can not be defeated by curing the default charged, after his contest is filed, and pending the disposition of a prior fraudulent and collusive contest.

The ruling contained in the first paragraph quoted above has been followed in various cases, and is recognized as the law of the Department. It is upon the ruling in the second paragraph that the departmental decision of April 28, 1896, is based; namely, that Shaut's alleged default could not be condoned or cured by returning to the land on July 16, 1894.

With the exception of the cases cited, in nearly all the departmental decisions now recalled it has been held that a contest is initiated

by filing the contest affidavit and service of notice thereof upon the contestee. Proof of such service or the voluntary appearance of the claimant gives the local office jurisdiction to try the case. Jurisdiction is not acquired until notice has been served. In this sense the contest is not really and properly initiated until such jurisdiction has been secured. This view would seem to be the proper one in face of various decisions holding that neglect or laches on the part of the claimant may in good faith be cured any time prior to actual or constructive notice of the contest; this view, of course, being upon the theory that the claimant's action was not induced by knowledge of the impending contest. It would not be seriously contended that the claimant could cure his laches after the contest has been actually and properly initiated. The mere filing of the affidavit of contest was, perhaps, not intended to secure the contestant such rights as are given him by the former decision. It is recognized that the contestant by filing his affidavit secures for himself a right to proceed against the entry that can not be defeated by certain contingencies, for instance, the subsequent contest of another, or by a relinquishment with knowledge of the contest; neither can he be deprived of any benefit accruing to the entryman because of a prior collusive or fraudulent contest, where these things are alleged and proven. In this sense his right takes effect as of the date when his affidavit was filed. This view runs throughout former departmental decisions. Thus, in the case of *Webb v. Loughrey et al.*, on review (10 L. D., 302), it was held:

While a contest is not initiated until the issuance of notice, yet the contestant by filing the affidavit of contest secures for himself a right to proceed against the entry that cannot be defeated by subsequent relinquishment.

And there are many decisions to the effect that a contest is not initiated until the issuance of notice, and that the claimant may in good faith cure any laches or neglect prior to such notice, or actual knowledge of the contest.

In the case of *Stayton v. Carroll* (7 L. D., 198), it was said:

Jurisdiction is acquired by due service of notice upon the claimant, and if there has been no legal notice to claimant, then there is no authority in the local office to adjudicate his rights.

A contest charging failure to establish residence and abandonment must fail, where, prior to legal service of notice thereof, the entryman had cured his laches.

The same ruling is followed in *Hall v. Fox* (9 L. D., 153); *Scott v. King* (Id., 299); *Heptner v. McCartney* (11 L. D., 400); *Brown v. Naylor* (14 L. D., 141); *Neal v. Cooley* (18 L. D., 3); *Marsh v. Hughes* (22 L. D., 581).

In the last mentioned case it was said: "It is well settled, that compliance with the law, after affidavit of contest is filed and before notice of contest is issued, will cure a prior default and defeat the contest," the entryman in that case being defeated by reason of the fact "that his laches were cured because of his knowledge of the pending contest."

The defendant in the case at bar denies that she had any knowledge

of Stransky's contest until August 8, 1894, the day on which notice thereof was served upon her, and there is no testimony going to contradict her statement. Her evident intention, when she returned to this land on July 16, 1894, in the absence of proof to the contrary, was in good faith to continue her residence on the land, or would have the effect to cure her laches if any existed. To quote from your office decision of February 21, 1895:

The evidence shows that Miss Shant established her residence on the land April 9, 1890, and on October 6, 1890, obtained leave of absence for one year; that she returned to the land September 4, 1891, remained twenty-four days, and was there about one-third of the time for the remainder of the year; that she is a seamstress and has to depend on her work to earn a living, and improve her land, and was for the greater part of the time for the next two years at work in Pukawana and Chamberlain, returning to her land at frequent intervals, being on the land about 140 days in 1892, and eighteen days in 1893; that she intended to return to her land January 1, 1894, but was taken sick with the "grip," and did not get back until February 15, 1894, when she remained only one day, as the condition of her health did not admit of a longer stay at that time; that she returned to her land July 16, 1894, where she has since remained, and was there August 8, 1894, when served with notice of this contest, which was the first intimation she had that Stransky had initiated a contest, and that she has a house of three rooms, and about eighteen acres under cultivation.

It will be observed that the nature of Miss Shaut's business necessitated her absence, she being self-supporting, and absence under such circumstances is not necessarily indicative of bad faith. There is no positive evidence in the record that she has not all along acted in good faith, and that her absence was not *bona fide* to earn means for a livelihood and the improvement of her home. *Fyffe v. Mooers* (21 L. D., 167).

It will be observed also that there is a distinction between the case at bar and that of *Eddy v. England*, upon which the former departmental decision was based, namely, the prior contest in that case was shown to be fraudulent and collusive, and was so set out in an affidavit attached to the contest affidavit, while in the case at bar, as previously stated, collusion was not alleged in the contest affidavit, and the intimation of collusion by the attorney at the hearing was not sustained by the cross-examination of the claimant. The finding in the decision complained of, that she refused to answer certain questions touching this matter, was an inadvertence, and does not correctly represent the facts, which are, that the questions were objected to by her attorney as being immaterial and not proper cross-examination, and properly so, in view of the fact that no such allegation was contained in the contest affidavit nor referred to in the direct examination, and the objection was properly sustained. The claimant did not therefore refuse to answer said questions as erroneously stated in said former decision.

Considering all the circumstances of the case, I am of the opinion that there was no connection between the first and second contests, and in the absence of a specific charge of fraud and collusion, the second contest must be regarded as distinct and independent. In this

view it must be treated as a new action. When the first contest failed from any cause, and the issue was not tried and determined, the charge on which it was based failed with it. If this were not true, the second contest could not be allowed on the same charge, unless fraud and collusion in the first contest were alleged, which the second contest failed to do. Under the circumstances the contestant in this case can not be given any other advantage than the ordinary contestant. It is thus held that the second contest against Miss Shaut was not actually initiated, so as to affect her rights, until she had received notice thereof on August 8, 1894. At that time, as heretofore shown, she had cured any neglect or laches she may have been guilty of. Stransky's contest affidavit began to run against Miss Shaut's entry on July 13, 1894, only so far as to protect him in the rights accorded an ordinary contestant, and could not defeat Miss Shaut in the absence of any knowledge thereof on her part, from curing her laches prior to the time the local office secured jurisdiction in the matter. This opinion is in harmony with the settled law of the Department.

The former departmental decision is hereby overruled, and the concurring decisions of the local office and your office affirmed.

PRACTICE—APPEAL—RULE 48 OF PRACTICE.

REEVES ET AL. *v.* KOONTZ.

In a case decided by the local office where one of the parties affected adversely fails to appeal, but an appeal is taken by another party thereto, the whole case comes before the General Land Office for disposition on its merits, and not under rule 48 of practice.

Secretary Francis to the Commissioner of the General Land Office, December 23, 1896. (I. H. L.) (E. M. R.)

This is an application filed by William C. Reeves, asking that the record in the case of *Reeves et al. v. Koontz* involving the NE. $\frac{1}{4}$ of Sec. 25, T. 20 N., R. 6 W., Enid land district, Oklahoma, be certified to this Department for its consideration and action.

On September 16, 1893, the territory within which this tract of land is included was opened to settlement; on September 22, 1893, one Mervin G. Koontz made homestead entry for the tract in controversy.

On October 6, 1893, William C. Reeves filed his affidavit of contest against said entry on the ground of prior settlement, together with his application to enter under the homestead law.

On October 16, 1893, the probate judge of the county in which this land is situated applied to enter said land for townsite purposes under sections 2387, 2388, and 2389, of the Revised Statutes.

This application was rejected, and on October 24, 1893, said probate judge filed a corroborated contest affidavit against said homestead entry.

On December 15, 1893, James P. Wilcox filed a corroborated contest affidavit against said entry, in which he sets forth that—

On December 14, 1893, he filed an application to enter said quarter section as the townsite of North Pond Creek, under section 2382 R. S.; that in company with about two hundred other persons he entered upon said tract at 1:34 P. M., September 16, 1893, for townsite purposes; that said occupants immediately began making improvements thereon, and began surveying it for a townsite; that the same afternoon the said occupants had a meeting and elected a committee of safety, and that he was elected chairman thereof; that said persons were the first legal settlers on said tract, made the first improvements, and that at the time they entered thereon no other qualified person claimed said tract for any other than townsite purposes; that from September 16, 1893, to the present time said tract has been continuously used and occupied for townsite purposes, and has a population of over two hundred and improvements amounting to \$15,000. In conclusion Wilcox asked that a hearing be ordered in the case, "That said townsite company may be allowed to prove said allegations," and that said homestead entry be canceled.

Your office decision further states that on December 16, 1893, William H. Carter filed a corroborated contest affidavit against said homestead entry, in which he claimed a superior right to the west half of said tract, and alleged settlement thereon at about 5:00 P. M., September 16, 1893. The local officers consolidated these several contests and set them for hearing on April 3, 1894. On that day motion was made to dismiss each of said contests.

Your office decision sets out the following statement of facts from the local officers:

On April 4, 1894, J. J. Thomasson and Henry Durfee, as members of townsite board No. 12, filed contest, and made application to intervene as trustees of the townsite occupants.

On July 23, 1894, the attorney for D. B. Madden, probate judge, filed a motion to dismiss the contest of the probate judge, and filed the application of R. J. Reid, E. Stevens, R. D. Bordeaux, and C. F. Shattenkirk to intervene as trustees of townsite occupants, and to substitute said trustees in place of the probate judge: . . . The application to intervene was allowed. All of said contests were consolidated, and on August 2, 1894, at the hearing, all the parties appeared, and were represented by counsel.

On August 16, 1894, R. J. Reid *et al.*, as trustees of the townsite occupants made an application for a continuance, which application was overruled, and from which ruling said applicants appealed.

The probate judge and townsite board No. 12 appear to have withdrawn from the case, and R. J. Reid *et al.*, acting in their own behalf, and as the authorized agents of the inhabitants of the quarter section, appeared at the hearing and made a motion for continuance, which motion was overruled, and from which action of the local officers they appealed and withdrew from the hearing.

The local officers on November 15, 1895, rendered their decision, in which they recommended the dismissal of all contests except that of Reeves, and the cancellation of Koontz's homestead entry, and that Reeves be allowed to make homestead entry for the land in controversy. From this action Koontz appealed.

On April 4, 1896, your office decision was rendered affirming the action

of the local officers in so far as it recommended the cancellation of the entry of Koontz, but held that the testimony showed, or tended strongly to show, that Reeves was acting in the interest of a townsite company, and said—

Should this decision become final, Reeves and the townsite occupants will be permitted to submit additional evidence in support of their respective rights—that is, the right of Reeves to make homestead entry of said land, and the right of said occupants to have it entered as a townsite for the use and benefit of the occupants, as their rights may appear.

On September 12, 1896, upon a motion for review of said decision of April 4, 1896, made by Reeves, your office decision denied the review and held that the evidence that Reeves was the first settler upon the land was not sufficient to authorize your office in directing the allowance of his entry without a preponderance of evidence that such settlement was made in good faith; that there was no evidence that the townsite claimants had abandoned the land in dispute, but if it were true, this showing could be made at the hearing; and that the appeal of the townsite claimants from the decision of April 4, 1896, should be dismissed because taken from an interlocutory decision.

Your office decision further canceled the entry of Koontz, inasmuch as Koontz had not appealed from your office decision of April 4, 1896.

Subsequently, to-wit, on the first of October, 1896, William C. Reeves filed an appeal from the decision of April 4, 1896, and that of September 12, 1896, and by your office decision of October 22, 1896, the said appeal was dismissed, on the ground that appeal would not lie from the order of rehearing, because of which action the application for writ of certiorari is made, and the following relief is asked for:

1. That the Honorable Secretary will exercise his supervisory power and direct the Commissioner to transmit the papers in this case to him.

2. That if the allegations herein are found to be sustained by the record, that the order of the Commissioner permitting the townsite claimant and Reeves to offer additional evidence may be revoked; and your petitioner further asks that this Department will decide the case upon the evidence now in the record.

Counsel for the petitioner argues that Mervin G. Koontz has no further interest in this case, not having appealed from the decision of your office of April 4, 1896, and his entry having been finally canceled; that the appeal of the townsite claimants from the denial of their motion for a continuance, at the hearing before the local officers, was properly dismissed, because it was an appeal from an interlocutory decision, from which an appeal would not lie; that the fact that the townsite claimants failed to appeal from the final decision of the register and receiver rendered such decision final as to the facts as against them; and that as the local officers had found that Reeves was a *bona fide* settler on the land in dispute, the townsite claimants can not now have that decision reversed as to that question of fact, and that under rule 48 of practice that decision could not be interfered with.

Without following out the argument of the petitioner's attorney

further, it is sufficient to say that it appears from the application for the issuance of a writ of certiorari, that Koontz appealed to your office from the final decision of the local officers in this case, presumably upon the merits of the cause. Such appeal being before your office, it was not necessary to invoke rule 48 of practice, which applies in certain cases; as the appeal of Koontz itself brought the whole case before your office, and though he has failed to appeal from your office decision, by his appeal from the decision of the local office your office was authorized to pass upon the merits of the case as then presented, and in doing so it appears that there was found by your office evidence that the contest of Reeves was not in his own interest and behalf solely, but that he was acting in conjunction or collusion with the townsite company. This being the fact as found by your office decision, it was perfectly proper, in order not to hold that Reeves was not entitled to the preference right of entry, to give him and the townsite company an opportunity to introduce further evidence upon the disputed question.

The case of *Hobbs v. Goulette et al.* (18 L. D., 409), relied upon by the petitioner, does not apply; as in that case no appeal was filed, and therefore it became necessary to invoke rule 48 of practice, whereas in the case at bar the appeal of Koontz upon the merits of the case obviated the necessity of an adjudication under the rule.

Should the parties in this cause not attend the hearing ordered, and should your office hold, upon the record as made, that Reeves is not entitled to the preference right of entry, it may be that from such action by your office appeal would lie. However that may be, it is sufficient now to say that the application for writ of certiorari must be denied. (*Witter v. Ostroski*, 11 L. D., 260; *Olney v. Shyrock*, 9 L. D., 633; *Gibson v. Van Gilder*, 9 L. D., 626.)

In this connection I deem it proper further to state that the action of your office in canceling the entry of Koontz, because of his failure to appeal pending the motion for review by Reeves, raises the question as to whether the filing of said motion for review did not operate to suspend the right of appeal by Koontz until the motion had been acted upon; and with the view to the consideration of that question as it may affect the rights of Koontz, if he shall deem it advisable to insist upon them hereafter, you will allow all parties who appealed from the action of the local officers to appear at the hearing, and introduce testimony upon their respective claims.

RAILROAD GRANT—ACTS OF JUNE 22, 1874, AND SEPTEMBER 29, 1890.

GULF AND SHIP ISLAND R. R. CO.

For earned lands relinquished under the act of June 22, 1874, the company acquires a vested right to select indemnity therefor, anywhere within the limits of the grant, and subsequent legislation, forfeiting the grant to the extent of unconstructed road, will not limit said right of selection to the lands unaffected by the forfeiture.

The completion of this road entitles the company to select indemnity for lands relinquished under section 7, act of September 29, 1890, anywhere within the indemnity limits of the grant.

Secretary Francis to the Commissioner of the General Land Office, December 24, 1896. (I. H. L.) (G. B. G.)

On May 14, 1896 (22 L. D., 560), the Department rendered a decision in the above styled cause, then on appeal from your office decision of April 21, 1894.

The purpose of said departmental decision was to define the rights of the Gulf and Ship Island railroad company in the matter of the selection of certain indemnity and lieu lands claimed by said company under and by virtue of the acts of June 22, 1874 (18 Stat., 194), and September 29, 1890 (26 Stat., 496), respectively.

It was held among other things in said decision—

The company will, therefore, be permitted to take lands in lieu of those relinquished under the act of 1874, anywhere within the limits of the first forty miles of its grant, either in the granted or indemnity limits, and either even or odd sections or both, which were non-mineral and unappropriated at the date of selection; but its right to select lands in lieu of those relinquished under the act of 1890 will be confined to the indemnity limits of the first twenty miles of its road.

On August 8, 1896, the company, by its attorney, filed in this Department a paper in the nature of a petition addressed to the supervisory power of the Secretary, requesting a modification of said decision.

It is urged first—

That the decision holds that the company is entitled to select lands in lieu of those relinquished by said company under the act of 1874, anywhere within the limits of the grant, but directs your office to allow these selections only within the first forty miles of the grant.

This exception appears to be well taken.

The act of 1874 (*supra*) provides for selections thereunder from any of the public lands not mineral, and within the limits of the grant not otherwise appropriated at the date of selection.

It can make no difference that the grant of lands along unconstructed road has been forfeited. The company does not claim them by virtue of the grant but claims the right to select them in lieu of earned lands relinquished under the act of 1874 (*supra*), and, as was said in said departmental decision (*supra*)—

For such lands as had been relinquished to the United States under the act of 1874 the company had acquired a vested right of selection and subsequent legislation could not operate upon such right.

It is submitted further by the company, that since the issues were made up in said departmental decision, and since said decision was rendered the company has completed the whole of its line of road, and it is urged that while the limitation of the company's right of selection under the act of 1890 (*supra*), was very properly confined to the first

twenty miles of road under the facts as they appeared of record, that the company is now entitled to make its selections under said last named act anywhere within the indemnity limits of its grant.

This contention would also appear to be sound. The act provides that these lands are

to be taken within the indemnity limits of the original grant nearest to and opposite such part of the line as may be constructed at the date of selection.

It follows that the departmental decision aforesaid should be modified.

The company will be permitted to take lands in lieu of earned lands relinquished under the act of 1874 anywhere within the limits of its grant, either in the granted or indemnity limits and either even or odd sections, or both; which were non-mineral and unappropriated at the date of selection, and for earned lands relinquished under the act of 1890 it may select lands anywhere within the indemnity limits of its grant, *provided* they are otherwise subject to selection, and on satisfactory evidence that said road has been completed as alleged.

ABANDONED MILITARY RESERVATION—FORT CRITTENDEN.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., November 20, 1896.

REGISTER AND RECEIVER,
Salt Lake City, Utah.

GENTLEMEN: The appraisers have appraised the lands in the Fort Crittenden abandoned military reservation, Utah, at from ten cents to one dollar and twenty-five cents per acre.

The Secretary of the Interior has, under the law, fixed the minimum price of said lands at \$1.25 per acre. Therefore no tract of land in this reservation can be disposed of at less than \$1.25 per acre.

All of said lands are subject to settlement under the public land laws of the United States, under the act of August 23, 1894 (28 Stat., 491), which, among other things, provides:

That persons who enter under the homestead law shall pay for such lands at not less than the value heretofore or hereafter determined by appraisement, *nor less than the price of the land at the time of the entry*, and such payment may, at the option of the purchaser, be made in five equal installments, at times and at rates of interest to be fixed by the Secretary of the Interior.

On April 9, 1895 (20 L. D., 303), the Secretary of the Interior directed this office to issue instructions under said act of August 23, 1894, as follows:

That the homesteader be given the option in making payment upon his entry of these lands, of making his payments in five equal payments to date from the time of the acceptance of his proof tendered

on his entry, and that the rate of the interest upon deferred payments be charged at the rate of 4 per cent per annum.

In allowing entries for the lands in this reservation, under said law, you will in each case endorse on the application "Fort Crittenden Reservation, Act August 23, 1894," and make the same notation on your abstract of homestead entries.

Under the provisions of the homestead law, an entryman has the right either to commute his entry after 14 months from the date of settlement, or offer final proof under Sec. 2291, R. S. In entries under said act of August 23, 1894, he may, at his option commute after 14 months with full payment in cash, or, after submitting ordinary five year final proof and after its acceptance, he may pay for the land the full amount of the appraised value thereof, without interest, or he may make payment in five equal installments, the first payment to be made one year after the acceptance of his final proof, and the subsequent payments to be made annually thereafter, interest to be charged at the rate of 4 per cent per annum from the date of the acceptance of final proof until all payments are made.

In case the full amount is paid after 14 months from date of settlement you will, if the proof is satisfactory, issue cash certificate and receipt; and in the event that regular final proof is made, and the full amount then paid, you will issue final certificate and receipt; but when partial payments are made the Receiver will issue a receipt only for the amount of the principal and interest paid, reporting the same in a special column of the abstract of homestead receipts, and at the time last payment is made, you will issue the final papers as in ordinary homestead entries.

In issuing final papers you will make the proper annotations thereon, as well as on the applications and abstracts, as before directed, to show that the entry covers lands in Fort Crittenden Reservation.

You are further advised that the same rule, as to the allowance of credit for residence prior to entry and for military service, applies to entries under said act of August 23, 1894, as to other homestead entries.

Where, upon submitting final proofs the entrymen elect to make payment for the lands entered in five annual installments, you are authorized to make the usual charges for reducing the testimony to writing, but as the final certificate and receipt cannot be issued until the last payment is made you cannot charge the final commissions until said final certificate and receipt are issued.

Where the entrymen submit final proofs and elect to pay for the lands in installments, you will not give said proofs current numbers and dates, but will, if they are acceptable to you, make proper notes on your records showing that satisfactory proof has been made and the dates upon which the partial payments must be made, and then transmit said proofs to this office, in special letters, and not in your monthly returns, for filing with the original entries.

There are no guarantees to be taken in order to secure the payment of the installments, but if, when each installment is due, any entryman fails to pay the same you will report the matter to this office when proper action will be taken in the case.

The said act of August 23, 1894, did not repeal the act of July 5, 1884 (23 Stat., 103), hence parties qualified to make entry under the second section of the latter act will be exempt from the payment required by it.

Sections 16 and 36 of this reservation are reserved for school purposes.*

You will acknowledge receipt of this letter.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved December 24, 1896.

DAVID R. FRANCIS,
Secretary.

KEITHLY *v.* RICHARDSON.

Motion for review of departmental decision of August 4, 1896, 23 L. D., 158, denied by Secretary Francis, December 26, 1896.

RAILROAD GRANT—LANDS EXCEPTED—DONATION CLAIM.

DYER *v.* OREGON AND CALIFORNIA R. R. CO.

Land embraced within the notification of a donation claim at the date of the grant to this company, and the definite location of the road, is excepted from the operation of said grant, though claims of such character are not specifically named in the excepting clause of the grant.

The act of July 6, 1894, providing for the completion of donation claims, treated lands covered by donation notifications as reserved thereby from other disposition.

If it appears, on answer to a demand for reconveyance of lands excepted from a railroad grant, that the title of a purchaser thereof is confirmed by the act of March 2, 1896, proceedings should then be instituted for the recovery of the value of the land.

Secretary Francis to the Commissioner of the General Land Office, December 26, 1896.

(I. H. L.)

(F. W. C.)

With your office letter of May 2, 1894, was forwarded a motion, filed on behalf of the Oregon and California Railroad Company, for review of departmental decision of March 31, 1884 (not reported), in the case of William Dyer *v.* Oregon and California Railroad Company, involving the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 15, T. 5 S., R. 4 W., Oregon City land district, Oregon.

* Under the act of July 16, 1894, 28 Stat., 109, sections 2 and 32, are also reserved for school purposes. Secretary's letter of January 11, 1896.

This tract is within the limits of the grant to said company, and was included in a patent issued July 12, 1871. Dyer tendered an application to enter this land, and in support thereof alleged that the tract was excepted from the company's grant because included in the donation claims of Harris Stanley and Hiram Buffum.

In your office decision of September 26, 1892, in sustaining the action of the local officers in rejecting Dyer's application, it was said—

Upon an examination of the records of this office, I fail to find that the allegations of Dyer are sustained or that the land in controversy was ever included in any donation claim, or otherwise excepted from the operation of the grant to the Oregon and California Railroad Company.

In the decision under review it was stated—

Upon inquiry at the Private Land Division of your office I learn that the allegation relative to said donation claims is correct, and that said claims, both of which cover the south half of said section fifteen, are still of record.

Because of the outstanding patent and the presence of these donation claims, your office decision, in so far as it sustained the rejection of Dyer's application, was affirmed.

It was further stated in said opinion that—

It would seem, however, that the patent was inadvertently issued to the company, two donation claims being still of record and filed at a date antedating the grant to said company. Your attention is called to this matter to the end that steps may be taken to recover the title erroneously conveyed on account of the grant.

As the company's appeal questions the correctness of the statement in said decision relative to said donation claims, repeated inquiry was made at your office for the donation notifications, which were stated to have been mislaid.

In answer to a letter from the First Assistant Attorney, dated December 8, 1896, your office letter of December 12, 1896, forwards said notifications, and in relation thereto reports as follows:

I have the honor to transmit herewith notification 6401, covering S. $\frac{1}{2}$ Sec. 15, Tp. 5 S., R. 4 W., filed March 19, 1855, and notification 7455, covering frac. SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ Sec. 15, Tp. 5 S., R. 4 W., filed November 26, 1855, and to report that the records of this office do not show that either of said claims have been perfected as required by act of July 26, 1894 (28 Stat., 122), or that there has been any correspondence with this office in relation thereto.

Filed with notification 7455, is the statement of C. H. Burch, dated June 11, 1868, to the effect that both of said claims had been abandoned, but "H. Buffum" had entered part of same, to-wit: SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 15, Tp. 5 S., R. 4 W., under the pre-emption law.

The company in its motion dwells at considerable length upon the authority of this Department to investigate any question of fact after report from your office thereon, it being urged that it was incumbent upon Dyer's counsel to make out his case, and that the decision of this Department should be predicated entirely upon the record as forwarded by the Commissioner.

It is unnecessary to enter into a discussion of said contention, so far as it affects Dyer's rights in the premises, as the rejection of his application was affirmed. The United States, however, has an interest in the matter, and as against that interest it is hardly presumed that counsel will contend that the Secretary of this Department should not have full recourse to the entire records of the Department.

The record as now complete shows that the land in question was, both at the date of the act making the grant for said company, July 25, 1866 (14 Stat., 239), and at the date of definite location, covered by the uncanceled donation notifications of Stanley and Buffum. It is contended, however, that such notifications were not sufficient to except the land from the grant to said company, because not covered by the specific exceptions in the granting act.

In the case of said company against Kuebel (22 L. D., 308), this very question was made the subject of decision, it being therein held that land embraced within the notification of a donation claim at the time when the railroad grant becomes effective is excepted from the operation of said grant though claims of said character are not specifically named in the excepting clause of the grant.

It might be further stated, that by the act of July 6, 1894 (28 Stat., 122), provision is made for the completion of such claims by making the requisite proof of residence prior to January 1, 1896; and in said act it is provided—

That in default of such final proof said donation claims will be held to have been abandoned and the lands embraced therein shall be and are hereby restored to the public domain, and shall be subject to disposal under the then existing laws providing for the disposition of the public lands.

It is clear that under this legislation the lands embraced in such donation notifications are treated as reserved, and surely would not pass under a grant of public lands made to aid in the construction of a railroad.

The motion is therefore denied and herewith returned to the files of your office.

Added to the motion is the following—

After the foregoing was written I was advised by Mr. Mills, land agent of the company, that the company had some years ago sold to individuals the lands involved in this case.

It is unnecessary to pay further attention to this statement than to say that in answer to the demand which you are hereby directed to make upon said company for the reconveyance of the tract here involved, the rights of such individual purchasers might be presented with a view to confirmation under the provisions of the act of March 2, 1896 (29 Stat., 42), in which event the character of the action against the company will be changed from that for the recovery of the specific tracts to a suit for the value of the land.

ACCOUNTS—UNEARNED FEES AND UNOFFICIAL MONEYS.

CIRCULAR.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 14, 1895.

TO REGISTERS AND RECEIVERS.

GENTLEMEN: From and after June 30, 1895, a uniform detailed record must be kept by the receiver and monthly report made to the Commissioner of the General Land Office of unearned fees and unofficial moneys received, returned, and on hand at each local land office, consisting of moneys received as fees or commissions or in payment for land in cases where the applications to file or enter are incomplete or can not be allowed for any reason and of amounts deposited under the act of May 14, 1880, for giving notice of cancellation of entry in contest cases, and of all moneys deposited as security for the cost of transcribing testimony in contest cases, together with a statement of the amount refunded or reported in quarterly contest account in each case.

To this end I have caused to be sent you a special register, form No. 4-986, in which will be entered all such moneys received by you, the disposition made of the same and the amount on hand at the end of the month, and special form of statement thereof, form No. 4-541, for monthly report to this office, which report shall be a complete abstract of the record herein required.

All such unearned fees and unofficial moneys must be promptly returned to the parties from whom received or their legal representatives. The practice of holding the moneys paid in such cases, subject to the order of the applicant until the papers in the application are perfected or completed, is contrary to existing regulations and must be discontinued.

The record herein required to be kept must show the receipt and return of all such moneys. All moneys deposited for register's fee of notice of cancellation in contest cases, and all deposits for reducing testimony to writing in contest cases must be reported and all amounts returned to the depositor or paid for clerical services under act of August 4, 1886, or earned and carried into the register of cash receipts and balances must be entered in the proper column and under proper dates.

In connection with the receipt of moneys at the district land offices, you are advised that registers of the land offices have no right officially to receive any moneys whatever except such as are paid to them by receivers as salaries, fees, and commissions. Should any money be forwarded to the register or paid to him, he will at once pay over the same to the receiver, as the latter is the proper officer to receive all moneys sent to the local land offices.

Very respectfully,
Approved:

WM. H. SIMS,
Acting Secretary.

S. W. LAMOREUX,
Commissioner.

* Not heretofore reported.

ACCOUNTS—UNEARNED FEES AND UNOFFICIAL MONEYS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., December 26, 1896.

REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES.

GENTLEMEN: Referring to circular (M) of instructions dated May 14, 1895, relating to the required record (Form 4-986) and monthly report (Form 4-541) of moneys received, designated therein as unearned fees and unofficial moneys, you are advised that in addition to said monthly report, receivers will be hereafter required to render a regular quarterly disbursing account (Form 4-103) under their bond as special disbursing agent, for all such moneys received.

Beginning with the quarter ending March 31, 1897, receivers will credit the United States in such quarterly account with the balance of such funds in their hands December 31, 1896, as shown by their monthly statement (Form 4-541) for said month. They will also credit the United States with all such moneys received by them during said quarter, showing separately in each case the amount of fees and commissions, the amount of purchase money, the amount deposited for notice of cancellation, the amount deposited for reducing testimony to writing in contest cases and the amount deposited as fees for publication of notices, etc., and debit the United States separately in each case with all moneys earned and carried into their receiver's account, all moneys returned to the parties from whom received, and all amounts paid to publishers.

For amounts earned it will be sufficient to refer in the quarterly account to the particular item in the receiver's account to which the amount is carried; for all amounts returned or paid to publishers they will be required to furnish a receipt from the person to whom such payment is made.

These moneys will be held by receivers as other disbursing funds and will be so deposited.

In case of rejected applications the moneys will be held by receivers until proper voucher for its return can be obtained, and no longer.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved:

DAVID R. FRANCIS,
Secretary.

DESERT LAND—PRICE OF LAND—ACT OF MARCH 3, 1891.

JAMES BOOMER.

By the provisions of sections 6, and 7, added to the act of March 3, 1877, by the amendatory act of March 3, 1891, the proviso to section 2357, R. S., so far as it governs the price of desert land within the granted limits of railroads, is repealed, and the price of desert lands entered under the act of 1891, fixed at one dollar and twenty-five cents per acre, irrespective of their situation with relation to the limits of railroad grants.

Secretary Francis to the Commissioner of the General Land Office, December 26, 1896.
(I. H. L.) (W. M. W.)

On March 23, 1892, James Boomer made desert land entry for the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 8, T. 2 S., R. 5 E., Bozeman, Montana, land district, for which he paid \$20.

On February 27, 1896, he made final proof, and final certificate was issued for said land upon the payment of \$80, which would be full payment if the land were subject to disposition at the rate of one dollar and twenty-five cents per acre.

The records of your office showed that this land is situated within the granted limits of the Northern Pacific Railroad; thereupon, on June 16, 1896, your office held that Boomer should have paid the double minimum price of two dollars and fifty cents per acre for said land, and suspended the entry for the supplemental payment of \$100.

Boomer appealed.

On November 25, 1896, your office transmitted to the Department the papers in the case, and with them a copy of your office decision of June 6, 1896, in the case of Elizabeth B. Wheelock, which was referred to in your office decision of June 16, 1896, in this case.

There is no dispute as to the facts in the case. The land involved is within the limits of the grant made to the Northern Pacific Railroad Company. Boomer's entry was made March 23, 1892, under the act of March 3, 1891. He paid one dollar and twenty-five cents per acre for the land. Your office held that he should have paid two dollars and fifty cents per acre for the tract, suspended and held his entry for cancellation for his failure to pay said amount.

The first specification of error in his appeal is as follows:

1. The declaration was made under the act of March 3, 1891, which distinctly specifies \$1.25 per acre—thns error to demand a higher rate.

The sole question presented for determination is, whether under the act of March 3, 1891 (26 Stat., 1095), the price to be charged for desert lands, within the granted limits of a railroad, is to be at the rate of one dollar and twenty-five cents, or two dollars and fifty cents per acre.

Under the desert land act of March 3, 1877 (19 Stat., 377), one dollar and twenty-five cents per acre was held to be the price of the land, irrespective of its location. This holding continued to be in force until

June 27, 1887, when Secretary Lamar issued a circular, in which it was said:

The price at which lands may be entered under the desert land act is the same as under the pre-emption law, viz: single minimum lands at \$1.25 per acre and double minimum lands at \$2.50 per acre. 5 L. D., 708.

This construction was adhered to by the Department up to the passage of the act of March 3, 1891. See John Cameron, 7 L. D., 436; Daniel G. Tilton, 8 L. D., 368; Annie Knaggs, 9 L. D., 49; Hugh Reese, 10 L. D., 541.

The 6th and 7th sections, amendatory of the act of March 3, 1877, as amended by the act of March 3, 1891, are as follows:

SEC. 6. That this act shall not affect any valid rights heretofore accrued under said act of March third, eighteen hundred and seventy-seven, but all bona fide claims heretofore lawfully initiated may be perfected, upon due compliance with the provisions of said act, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests as if this act had not been passed; or said claims, at the option of the claimant, may be perfected and patented under the provisions of said act, as amended by this act, so far as applicable; and all acts and parts of acts in conflict with this act are hereby repealed.

SEC. 7. That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and the receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold, by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands; but this section shall not apply to entries made or initiated prior to the approval of this act: *Provided, however,* That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under this or any preceding act shall be subject to contest, as provided by the law relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands and moneys paid therefor shall be forfeited to the United States.

On January 13, 1892, the Department issued instructions under said act, in which it was held that the price of desert land entered under the act of March 3, 1877, as amended by the act of March 3, 1891,

is one dollar and twenty-five cents per acre, without regard to the situation of the land with relation to the limits of railroad grants. See 14 L. D., 74.

This construction has been followed by the Department in the following reported cases:

George W. Crane, 16 L. D., 170;

Robert J. Gardinier, 19 L. D., 83;

Kate G. Organ, 20 L. D., 406.

In the case of the *United States v. Healey*, 160 U. S., 136, the question as to the price of desert lands under the act of 1877, and prior to the passage of the act of March 3, 1891, was before the court and discussed by it at length. In the course of the opinion it is said that:

It results that prior to the passage of the act of 1891 lands such as those here in

suit, although within the general description of desert lands, could not properly be disposed of at less than \$2.50 per acre. Was a different rule prescribed by that act in relation to entries made previously to its passage?

If it be true, as seems to have been held by the Interior Department, that the act of 1877, as amended by that of 1891, embraces alternate reserved sections along the lines of land grant railroads that require irrigation in order to fit them for agricultural purposes—upon which question we express no opinion—it is necessary to determine whether a case begun, as this one was, prior to the passage of the act of 1891, is controlled by the law as it was when the original entry was made. This question is important in view of the fact that the appellee's entry was made under the act of 1877 before it was amended, and his final proof was made after the act of 1891 took effect. . . . The present Secretary of the Interior, as we have seen, held that entries initiated under the act of 1877 and prior to the act of 1891 could be completed upon the terms fixed by the latter act as to the price of desert lands. If that construction be correct, and if the plaintiff is not precluded from recovering the money voluntarily paid by him, with full knowledge of all the facts, then the judgment below was right. Otherwise, it must be reversed. We are of opinion that the act of 1891 did not authorize the lands in dispute to be sold at \$1.25 per acre, when, as in this case, the proceedings to obtain them were begun before its passage.

The court further said that the purpose of section 6, added by the act of 1891 to the desert land act of 1877, was to preserve the right to perfect all *bona fide* claims "lawfully initiated" under the act of 1877, "upon the same terms and conditions" as were prescribed by that act; that if any doubt could exist as to the object of said section 6,

that doubt must be removed by the explicit language of section 7. The latter section fixes the price of desert lands at one dollar and twenty-five cents per acre, and declares that "this section shall not apply to entries made or initiated prior to the approval of this act"—that is, to entries made prior to the approval of the act of 1891.

The act of 1891 amended the act of 1877 by adding five new sections to it. By the terms of these new sections many things are required of entrymen thereunder which were not required under the original act of 1877. Among these new requirements, section 5 prohibits the issuance of a patent, under said act, to any person until after such person or his assigns shall have expended, in the necessary irrigation, reclamation and cultivation, by means of main canals, branch ditches, permanent improvements on the land, and purchase of water rights for irrigation of the same, at least three dollars per acre for the whole tract. An entryman is also required under said section to file proofs during each year showing the expenditure of at least one dollar per acre, and at the end of the third year a map or plan showing the character and extent of such improvements.

In construing the original desert act of 1877, Secretaries Lamar and Noble held that the price of desert land under said act within the granted limits of railroads was two dollars and fifty cents per acre. Their conclusions on this point were based on the fact that the desert act of 1877 did not contain any repealing clause, and as to the price of desert lands within the limits of railroad grants, said act should not be construed as repealing by implication the proviso contained in section

2357 of the Revised Statutes, which fixes the price to be paid for alternate reserved lands, along the line of railroads within the granted limits by an act of Congress at two dollars and fifty cents per acre.

The supreme court in the Healey case, *supra*, sustained the construction placed upon the original desert act of 1877 by Secretaries Lamar and Noble.

In construing a statute the intention of the whole act should control in the interpretation of the several parts of it. See Sutherland on Statutory Construction, Sec. 319. Another familiar rule is, that laws are presumed to be passed with deliberation, and with a full knowledge of all existing ones on the same subject.

Applying these rules to the case at bar, it is clear that Congress in passing the amendatory act of 1891 intended, (1) to protect and preserve intact, at the option of the claimant, every accrued and accruing valid right existing at the date of the passage of said act, in favor of claimants or contestants under the act of 1877, the same in all respects as if the act of 1891 had not been passed; (2) to provide additional new requirements which should govern and control in the disposition of desert lands in all entries made after the passage of the act of 1891; (3) that the price to be paid the government for desert lands, in all entries made under said act, is one dollar and twenty-five cents per acre, whether land so entered be situated within or without the limits of railroad grants; (4) that the repealing clause in said act operated as a repeal of the proviso to section 2357 of the Revised Statutes, in so far as it related to the price to be paid for desert lands within the granted limits of railroads.

The Healey case does not conflict with the views herein expressed as to desert entries made under the act of 1891. This construction of said act was known to the court when the Healey case was decided; in the opinion in that case the court referred to 14 L. D., 74, wherein the Department construed said act as fixing the price of desert lands at one dollar and twenty-five cents per acre, without regard to the situation of the land with relation to the limits of railroad grants.

The cases of Jedediah F. Holcomb, 22 L. D., 604, and Frederick Lawrence, 23 L. D., 450, are not in conflict herewith, for the reason that the entry in each one of those cases was made prior to the passage of the act of 1891.

For the foregoing reasons, your office decision of June 16, 1896, suspending Boomer's entry and holding it for cancellation, is reversed.

TOWNSITE BOARD—HEARING—JURISDICTION.

FLORENCE A. RICHARDSON.

The transfer of a case, during the hearing, from one townsite board to another, is no ground for a rehearing, where all the testimony is reduced to writing and before the board that rendered judgment.

Secretary Francis to the Commissioner of the General Land Office, December 26, 1896. (I. H. L.) (P. J. C.)

Motion for review of departmental decision of August 28, 1896, has been filed by counsel for Elisha Penny.

All the persons above named were applicants for lot 1, block 28, Perry, Oklahoma. A hearing to determine who had the prior right thereto was ordered. Beginning on June 8, 1895, the testimony was taken before board No. 9, and continued till June 21, following, during which time 293 pages of closely printed type-written testimony was taken. On June 20, the Secretary of the Interior, by telegram, directed board No. 8 to take charge of the business at Perry, and this board took the balance of the testimony, amounting to 53 pages. In addition to this testimony so taken, there were several depositions. At the time of the change of the board, counsel for Penny objected thereto, "for the reason that townsite board No. 8 has not been present during the trial of the case, and has no knowledge and has not observed the demeanor of the witnesses while on the witness stand." This motion was overruled. Counsel then moved for a trial *de novo*, on the grounds (1) the board No. 9 was sitting in a judicial capacity; the 2d and 3d grounds are substantially the same as offered in the first objection; and (4) that one board can not be discontinued in the midst of a trial and the trial taken up by another who has not heard the testimony of the witnesses, unless agreed to by all parties. This motion was also overruled. Exception was taken to both rulings.

On consideration of all the testimony thus taken, a majority of board No. 8 decided in favor of Penny. On appeal, your office reversed their decision, and awarded the lot to Florence A. Richardson, and the Department affirmed your office decision.

The several specifications of error raise substantially but two points—the first as to the action of board No. 8 succeeding No. 9 during the trial of the case, and the second as to the facts.

In deciding this case the Department adopted the statement of the facts as found by, and recited at length in, your office letter of March 9, 1896. The judgment on the facts was that Case, the grantor of Richardson, was the prior settler on the lot, and as such entitled to the same. This matter having been thoroughly considered in the first instance, can not now be entertained on a motion for review.

The objection to the change in the board is not a sound one. All the testimony was taken in shorthand, then transcribed. It was

therefore all before the board that rendered the judgment. The mere fact that the board rendering the decision did not have an opportunity to see and hear the witnesses would not, under our system of practice, where the testimony is always written, be ground for review or for granting a rehearing. It is not uncommon that local officers have nothing but the written testimony before them, as where it is taken under an order before some officer near the land, or where there is a change in the incumbency of the offices, and the new officers have to examine testimony and pass upon the facts in cases where the testimony was taken before their predecessors.

It may be desirable, perhaps, to have the reviewing officers see and hear the witnesses, but in emergencies such as noted above, or such as arose in this case, and where the testimony is all written down, the action of the reviewing officers in considering all the testimony and rendering judgment thereon will not be disturbed.

The motion is therefore overruled.

WAGON ROAD GRANT—ACT OF MARCH 3, 1887.

KING v. EASTERN OREGON LAND CO.

The provisions of the act of March 3, 1887, apply only to land grants for railroad purposes and cannot be invoked for the protection of a purchaser under a wagon road grant.

Secretary Francis to the Commissioner of the General Land Office, December 26, 1896. (I. H. L.) (C. W. P.)

The land involved in this controversy is the SE. $\frac{1}{4}$ of Sec. 27, T. 2 S., R. 16 E., The Dalles land district, Oregon, and is within the limits of that portion of the grant made by the act of July 2, 1864 (13 Stat., 356), to the Northern Pacific Railroad Company, which was forfeited by the act of September 29, 1890 (26 Stat., 496), as well as within the limits of the grant made by the act of February 25, 1867 (14 Stat., 409), to aid in the construction of The Dalles military road.

The grant to the Northern Pacific road being prior, defeated the grant to The Dalles road, to the extent of the overlap, and your office included the unpatented lands in said limits in the restoration of the forfeited lands of the Northern Pacific Railroad. Under this restoration Rufus H. King made homestead entry, No. 4922, of said land, on October 1, 1893, and made proof on the day appointed therefor. The Eastern Oregon Land Company filed a protest against the admission of such proof, claiming a prior right, as a purchaser from The Dalles Military Road Company, and by reason thereof, the preference right to purchase said land, under the act of March 3, 1887 (24 Stat., 556).

The entryman made proof, and evidence was submitted by the protestant in support of its claim. On July 20, 1895, the local officers decided in favor of the entryman. The company appealed. Your

office, on April 23, 1896, reversed the decision of the local officers and sustained the company's protest.

The entryman appeals to the Department.

The question arises: Does the act of Congress of March 3, 1887, *supra*, entitled, "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes," extend to lands granted to the State of Oregon, to aid in the construction of wagon-roads in said State?

It is a rule of construction that remedial statutes are to be liberally construed so as to suppress the mischief and advance the remedy. But this rule is only applicable when the words of the statute will admit of its application. When they are plain and clearly define its scope and limit, construction can not extend it.

If we depart from the plain and obvious meaning, we do not in truth construe the act, but alter it. We supply a defect which the legislature could easily have supplied, and are making the law, not interpreting it. Sutherland on Statutory Construction, § 430, p. 556.

The statute under consideration is plain, precise and unambiguous, and, by its terms, only applies to grants of land to railroads.

It has recently been held by the Department that said act "relates specifically to the adjustment of railroad grants," that it "is limited to railroad grants," and that it does not apply to a suit instituted for the recovery of title to lands certified on account of a wagon road grant in the State of Oregon. *California and Oregon Land Company*, 22 L. D., 170.

I am therefore of opinion that the decision of the register and receiver, recommending that King's entry be approved for patent and the company's protest dismissed, should be affirmed.

Your office decision is reversed.

WILSON v. NORTHERN PACIFIC R. R. CO.

Motion for review of departmental decision of August 28, 1896, 23 L. D., 247, denied by Secretary Francis, December 26, 1896.

EVIDENCE—TRANSCRIPT OF JUDICIAL PROCEEDINGS.

SMITH v. ANDERSON ET AL.

It is within the supervisory authority of the Secretary of the Interior to take cognizance, at any time, of the action of a court of record convicting a party of perjury committed in the testimony given by him in the case under consideration.

Secretary Francis to the Commissioner of the General Land Office, December 26, 1896.

(I. H. L.)

ber 26, 1896.

(C. J. G.)

David Smith, through his attorneys, has filed a motion for review of departmental decision of October 3, 1896, dismissing his contest against the homestead entry of Vincent Anderson for the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$

and lots 2 and 3 of Sec. 19, T. 12 N., R. 4 W., Kingfisher series, now Oklahoma land district, Oklahoma.

The basis for said departmental action, without passing directly upon the contention of prior settlement, was that, pending the disposition of the said Anderson's appeal to this Department from your office decision of December 18, 1893, holding his homestead entry for cancellation, there were filed copies of the Oklahoma court record showing that Smith had been indicted, tried, convicted, and sentenced on account of perjury committed by him in his testimony at the trial of the case now under consideration.

After a consideration of the case it was decided that this evidence, being that of a court of record and of material and controlling importance to the issue in the case, was properly admissible by the Department, notwithstanding the said evidence was not before the court below. The Department still adheres to this ruling. The Secretary of the Interior under his supervisory authority will and does take notice of the certified proceedings of a court of record, when the proceedings directly impeach the testimony of a witness at the hearing of a contest case. The case at bar is regarded as different from one in which *ex parte* affidavits are filed. Of course, in a case of that kind the Department would not admit such evidence pending the disposition of an appeal before it.

The opposing counsel were served with notice of these certified copies of the court of record, and thus had an opportunity to refute the truthfulness of the charges by the affidavits of witnesses, who it is alleged could not be procured at the trial of the perjury case. By failure to do so it is impliedly admitted that the record is true, and when the truth of the charges appearing in a court of record is admitted, or not denied, the Department under its supervisory authority will take cognizance of such record.

It is true the opposing counsel objected to the admission of copies of the court record touching the indictment of Smith for perjury, but the mere indictment proved nothing. It was the proof of his conviction of the offense charged that could not be ignored by the Department. There has been no denial of the charge; objection is only made to the admission of such record at this time. Smith himself admits his conviction, but asserts that it was due to unfair treatment at the trial. But this Department has only to do with the fact of conviction of perjury, as proven by the court record, in so far as such conviction invalidates the testimony given by him at the hearing of this case relative to his entry of and settlement on the tract in controversy.

It was held in the case of *Benesh v. Kalashek* (22 L. D., 530), that—

A certified copy of an indictment, verdict, and sentence, are properly admissible as evidence tending to establish a charge embraced in the issue tried and determined in the prior criminal proceeding.

In the case of *Meyers v. Massey* (22 L. D., 159), it was held that a hearing on an affidavit of contest was properly refused where the court

record showed that the corroborating witness had been convicted of perjury in swearing to the allegations contained in said affidavit of contest. I am of the opinion that such evidence of a court of record is properly admissible to impeach the testimony of the contestant, or his witnesses, in such a case. It rests within the sound discretion of the Commissioner of the General Land Office in the first instance, as to whether a hearing should be allowed on a contest affidavit; it is certainly within the supervisory authority of the Secretary of the Interior to take cognizance at any time of the action of a court of record convicting the contestant of the offense of perjury committed in the testimony offered by him in support of the allegations of his affidavit of contest.

The motion for review is hereby denied.

HEINRICHS v. BAKKENE ET AL.

Motion for review of departmental decision of August 27, 1896, 23 L. D., 234, denied by Secretary Francis.

PRIVATE CASH ENTRY—ACT OF APRIL 7, 1896.

JARED MARTIN ET AL.

Applications for reinstatement of private cash entries under the act of April 7, 1896, should not be rejected on account of adverse claims, without due notice, and opportunity to be heard as against said claims.

The act of April 7, 1896, providing for the reinstatement and confirmation of certain canceled private cash entries on condition that such action should only be taken in the absence of intervening adverse claims, contemplated, by such exception, *valid* adverse claims, and inquiry as to the character of apparent adverse claims may therefore be properly made on application for action under said statute.

Secretary Francis to the Commissioner of the General Land Office, December 26, 1896. (I. H. L.) (E. B., JR.)

The joint resolution of May 14, 1888 (25 Stat., 622), withdrew from private sale public lands in the State of Arkansas and directed their disposition under the homestead laws after that date for the period therein indicated. On May 18, 1888, prior to the promulgation of said act and within said period, Jared Martin made cash entries in the local office at Camden, Arkansas, as follows:

No. 18709, for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 19, and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of section 20, T. 13 S., R. 8 W., 5th P. M.;

No. 18710, for the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 29, said township and range; and

No. 18711, for the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 30, the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 32, and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 33, said township and range.

These entries were each canceled by your office September 12, 1891, for invalidity under said act.

On April 7, 1896 (29 Stat., 90), an act was passed confirming, and directing your office to reinstate, under certain conditions therein specified, upon application of the purchaser, his representatives or assigns, all such canceled entries in Arkansas, Alabama, and Mississippi, made after the passage of said joint resolution and prior to "its promulgation." May 29, 1888, provided no adverse claim attached "prior to such application." Thereupon, April 14, 1896, Horatio N. Hovey and John B. McCracken, comprising the firm of Hovey and McCracken, as assignees of said Martin, applied for reinstatement of the said cash entries, which application was by your office decisions of June 5, and 7, 1896, granted as to the tracts in sections 32 and 33, but was rejected as to all the other tracts on the ground that adverse claims thereto had attached as follows:

H. E. 16478, James P. Burton, E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 20, August 30, 1892;

H. E. 17493, W. H. Bailey, NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 20, and SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 17, May 20, 1894;

H. E. 17683, Lydia Minor, SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 19, November 9, 1894;

H. E. 16639, Clifton H. Drinker, N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 29, December 19, 1892;

H. E. 16562, November 2, 1892, David C. Willett, E. $\frac{1}{2}$ of SE. $\frac{1}{4}$, Sec. 19, and E. $\frac{1}{2}$ of NE. $\frac{1}{4}$, Sec. 30; patented June 29, 1895, as cash entry No. 19077.

From these rejections Hovey and McCracken appealed August 12, 1896.

On November 3, 1896, they filed an application for a hearing, alleging that they had no notice of said adverse claims nor any opportunity to contest the validity of the same prior to said decisions, and

that immediately after receiving notice of said decisions the applicants proceeded to investigate the circumstances connected with said adverse claims, and satisfied themselves from the facts which they were able to obtain that said claims were not made in good faith, but were fraudulently made for the purpose of obtaining possession of the timber upon the lands covered by said entries.

Wherefore they pray that a hearing be ordered and opportunity given them

to present the proofs to substantiate the claim made by them that said adverse claims are in fact and in law fraudulent and void, and that they are entitled to reinstatement of the entries covered by said appeal.

This application is sworn to by said Hovey.

The record before the Department sustains the allegation of rejection of the application for reinstatement, without actual notice of the adverse

claims or opportunity given to be heard against them. This was too summary action. Appellants should have been notified by your office, upon filing such application, of the existence of said adverse claims and given a reasonable time to show cause why their application should not be rejected. This much, at least, I am convinced was due them as applicants under the said act.

It is elsewhere further alleged by appellants that:

All said lands are flat, low and wet, unsuitable for farm lands, and of value only for the pine timber thereon at the time of entry. At and prior to the time when said pretended adverse claims attached they were all covered in whole or in part by pine timber suitable for lumber. Near said lands there was located shortly before the first of said entries was made the saw mill of the Gates Lumber Company. The adverse claimants, W. H. Bailey, Clifton H. Drinker, James P. Burton and David C. Willett, were employes of said Gates Lumber Company and came to that vicinity with said Lumber Company. When the Gates Lumber Company commenced preparations to extend its railroad south from its mill for logging purposes, the said Bailey, Drinker, Burton, Willett and other employes of said Lumber Company made application to enter lands located near the south terminus of said road, including the lands in question on this appeal. As soon as they could they sold or allowed the Gates Lumber Company to cut and haul off from said lands all the pine timber thereon that was valuable for sawing. Said David C. Willett went on the lands applied for by him and made small improvements and lived on the place until the timber was sold and cut and has not resided thereon since and is not now residing thereon nor in the county in which said land is situated. W. H. Bailey never resided on the land for which he applied, but soon after he made his entry he began cutting the pine timber on the land and allowed the Gates Lumber Company to take off all that was suitable for lumber. The only improvement ever made on his farm was the enclosing of about $\frac{1}{2}$ of an acre of land and the erection of a board barn. Said Bailey is not engaged in farming, but in hauling logs. No part of the land entered by Clifton H. Drinker has been cleared for cultivation or put in cultivation and no improvements of any sort have been made thereon, and no one lives there. While Burton has cleared a few acres of his land, and is living on the land, he took the land for the sake of selling the timber to the Gates Lumber Company, and did sell the timber and cut it off before he had any right or authority so to do. The entry made by Lydia Minor adjoined other land belonging to a kinsman of hers. The only improvements on said land consist of a small log cabin and stable and about fifteen acres fenced and in cultivation, and those improvements were not made by Lydia Minor, but were made by her kinsman by mistake, supposing that he was improving other land entered by himself, and the entry made by Lydia Minor was made in part for the purpose of giving him the benefit of that mistake and in part for the purpose of obtaining said pine timber and selling the same to the Gates Lumber Company. A large part of said timber has been cut and removed from said land, but not for the purpose or in process of clearing the land for cultivation.

Appellants further state that they are informed and believe that the Gates Lumber Company procured said parties to make the entries aforesaid in order that it might obtain the timber on said lands, and furnished the money for the expenses incident to the making of said entries.

These further allegations, as to matters of fact, are well supported by the affidavit of Frank Haynes, as surveyor of Drew county, Arkansas, wherein the said lands are situated, and the affidavit of said James P. Burton, except that his affidavit relates only to tracts covered by the entries of Bailey, Minor, Drinker and Willett.

Here are clear, positive, and specific allegations of fraud, which, if duly proven, will invalidate the homestead entries above indicated. These entries are apparently the only claims adverse to the said cash entries. I do not think it can be successfully maintained that after confirming and directing the reinstatement of such cash entries Congress by adding thereto the proviso "That no adverse claim has attached or shall attach prior to such application for reinstatement" (act of April 7, 1896, *supra*) intended that, *ipso facto*, an adverse claim of record should preclude an inquiry into its validity as against such application, or in other words, that such adverse claim as against such application should be conclusive whatever might be alleged or proven against its validity. To so hold would be, in effect, to impute an intention to Congress to uphold illegal claims and not only to condone fraud but to offer a reward for it, at least as against such applications. I am satisfied that by "adverse claims" in said proviso Congress intended *lawful* or *valid* adverse claims, only. No other intention could be imputed; to be successfully maintained otherwise, express words to that effect would be necessary.

Upon consideration of the premises the rejection of the application for reinstatement is vacated and your office is directed to order a hearing as applied for to determine whether, all or singular, the said homestead entries Nos. 16478, 17493, 17683, 16639, and 16562, of said Burton, Bailey, Minor, Drinker and Willett, respectively, were made in bad faith and for speculative and fraudulent purposes by the several parties, as charged by said Hovey and McCracken.

Although by the issuance of patent for the tract embraced by Willett's entry this Department is deprived of jurisdiction over the title thereto, it is still desirable that all the facts touching the charges against the same may be disclosed for the further guidance of the Department relative to the institution of suit to vacate the patent in the event the evidence produced at the hearing may seem to require a recommendation to that effect.

NEWMAN *v.* BARNES.

Motion for review of departmental decision of August 28, 1896, 23 L. D., 258, denied by Secretary Francis, December 26, 1896.

RAILROAD LANDS—ACT OF AUGUST 5, 1892.

MADS JENSEN.

The operation of the remedial act of August 5, 1892, as to an entry that falls within the terms of said act at the date of its passage, is not defeated by a subsequent relinquishment of the entry.

Secretary Francis to the Commissioner of the General Land Office, December 26, 1896. (I. H. L.) (R. W. H.)

In your letter of July 15, 1896, is submitted for departmental consideration the application of Mads Jensen to have his canceled homestead entry for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 9, T. 139 N., R. 47 W., Fargo land district, North Dakota, reinstated, and you ask to be advised respecting the same.

Said tract of land is situated in North Dakota and is within ten miles of the line of the St. Paul, Minneapolis and Manitoba Railway Company in Minnesota, as shown by its map of definite location.

The land department held that the grant, made to aid in the construction of said road, by the act of March 3, 1857 (11 Stat., 195), and the act of March 3, 1865 (13 Stat., 536), being to the Territory and State of Minnesota, respectively, was limited to the confines of said Territory and State, and consequently did not pass title to any of the odd numbered sections so situated in Dakota.

Under this ruling many persons were allowed to settle upon, enter and improve the lands in Dakota within ten miles of the line of said road, among whom was Nehemiah Davis, who, on July 28, 1890, made timber culture entry for the tract heretofore described.

Subsequently, on December 22, 1890, the supreme court, in the case of the St. Paul, Minneapolis and Manitoba Railway Company v. Phelps (137 U. S., 528), decided that the ruling of the land department in relation to the odd numbered sections within ten miles of the railroad, situated in Dakota, was wrong, and that title thereto vested, under the grant, in said company upon the definite location of its line of road, which was made prior to May 25, 1869.

In this condition of affairs, the act of August 5, 1892 (27 Stat., 390), was passed, for the purpose of protecting those, who, in good faith, had gone upon said lands, from the hardship of being deprived of the same under the circumstances stated.

It was therein enacted, in substance, that the Secretary of the Interior should cause to be prepared and delivered to the railway company a list of the said odd numbered sections, or parts thereof, which, prior to January 1, 1891, any person had purchased, occupied, or improved in good faith, under color of title or right to do so, derived from the laws of the United States relating to the public domain, and upon the relinquishment by said company to the United States of its claims to the lands described in said list, the right and title of the railway company

to each of said tracts shall revert to the United States and such tracts shall be treated in the same manner as though no rights thereto had ever vested in said company, and all qualified persons who have occupied and improved the same as before provided, or who have purchased said lands in good faith, their heirs or assigns shall be permitted to perfect their title to the same "as if said grant had never been made."

And in lieu of the lands so relinquished section two provides, in effect, that the railroad company shall be allowed to select other lands along the entire line of its road, equal to the amount of lands relinquished, not to exceed, in the whole, 65,000 acres.

On October 19, 1892, your office instructed the local officers to publish notice, in the vicinity of the lands described in said act, to the effect that all persons who prior to January 1, 1891, had purchased, occupied or improved, in good faith under color of title from the United States, who had not abandoned their claims on August 5, 1892, would be entitled, upon making proper proof of those facts, to perfect their claims. At the same time the officers were furnished with lists giving the names of parties claiming lands affected by said act and the officers were directed, when claims had expired, to call upon the parties to show cause why their filings or entries should not be canceled and the others to show that they had not abandoned their claims.

It is not expressly stated that the claim of Davis was in the list thus sent to the local officers, but it is to be assumed from your letter that it was in that list, especially as it ought to have been therein, and no reason is stated to the contrary. At all events in February, 1893, said Davis filed his affidavit duly corroborated, that since the date of said entry he had fully complied with all the requirements of the timber culture law, and further that he had not, on August 5, 1892, or at any time, abandoned his claim.

The truth of the statements in Davis' affidavit is not questioned. It thus appears clearly that Davis' entry came within the conditions and provisions of the remedial act of August, 1892. He had made entry in good faith, under color of title from the United States, of an odd-numbered section, in Dakota, within ten miles of the located line of said road, had cultivated and improved it, and at the date of the passage of the act had not abandoned the same, but was claiming it at least six months thereafter, and that you had listed the tract as provided by law.

It is further stated that the railroad company is willing to execute its relinquishment for said tract.

On the foregoing statement there seems to be no reason why the relinquishment for said tract should not be accepted at once, and the company allowed lieu lands therefor.

You state, however, that after the date of the recited transactions, on May 10, 1893, Davis relinquished his said entry, the same was canceled at the local office, and one Mads Jensen was permitted to make homestead entry for the same land. This last entry you caused to be canceled, and Jensen has applied to have it reinstated.

Under these circumstances you submit the matter to this Department for consideration and request advice and direction in relation to the same.

I am of the opinion, as stated before, that Davis' entry, being in existence on January 1, 1891, and the land not having been abandoned by him on August 5, 1892, said entry came within the purview of the remedial provisions of the act of Congress, which conditions existing operate, in effect, to place the land, when relinquished by the company, in the category of other public lands of the United States, disencumbered of any claims of the railroad company, and the subsequent relinquishment of his entry by Davis does not act retrospectively so as to change the previous status of the land at the dates when said act operated upon it.

Entertaining these views, the relinquishment of the company should be accepted and Jensen's entry reinstated, if there be no other valid objection to so doing.

PATENT—ERRONEOUS RECORD—JURISDICTION.

SPIRLOCK *v.* NORTHERN PACIFIC R. R. CO. (ON REVIEW).

The Department may properly direct the cancellation of the record of an incomplete patent, that was in fact never issued, but was entered of record through mistake. Land embraced within a pre-emption filing at the date of a railroad grant is excepted from the operation of the grant.

Secretary Francis to the Commissioner of the General Land Office, December 26, 1896. (I. H. L.) (W. M. B.)

With your office letter of October 13, 1896, was forwarded a motion filed on behalf of the company in the case of James D. Spirlock *v.* The Northern Pacific Railroad Company, involving the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 5, T. 16 N., R. 1 W., Olympia land district, Washington, for review of departmental decision of February 4, 1896 (22 L. D., 92), reversing the decision of your office which awarded the entire tract (eighty acres) to the company; the said departmental decision holding that as Spirlock held the above described tract of land by virtue of a cash entry thereof, as evidenced by a perfect record of what appeared to be a perfect patent—complete in all its parts—and regularly issued, the Department was deprived of any further jurisdiction or authority to consider and determine the question respecting the rights of the respective parties to the land claimed by each.

The motion for reconsideration is based upon the ground, and alleges, substantially, that the instrument or purported patent, as a matter of fact, which is enrolled at page 278, volume 6, book of records, in the office of recorder of the General Land Office—the record upon which Spirlock relies as conclusive evidence of his title to the land in question—is an imperfect patent, being incomplete for the reason that no

seal was ever affixed thereto; that it was recorded by mistake; that the copy thereof appearing of record is an incorrect copy, as it appears therefrom that the original instrument had a seal attached, whereas none was ever affixed thereto. In view of the alleged state of facts it is contended by the company that as the lands involved were never patented to Spirlock, the Department still has jurisdiction of the question at issue. The said company further alleges that,

the tract in question falls within the primary limits of the grant to the Northern Pacific Railroad Company and was free from all adverse claim or rights at the date of the definite location of the road,

and asks that the land for said reason be awarded to it.

When this case was before the Department on appeal there was found among the papers constituting the record which was submitted an incomplete patent made out in Spirlock's name for the same tract described in the record of what was supposed to be the enrollment of a perfect patent; the paper so found being without a seal.

The record submitted in the case contained no affirmative evidence whatever to the effect that this particular paper, or incomplete patent, was the same instrument which was recorded in the recorder's office. This imperfect patent, referred to, raised a strong presumption, when the case was here on appeal, favoring the theory that it was the identical instrument which was recorded in the manner and at the place stated, but there was no evidence sufficiently conclusive to establish such supposition as a fact, and the Department did not feel justified in depriving a purchaser who had been permitted to enter, and required to pay for a tract of land—with about twenty-five years quiet possession—of his right thereto upon a mere surmise or presumption.

Since departmental action in the matter, however, when the case was here on appeal, further investigation has led to the discovery of additional evidence from which it appears that the above described tract was never patented to Spirlock, and that the record upon which he relied as evidence of his title was incorrect in the important particular that it purported and appeared to be a true and accurate record of a perfect or completed patent, whereas in reality it was an incorrect enrollment or record of a patent in regular form except in the essential requirement of having a seal affixed thereto—and was therefore incomplete. This imperfect patent was by mistake in copying erroneously represented as containing the usual seal, the affixing of which is the last official act performed in the execution of patents.

This Department has authority to order the cancellation of the record of an incomplete patent which was recorded by mistake, and which, in fact, was never issued, and still remains in the custody of your office, and you are hereby directed to cause the cancellation of such record.

This finding of fact preserves to the Department full jurisdiction of the controversy affecting this land, with authority to determine which of the parties interested has a superior claim and right thereto, to

solve which question it is only necessary in this particular case to ascertain the status of the land at the date of grant to the company, and of Spirlock's cash entry, and final certificate, on September 17, 1870.

There having been a statutory withdrawal on August 13, 1870, of the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section 5 prior to Spirlock's cash entry for the same on September 17, 1870, which said tract being found, upon definite location of line of the road, to fall within the primary limits of the grant to the company, rendered Spirlock's entry invalid as to said forty acre tract, wherefore you are directed to cancel his said entry to that extent—this tract having passed to the company under its grant.

With regard to the remaining forty acre tract—the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 5—departmental decision of February 4, 1896 (*supra*), contained a finding of fact as follows:

An examination of the records in your office show that one Jeremiah Mabie made a pre-emption filing, with alleged settlement prior thereto, upon the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said Sec. 5, township and range aforementioned, previous to the date of the grant to said railroad company, and that said filing was of record, subsisting and *prima facie* valid at the date of said grant which excepted said forty acre tract from the operation of the grant, and left Spirlock free to purchase the same in the absence of any adverse right.

The motion under consideration does not call in question the correctness of such finding of fact. The particular forty acre tract having been excepted from the operation of the grant at the date of the granting act was forever excepted therefrom and could in no way revert to the company. The Department seeing no reason for disturbing the finding of fact above set out, as contained in departmental decision now under review, by which it appears that Spirlock's entry for the said NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ was a valid one to that extent, you are, for said reason, directed to cause patent to issue to him for the same.

Departmental decision of February 4, 1896, for the foregoing reasons, is modified in manner and particulars above indicated.

ISOLATED TRACT—SECTION 2455, R. S.

FRANCIS ADKINSON.

An eighty acre tract will not be ordered into market as an isolated tract, where one of the forty acre subdivisions embraced therein is part of a quarter section the whole of which is vacant public land.

Secretary Francis to the Commissioner of the General Land Office, December 26, 1896.
(I. H. L.) (C. W. P.)

On November 25, 1895, Francis Adkinson applied to have the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 21, township 21 N., range 1 E., Helena land district, Montana, with other tracts therein described, ordered into market under section 2455 of the Revised Statutes of the United States, as amended by the act of February 26, 1895

(28 Stat., 687). On this petition the local officers stated that the plats and other records of their office do not show the existence of any objection to the offering of said lands under said act.

Your office, by letter of December 20, 1895, refused to order the sale, holding that said tracts could not be considered isolated within the meaning of said act, the records of your office showing that the entire NW. $\frac{1}{4}$ of said section is vacant government land.

The petitioner appealed from your office decision to the Department.

There appears to be no error in your office decision, and it is affirmed.

CONTEST—APPROVED SWAMP LAND SELECTION.

MARKUSON *v.* STATE OF MINNESOTA.

The local office has no authority to entertain and act upon an application to contest an approved swamp land selection.

Secretary Francis to the Commissioner of the General Land Office, December 26, 1896. (I. H. L.) (W. C. P.)

Peter Markuson has appealed from your office decision of July 19, 1895, dismissing his contest against the swamp land selection of the State of Minnesota of the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 6, T. 161, R. 39, Crookston, Minnesota, land district.

It seems that on January 10, 1895, a list of lands selected by the State of Minnesota as swamp, which included these tracts, was submitted to the local officers for report as to the status of the lands selected, and said officers were instructed to allow no entries, and to permit no filings upon any of said lands thereafter. Their report was made January 31, 1895, and in view of the showing made thereby and by the records of your office, swamp land list No. 36, was submitted to this office for approval, and approved March 6, 1895. It appears that the local officers on May 3, 1895, allowed Peter Markuson to file an affidavit of contest against the selection of said tracts. This fact was reported to your office under date of June 22, 1895, and only after the local officers had received for their information a certified copy of said approved list. Thereupon you dismissed said contest, and the appeal from that decision brings the case here.

The affidavit of contest is not among the papers in the case; neither is there anything to show the allegations made, nor what action, if any, was taken upon said affidavit by the local officers. An informal inquiry at the Swamp Land Division in your office discloses the fact that said affidavit was not transmitted there by the local officers, but nothing was learned as to contents thereof, or as to the action taken by the local officers.

The local officers had no authority to entertain and act upon an application to contest the claim of the State as to any tract of land in

said approved list, and all that they could have properly done was to have forwarded the affidavit to your office for instructions.

It is possible that said affidavit makes such a showing as to justify an investigation of the charges, but it is not possible to determine that question satisfactorily upon the record as now presented here. Under these circumstances, it seems that a further investigation to ascertain the facts in the case is necessary to the proper disposition thereof. The decision appealed from is, therefore, set aside, and the case is returned to your office for further investigation, to ascertain the facts as to the allegations of the contest affidavit, and the action taken by the local officers. Upon ascertaining these facts you will consider the case, and take such action in the premises as may seem proper in the light of such facts and under the rules applicable thereto.

REVISED RULES OF PRACTICE.

Approved, December 23, 1896.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 15, 1896.

SIR: I have the honor to submit herewith for your consideration, and approval if found satisfactory, a revised draft of the rules of practice in cases before the district land offices, the General Land Office, and the Department of the Interior.

It will be observed, upon examination, that no change or modification of the present rules has been made, but where rules have been amended from time to time such rules as last amended have been placed in their proper numerical order in the body of the rules of practice instead of in chronological order in an appendix, as has heretofore been the custom.

I have also deemed it proper to append to the rules of practice the regulations governing the recognition of agents and attorneys before district land offices and the laws and regulations governing the recognition of agents, attorneys, and other persons to represent claimants before the Department of the Interior and the bureaus thereof.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

The SECRETARY OF THE INTERIOR.

DEPARTMENT OF THE INTERIOR,
Washington, December 23, 1896.

SIR: I have examined the revised draft of the rules of practice in cases before the district land offices, the General Land Office, and the

Department of the Interior, submitted with your enclosure of the 15th instant, and return the same herewith duly approved.

Very respectfully,

DAVID R. FRANCIS, *Secretary.*

The COMMISSIONER OF THE GENERAL LAND OFFICE.

DEPARTMENT OF THE INTERIOR,

Washington, December 23, 1896.

The following rules of practice for the government of proceedings in this Department and subordinate offices in land cases, together with regulations governing the recognition of agents, attorneys, and other persons to represent claimants, are hereby prescribed, to take effect this day.

None of said rules shall be construed to deprive the Secretary of the Interior of the exercise of the directory and supervisory powers conferred upon him by law.

Proceedings under former rules of practice will not be prejudiced by anything herein contained.

DAVID R. FRANCIS,
Secretary.

I.

PROCEEDINGS BEFORE REGISTERS AND RECEIVERS.

1.—Initiation of contests.

RULE 1.—Contests may be initiated by an adverse party or other person against a party to any entry, filing, or other claim under laws of Congress relating to the public lands, for any sufficient cause affecting the legality or validity of the claim.

RULE 2.—In every case of application for a hearing an affidavit must be filed by the contestant with the register and receiver, fully setting forth the facts which constitute the grounds of contest. When the contest is against the heirs of a deceased entryman, the affidavit shall state the names of all the heirs. If the heirs are nonresident or unknown, the affidavit shall set forth the fact, and be corroborated with respect thereto by the affidavit of one or more persons.

RULE 3.—Where an entry has been allowed and remains of record, the affidavit of the contestant must be accompanied by the affidavits of one or more witnesses in support of the allegations made.

2.—Hearings in contested cases.

RULE 4.—Registers and receivers may order hearings in all cases wherein entry has not been perfected and no certificate has been issued as a basis for patent.

RULE 5.—In case of an entry or location on which final certificate has been issued the hearing will be ordered only by direction of the Commissioner of the General Land Office.

RULE 6.—Applications for hearings under Rule 5 must be transmitted by the register and receiver, with special report and recommendation, to the Commissioner for his determination and instructions.

3.—Notice of contest.

RULE 7.—At least thirty days' notice shall be given of all hearings before the register and receiver unless by written consent an earlier day shall be agreed upon.

RULE 8.—The notice of contest and hearing must conform to the following requirements:

1. It must be written or printed.
2. It must be signed by the register and receiver, or by one of them.
3. It must state the time and place of hearing.
4. It must describe the land involved.
5. It must state the register and receiver's number of the entry and the land office where and the date when made, and the name of the party making the same.
6. It must give the name of the contestant, and briefly state the grounds and purpose of the contest.
7. It may contain any other information pertinent to the contest.

4.—Service of Notice.

RULE 9.—Personal service shall be made in all cases when possible, if the party to be served is resident in the State or Territory in which the land is situated, and shall consist in the delivery of a copy of the notice to each person to be served. When the contest is against the heirs of a deceased entryman, the notice shall be served on each heir. If the heirs of the entryman are nonresident or unknown, notice may be served upon them by publication as hereinafter provided. If the person to be personally served is an infant under fourteen years of age, or a person who has been legally adjudged of unsound mind, service of notice shall be made by delivering a copy of the notice to the statutory guardian or committee of such infant or person of unsound mind, if there be one; if there be none, then by delivering a copy of the notice to the person having the infant or person of unsound mind in charge.

RULE 10.—Personal service may be executed by any officer or person.

RULE 11.—Notice may be given by publication alone only when it is shown by affidavit of the contestant, and by such other evidence as the register and receiver may require, that due diligence has been used and that personal service can not be made. The party will be required to state what effort has been made to get personal service.

RULE 12.—When it is found that the prescribed service can not be had, either personal or by publication, in time for the hearing provided for in the notice, the notice may be returned prior to the time fixed for the hearing, and a new notice issued fixing another time of hearing, for the proper service thereof, an affidavit being filed by the contestant showing due diligence and inability to serve the notice in time.

5.—Notice by publication.

RULE 13.—Notice by publication shall be made by advertising the notice at least once a week for four successive weeks in some newspaper published in the county wherein the land in contest lies; and if no newspaper be published in such county, then in the newspaper published in the county nearest to such land. The first insertion shall be at least thirty days prior to the day fixed for the hearing.

RULE 14.—Where notice is given by publication, a copy of the notice shall be mailed by registered letter to the last known address of each person to be notified thirty days before date of hearing, and a like copy shall be posted in the register's office during the period of publication, and also in a conspicuous place on the land, for at least two weeks prior to the day set for hearing. But when proceedings are commenced by the Government against timber and stone entries, and it becomes necessary to give notice by publication, the posting of notices upon the land will not be required.

6.—Proof of service of notice.

RULE 15.—Proof of personal service shall be the written acknowledgment of the person served or the affidavit of the person who served the notice attached thereto, stating the time, place, and manner of service.

RULE 16.—When service is by publication, the proof of service shall be a copy of the advertisement, with the affidavit of the publisher or foreman attached thereto, showing that the same was successively inserted the requisite number of times, and the date thereof.

7.—Notice of interlocutory proceedings.

RULE 17.—Notice of interlocutory motions, proceedings, orders, and decisions shall be in writing, and may be served personally or by registered letter through the mail to the last known address of the party.

RULE 18.—Proof of service by mail shall be the affidavit of the person who mailed the notice, attached to the post-office receipt for the registered letter.

8.—Rehearings.

RULE 19.—Orders for rehearing must be brought to the notice of the parties in the same manner as in case of original proceedings.

9.—Continuances.

RULE 20.—A postponement of a hearing to a day to be fixed by the register and receiver may be allowed on the day of trial on account of the absence of material witnesses, when the party asking for the continuance makes an affidavit before the register and receiver showing—

1. That one or more of the witnesses in his behalf is absent without his procurement or consent;

2. The name and residence of each witness;

3. The facts to which they would testify if present;

4. The materiality of the evidence;

5. The exercise of proper diligence to procure the attendance of the absent witnesses; and

6. That affiant believes said witnesses can be had at the time to which it is sought to have the trial postponed.

7. Where hearings are ordered by the Commissioner of the General Land Office in cases to which the United States is a party, continuances will be granted in accordance with the usual practice in United States cases in the courts, without requiring an affidavit on the part of the Government.

RULE 21.—One continuance only shall be allowed to either party on account of absent witnesses, unless the party applying for a further continuance shall at the same time apply for an order to take the depositions of the alleged absent witnesses.

RULE 22.—No continuance shall be granted when the opposite party shall admit that the witnesses would, if present, testify to the statement set out in the application for continuance.

10.—Depositions on interrogatories.

RULE 23.—Testimony may be taken by deposition in the following cases:

1. Where the witness is unable, from age, infirmity, or sickness, or shall refuse, to attend the hearing at the local land office.

2. Where the witness resides more than fifty miles from the place of trial, computing distance by the usually traveled route.

3. Where the witness resides out of or is about to leave the State or Territory, or is absent therefrom.

4. Where from any cause it is apprehended that the witness may be unable or will refuse to attend, in which case the deposition will be used only in event that the personal attendance of the witness can not be obtained.

RULE 24.—The party desiring to take a deposition under Rule 23 must comply with the following regulations:

1. He must make affidavit before the register or receiver, setting forth one or more of the above-named causes for taking such deposition, and that the witness is material.

2. He must file with the register and receiver the interrogatories to be propounded to the witness.

3. He must state the name and residence of the witness.

4. He must serve a copy of the interrogatories on the opposing party or his attorney.

RULE 25.—The opposing party will be allowed ten days in which to file cross-interrogatories.

RULE 26.—After the expiration of the ten days allowed for filing cross-interrogatories, a commission to take the deposition shall be issued by the register and receiver, which commission shall be accompanied by a copy of all the interrogatories filed.

RULE 27.—The register and receiver may designate any officer authorized to administer oaths within the county or district where the witness resides to take such deposition.

RULE 28.—It is the duty of the officer before whom the deposition is taken to cause the interrogatories appended to the commission to be written out and the answers thereto to be inserted immediately underneath the respective questions, and the whole, when completed, is to be read over to the witness, and must be by him subscribed and sworn to in the usual manner before the witness is discharged.

RULE 29.—The officer must attach his certificate to the deposition, stating that the same was subscribed and sworn to by the deponent at the time and place therein mentioned.

RULE 30.—The deposition and certificate, together with the commission and interrogatories, must then be sealed up, the title of the cause indorsed on the envelope, and the whole returned by mail or express to the register and receiver.

RULE 31.—Upon receipt of the package at the local land office, the date when the same is opened must be indorsed on the envelope and body of the deposition by the local land officers.

RULE 32.—If the officer designated to take the deposition has no official seal, a proper certificate of his official character, under seal, must accompany his return.

RULE 33.—The parties in any case may stipulate in writing to take depositions before any qualified officer, and in any manner.

RULE 34.—All stipulations by parties or counsel must be in writing, and be filed with the register and receiver.

11.—Oral testimony before officers other than registers and receivers.

RULE 35.—In the discretion of registers and receivers testimony may be taken near the land in controversy before a United States commissioner, or other officer authorized to administer oaths, at a time and place to be fixed by them and stated in the notice of hearing.

2. Officers taking testimony under the foregoing rule will be governed by the rules applicable to trials before registers and receivers. (See Rules 36 to 42, inclusive.)

3. Testimony so taken must be certified to, sealed up, and transmitted by mail or express to the register and receiver, and the receipt thereof at the local office noted on the papers, in the same manner as provided in case of depositions by Rules 29 to 32, inclusive.

4. On the day set for hearing at the local office the register and receiver will examine the testimony taken by the officer designated, and render a decision thereon in the same manner as if the testimony had been taken before themselves. (See Rules 50 to 53, inclusive.)

5. No charge for examining testimony in such cases will be made by the register and receiver.

6. Officers designated to take testimony under this rule will be allowed to charge such fees as are properly authorized by the tariff of fees existing in the local courts of their respective districts, to be taxed in the same or equivalent manner as costs are taxed by registers and receivers under Rules 54 to 58, inclusive.

7. When an officer designated to take testimony under this rule, or when an officer designated to take depositions under Rule 27, can not act on the day fixed for taking the testimony or deposition, the testimony or deposition, as the case may be, will be deemed properly taken before any other qualified officer, at the same place and time, who may be authorized by the officer originally designated, or by agreement of parties, to act in the place of the officer first named.

12.—Trials.

RULE 36.—Upon the trial of a cause, the register and receiver may in any case, and should in all cases when necessary, personally direct the examination of the witnesses, in order to draw from them all the facts within their knowledge requisite to a correct conclusion by the officers upon any point connected with the case.

RULE 37.—The register and receiver will be careful to reach, if possible, the exact condition and status of the land involved by any contest, and will ascertain all the facts having any bearing upon the rights of parties in interest.

RULE 38.—In preemption cases they will particularly ascertain the nature, extent, and value of alleged improvements; by whom made, and when; the true date of the settlement of persons claiming; the steps taken to mark and secure the claim, and the exact status of the land at that date as shown upon the records of their office.

RULE 39.—In like manner, under the homestead and other laws, the conditions affecting the inception of the alleged right, as well as the subsequent acts of the respective claimants, must be fully and specifically examined.

RULE 40.—Due opportunity will be allowed opposing claimants to confront and cross-examine the witnesses introduced by either party.

RULE 41.—No testimony will be excluded from the record by the

register and receiver on the ground of any objection thereto; but when objection is made to testimony offered the exceptions will be noted, and the testimony, with the exceptions, will come up with the case for the consideration of the Commissioner. Officers taking testimony will, however, summarily put a stop to obviously irrelevant questioning.

RULE 42.—Upon the day originally set for hearing, and upon any day to which the trial may be continued, the testimony of all the witnesses present shall be taken and reduced to writing. When testimony is taken in shorthand, the stenographer's notes must be written out, and the written testimony then and there subscribed by the witness and attested by the officer before whom the same is taken.

13.—Appeals.

RULE 43.—Appeals from the final action or decisions of registers and receivers lie in every case to the Commissioner of the General Land Office. (Revised Statutes, sections 453, 2478.)

In cases dismissed for want of prosecution the register and receiver will by registered letter notify the parties in interest of the action taken, and that unless within thirty days a motion for reinstatement shall be made, the default of the plaintiff will be final, and that no appeal will be allowed; which notice shall be given as provided in circular of October 28, 1886 (5, L. D., 204).

If such motion for reinstatement be made within the time limited, the local officers shall take action thereon, and grant or deny it as they deem proper. If granted, no appeal shall lie. If overruled, the plaintiff shall have the right of appeal, the time for which shall be thirty days, and run from the date of written notice to the plaintiff.

RULE 44.—After hearing in a contested case has been had and closed, the register and receiver will, in writing, notify the parties in interest of the conclusions to which they have arrived, and that thirty days are allowed for an appeal from their decision to the Commissioner, the notice to be served personally or by registered letter through the mail to their last known address.

RULE 45.—The appeal must be in writing or in print, and should set forth in brief and clear terms the specific points of exception to the ruling appealed from.

RULE 46.—Notice of appeal and copy of specification of errors shall be served on appellee within the time allowed for appeal, and appellee shall be allowed ten days for reply before transmittal of the record to the General Land Office.

RULE 47.—No appeal from the action or decisions of the register and receiver will be received at the General Land Office unless forwarded through the local officers.

RULE 48.—In case of a failure to appeal from the decision of the

local officers, their decision will be considered final as to the facts in the case and will be disturbed by the Commissioner only as follows:

1. Where fraud or gross irregularity is suggested on the face of the papers.
2. Where the decision is contrary to existing laws or regulations.
3. In event of disagreeing decisions by the local officers.
4. Where it is not shown that the party against whom the decision was rendered was duly notified of the decision and of his right of appeal.

RULE 49.—In any of the foregoing cases the Commissioner will reverse or modify the decision of the local officers or remand the case, at his discretion.

RULE 50.—All documents once received by the local officers must be kept on file with the cases, and the date of filing must be noted thereon; and no papers will be allowed under any circumstances to be removed from the files or taken from the custody of the register and receiver, but access to the same, under proper rules, so as not to interfere with necessary public business, will be permitted to the parties in interest, or their attorneys, under the supervision of those officers.

14.—Reports and opinions.

RULE 51.—Upon the termination of a contest, the register and receiver will render a joint report and opinion in the case, making full and specific reference to the postings and annotations upon their records.

RULE 52.—The register and receiver will promptly forward their report, together with the testimony and all the papers in the case, to the Commissioner of the General Land Office, with a brief letter of transmittal, describing the case by its title, the nature of the contest, and the tract involved.

RULE 53.—The local officers will thereafter take no further action affecting the disposal of the land in contest until instructed by the Commissioner.

In all cases, however, where a contest has been brought against any entry or filing on the public lands, and trial has taken place, the entryman may, if he so desires, in accordance with the provisions of the law under which he claims and the rules of the Department, submit final proof and complete the same, with the exception of the payment of the purchase money or commissions, as the case may be; said final proof will be retained in the local land office, and should the entry finally be adjudged valid, said final proof, if satisfactory, will be accepted upon the payment of the purchase money or commissions, and final certificate will issue, without any further action on the part of the entryman, except the furnishing of a nonalienation affidavit by the entryman, or in case of his death, by his legal representatives.

In such cases the party making the proof, at the time of submitting the same, will be required to pay the fees for reducing the testimony to writing.

15.—Taxation of costs.

RULE 54.—Parties contesting preemption, homestead, or timber-culture entries and claiming preference rights of entry under the second section of the act of May 14, 1880 (21 Stat., 140), must pay the costs of contest.

RULE 55.—In other contested cases each party must pay the costs of taking testimony upon his own direct and cross examination.

RULE 56.—The accumulation of excessive costs under Rule 54 will not be permitted; but when the officer taking testimony shall rule that a course of examination is irrelevant and checks the same, under Rule 41, he may, nevertheless, in his discretion, allow the same to proceed at the sole cost of the party making such examination. This rule will apply also to cross-examination in contests covered by the provisions of Rule 55.

RULE 57.—Where parties contesting preemption, homestead, or timber-culture entries establish their right of entry under the preemption or homestead laws of the land in contest by virtue of actual settlement and improvement, without reference to the act of May 14, 1880, the cost of contest will be adjudged under Rule 55.

RULE 58.—Registers and receivers will apportion the cost of contest in accordance with the foregoing rules, and may require the party liable thereto to give security in advance of trial, by deposit, or otherwise, in a reasonable sum or sums, for payment of the costs of transcribing the testimony.

RULE 59.—The costs of contest chargeable by registers and receivers are the legal fees for reducing testimony to writing. No other contest fees or costs will be allowed to or charged by those officers directly or indirectly.

RULE 60.—Contestants must give their own notices and pay the expenses thereof.

RULE 61.—Upon the termination of a trial, any excess in the sum deposited as security for the costs of transcribing the testimony will be returned to the proper party.

RULE 62.—When hearings are ordered by the Commissioner or by the Secretary of the Interior, upon the discovery of reasons for suspension in the usual course of examination of entries, the preliminary costs will be provided from the contingent fund for the expenses of local land offices.

RULE 63.—The preliminary costs provided for by the preceding section will be collected by the register and receiver when the parties are brought before them in obedience to the order of hearing.

RULE 64.—The register and receiver will then require proper

provision to be made for such further notification as may become necessary in the usual progress of the case to final decision.

RULE 65.—The register and receiver will append to their report in each case a statement of costs and the amount actually paid by each of the contestants, and also a statement of the amount deposited to secure the payment of the costs, how said sum was apportioned, and the amount returned, if any, and to whom.

16.—**Appeals from decisions rejecting applications to enter public lands.**

RULE 66.—For the purpose of enabling appeals to be taken from the rulings or action of the local officers relative to applications to file upon, enter, or locate the public lands the following rules will be observed:

1. The register and receiver will indorse upon every rejected application the date when presented and their reasons for rejecting it.
2. They will promptly advise the party in interest of their action and of his right of appeal to the Commissioner.
3. They will note upon their records a memorandum of the transaction.

RULE 67.—The party aggrieved will be allowed thirty days from receipt of notice in which to file his appeal in the local land office. Where the notice is sent by mail, five days additional will be allowed for the transmission of notice and five for the return of the appeal.

RULE 68.—The register and receiver will promptly forward the appeal to the General Land Office, together with a full report upon the case.

RULE 69.—This report should recite all the facts and the proceedings had, and must embrace the following particulars:

1. A statement of the application and rejection, with the reasons for the rejection.
2. A description of the tract involved and a statement of its status, as shown by the records of the local land office.
3. References to all entries, filings, annotations, memoranda, and correspondence shown by the record relating to said tract and to the proceedings had.

RULE 70.—Rules 43 to 48, inclusive, and Rule 93 are applicable to all appeals from decisions of registers and receivers.

II.

PROCEEDINGS BEFORE SURVEYORS-GENERAL.

RULE 71.—The proceedings in hearings and contests before surveyors-general shall, as to notices, depositions, and other matters, be governed as nearly as may be by the rules prescribed for proceedings before registers and receivers, unless otherwise provided by law.

III.

PROCEEDINGS BEFORE THE COMMISSIONER OF THE
GENERAL LAND OFFICE AND SECRETARY OF THE
INTERIOR.

1.—Examination and argument.

RULE 72.—When a contest has been closed before the local land officers and their report forwarded to the General Land Office, no additional evidence will be admitted in the case, unless offered under stipulation of the parties to the record, except where such evidence is presented as the basis of a motion for a new trial or in support of a mineral application or protest; but this rule will not prevent the Commissioner, in the exercise of his discretion, from ordering further investigation when necessary.

RULE 73.—After the Commissioner shall have received a record of testimony in a contested case, thirty days will be allowed to expire before any action thereon is taken, unless, in the judgment of the Commissioner, public policy or private necessity shall demand summary action, in which case he will proceed at his discretion, first notifying the attorneys of record of his proposed action.

RULE 74.—When a case is pending on appeal from the decision of the register and receiver or surveyor-general, and argument is not filed before the same is reached in its order for examination, the argument will be considered closed, and thereafter no further arguments or motions of any kind will be entertained except upon written stipulation duly filed or good cause shown to the Commissioner.

RULE 75.—If before decision by the Commissioner either party should desire to discuss a case orally, reasonable opportunity therefor will be given in the discretion of the Commissioner, but only at a time to be fixed by him upon notice to the opposing counsel, stating time and specific points upon which discussion is desired; and except as herein provided, no oral hearings or suggestions will be allowed.

2.—Rehearing and review.

RULE 76.—Motions for rehearing before registers and receivers, or for review or reconsideration of the decisions of the Commissioner or Secretary, will be allowed, in accordance with legal principles applicable to motions for new trials at law, after due notice to the opposing party.

RULE 77.—Motions for rehearing and review, except as provided in Rule 114, must be filed in the office wherein the decision to be affected by such rehearing or review was made or in the local land office, for transmittal to the General Land Office; and, except when based upon newly discovered evidence, must be filed within thirty days from notice of such decision.

RULE 78.—Motions for rehearing and review must be accompanied by an affidavit of the party, or his attorney, that the motion is made in good faith, and not for the purpose of delay.

RULE 79.—The time between the filing of a motion for rehearing or review and the notice of the decision upon such motion shall be excluded in computing the time allowed for appeal.

RULE 80.—No officer shall entertain a motion in a case after an appeal from his decision has been taken.

3.—Appeals from the Commissioner to the Secretary.

RULE 81.—No appeal shall be had from the action of the Commissioner of the General Land Office affirming the decision of the local officers in any case where the party or parties adversely affected thereby shall have failed, after due notice, to appeal from such decision of said local officers.

Subject to this provision, an appeal may be taken from the decision of the Commissioner of the General Land Office to the Secretary of the Interior upon any question relating to the disposal of the public lands and to private land claims, except in case of interlocutory orders and decisions and orders for hearing or other matter resting in the discretion of the Commissioner. Decisions and orders forming the above exception will be noted in the record, and will be considered by the Secretary on review in case an appeal upon the merits be finally allowed.

RULE 82.—When the Commissioner considers an appeal defective, he will notify the party of the defect, and if not amended within fifteen days from the date of the service of such notice the appeal may be dismissed by the Secretary of the Interior and the case closed.

RULE 83.—In proceedings before the Commissioner in which he shall formally decide that a party has no right of appeal to the Secretary, the party against whom such decision is rendered may apply to the Secretary for an order directing the Commissioner to certify said proceedings to the Secretary and to suspend further action until the Secretary shall pass upon the same.

RULE 84.—Applications to the Secretary under the preceding rule shall be made in writing, under oath, and shall fully and specifically set forth the grounds upon which the application is made.

RULE 85.—When the Commissioner shall formally decide against the right of an appeal, he shall suspend action on the case at issue for twenty days from service of notice of his decision, to enable the party against whom the decision is rendered to apply to the Secretary for an order, in accordance with Rules 83 and 84.

RULE 86.—Notice of an appeal from the Commissioner's decision must be filed in the General Land Office and served on the appellee or his counsel within sixty days from the date of the service of notice of such decision.

RULE 87.—When notice of the decision is given through the mails by the register and receiver or surveyor-general, five days additional will be allowed by those officers for the transmission of the letter and five days for the return of the appeal through the same channel before reporting to the General Land Office.

RULE 88.—Within the time allowed for giving notice of appeal the appellant shall also file in the General Land Office a specification of errors, which specification shall clearly and concisely designate the errors of which he complains.

RULE 89.—He may also, within the same time, file a written argument, with citation of authorities, in support of his appeal.

RULE 90.—A failure to file a specification of errors within the time required will be treated as a waiver of the right of appeal, and the case will be considered closed.

RULE 91.—The appellee shall be allowed thirty days from the expiration of the sixty days allowed for appeal in which to file his argument.

RULE 92.—The appellant shall be allowed thirty days from service of argument of appellee in which to file argument strictly in reply, and no other or further arguments or motions of any kind shall be filed without permission of the Commissioner or Secretary and notice to the opposite party.

RULE 93.—A copy of the notice of appeal, specification of errors, and all arguments of either party shall be served on the opposite party within the time allowed for filing the same.

RULE 94.—Such service shall be made personally or by registered letter.

RULE 95.—Proof of personal service shall be the written acknowledgment of the party served or the affidavit of the person making the service, attached to the papers served, and stating time, place, and manner of service.

RULE 96.—Proof of service by registered letter shall be the affidavit of the person mailing the letter, attached to a copy of the post-office receipt.

RULE 97.—Fifteen days, exclusive of the day of mailing, will be allowed for the transmission of notices and papers by mail, except in case of notice to resident attorneys, when one day will be allowed.

RULE 98.—Notice of interlocutory motions and proceedings before the Commissioner and Secretary shall be served personally or by registered letter, and service proved as provided in Rules 94 and 95.

RULE 99.—No motion affecting the merits of the case or the regular order of proceedings will be entertained except on due proof of service of notice.

RULE 100.—Ex parte cases and cases in which the adverse party does not appear will be governed by the foregoing rules as to notices of decisions, time for appeal, and filing of exceptions and arguments, as far as applicable. In such cases, however, the right to file additional

evidence at any stage of the proceedings to cure defects in the proof or record will be allowed.

RULE 101.—No person hereafter appearing as a party or attorney in any case shall be entitled to a notice of the proceedings who does not at the time of his appearance file in the office in which the case is pending a statement in writing, giving his name and post-office address and the name of the party whom he represents; nor shall any person who has heretofore appeared in a case be entitled to a notice unless within fifteen days after being requested to file such statement he shall comply with said requirement.

RULE 102.—No person not a party to the record shall intervene in a case without first disclosing on oath the nature of his interest.

RULE 103.—When the Commissioner makes an order or decision affecting the merits of a case or the regular order of proceedings therein, he will cause notice to be given to each party in interest whose address is known.

4.—Attorneys.

RULE 104.—In all cases, contested or *ex parte*, where the parties in interest are represented by attorneys, such attorneys will be recognized as fully controlling the cases of their respective clients.

RULE 105.—All notices will be served upon the attorneys of record.

RULE 106.—Notice to one attorney in a case shall constitute notice to all counsel appearing for the party represented by him, and notice to the attorney will be deemed notice to the party in interest.

RULE 107.—All attorneys practicing before the General Land Office and Department of the Interior must first file the oath of office prescribed by section 3478, United States Revised Statutes.

RULE 108.—In the examination of any case, whether contested or *ex parte*, the attorneys employed in said case, when in good standing in the Department, for the preparation of arguments, will be allowed full opportunity to consult the records of the case, the abstracts, field notes, and tract books, and the correspondence of the General Land Office or of the Department not deemed *privileged and confidential*; and whenever, in the judgment of the Commissioner, it would not jeopardize any public or official interest, may make verbal inquiries of chiefs of divisions at their respective desks in respect to the papers or status of said case; but such inquiries will not be made to said chiefs or other clerks of division except upon consent of the Commissioner, Assistant Commissioner, or chief clerk, and will be restricted to hours between 11 a. m. and 2 p. m.

RULE 109.—Any attorney detected in any abuse of the above privileges, or of gross misconduct, upon satisfactory proof thereof, after due notice and hearing, shall be prohibited from further practicing before the Department.

RULE 110.—Should either party desire to discuss a case orally before

the Secretary, opportunity will be afforded at the discretion of the Department, but only at a time specified by the Secretary or fixed by stipulation of the parties, with the consent of the Secretary, and in the absence of such stipulation or written notice to opposing counsel, with like consent, specifying the time when argument will be heard.

RULE 111.—The examination of cases on appeal to the Commissioner or Secretary will be facilitated by filing in printed form such arguments as it is desired to have considered.

5.—Decisions.

RULE 112.—Decisions of the Commissioner not appealed from within the period prescribed become final, and the case will be regularly closed.

RULE 113.—The decision of the Secretary, so far as respects the action of the Executive, is final.

RULE 114.—Motions for review and motions for rehearing before the Secretary must be filed with the Commissioner of the General Land Office within thirty days after notice of the decision complained of, and will act as a supersedeas of the decision until otherwise directed by the Secretary.

Such motion must state concisely and specifically the grounds upon which it is based, and may be accompanied by an argument in support thereof.

On receipt of such motion, the Commissioner of the General Land Office will forward the same immediately to this Department, where it will be treated as "special." If the motion does not show proper grounds for review or rehearing, it will be denied and sent to the files of the General Land Office, whereupon the Commissioner will remove the suspension and proceed to execute the judgment before rendered. But if, upon examination, proper grounds are shown, the motion will be entertained and the moving party notified, whereupon he will be allowed thirty days within which to serve the same, together with all argument in support thereof, on the opposite party, who will be allowed thirty days thereafter in which to file and serve an answer, after which no further argument will be received. Thereafter the case will not be reopened except under such circumstances as would induce a court of equity to grant relief against a judgment of a court of law.

INDEX.

Abandonment.

See *Contest*.

Absence, Leave of.

See *Residence*.

Accounts.

Circular instructions of May 14, 1895, with respect to unearned fees and unofficial moneys 572

Circular instructions of December 26, 1896, with respect to unearned fees and unofficial moneys 573

Adverse Claim.

See *Mining Claim*.

The term as used in the act of April 7, 1896, held to mean valid adverse claim 582

Alabama Lands.

See *Mineral Land*.

Alaska.

See *Final Proof*.

The right of purchase conferred upon individuals or corporations engaged in trade or manufactures is limited to land actually occupied for such purposes, not to exceed in any case one hundred and sixty acres ... 7

The right to purchase lands in Alaska for purposes of trade or manufactures does not extend unconditionally to one hundred and sixty acres, but only to so much as may be actually occupied for the purposes named, in no case to exceed one hundred and sixty acres 283

The survey of a tract of land in, with a view to the purchase thereof, must be rejected where the alleged trade or business to be transacted thereon is entirely prospective and no improvements have been placed on said land 245

The evident intent of section 12, act of March 3, 1891, is that claimants must be in possession and occupying the tracts sought to be entered for the purpose of trade or manufactures, at the date of application to have the survey made, with such trade or manufactures in actual operation 280

The land taken under section 12, act of March 3, 1891, must be nearly as practicable in a square form 280

The requirement that such land shall be taken in "square form" means that the tract claimed should be surveyed in the form of a rectangular equilateral parallelogram, as nearly as the configuration of the land will permit 283

Page.

Page.

In a survey under the act of March 3, 1891, the claim must be as nearly practicable in a square form, and not include land to which the natives have prior rights by virtue of actual occupation 335

A survey that does not follow the requirement as to square form, will not be approved on the ground that the irregularity in form is necessary in order to exclude swamp land, as there is no statutory provision excepting such lands from purchase 337

The government is not bound by an erroneous approval of field notes and plat of survey, under section 13, act of March 3, 1891, to issue patent contrary to the provisions of said act requiring land to be taken as nearly as practicable in a square form 442

Alienation.

A transferee whose title is acquired after cancellation of an entry is charged with notice of such action 28

The sale of part of the land settled upon and claimed by a homesteader disqualifies him as an applicant 87

Amendment.

See *Entry; Practice*.

Appeal.

See *Practice*.

Application.

To enter, filed for lands restored to entry under a decision of the Supreme Court, prior to the time fixed therefor by the Department, should not be allowed 407

Pending for land covered by a private claim should not be disposed of without opportunity for the assertion of rights thereunder in the event of the disallowance of such claim 185

For reinstatement of private cash entries under the act of April 7, 1896, should not be rejected on account of adverse claims, without due notice, and opportunity to be heard as against said claims 582

To enter properly rejected by final decision of the Department, under the rulings then in force, can not be reinstated with a view to favorable action under a changed construction of the law. The applicant in such case may make a new application if he is qualified, and no intervening rights have attached 452

	Page.		Page.
To enter, in conflict with a railroad indemnity selection may be considered in connection with final action on the selection.....	513	opening and improving of a coal mine on public land that is in the actual possession of the applicant.....	110
TIMBER CULTURE.		It is not necessary to show that coal has been developed on all parts of a forty-acre tract; if coal has been discovered thereon, the applicant is entitled to the whole of such legal subdivision.....	116
To enter, not settlement, initiates right under the timber-culture law.....	1	An entry made by an association under the proviso to section 2348, R. S., may embrace by legal subdivisions six hundred and forty acres, including the legal subdivisions on which the mining improvements are actually situated, whether the land covered by said improvements is coal or agricultural land.....	127
WITH CONTEST.		Under an entry made by an association the land must appear to be mineral in character as a present fact and from actual production of coal, but the development of coal on each forty-acre subdivision is not requisite.....	127
To enter filed with a timber-culture contest is dependent upon the result of the contest, whether it be the first or second contest; and, where for any cause the second contest fails, or never attaches by reason of the cancellation of the entry under the first contest, the application filed with the second contest does not serve to reserve the land after the disposal of said contest, but falls with it, and confers no right upon the applicant.....	119	On the failure of a coal claimant to perfect title within the statutory period, the work done by him inures to the benefit of a valid adverse claim then asserted for the land involved.....	243
To make timber-culture entry, filed with a timber-culture contest, prior to the repeal of the timber-culture law, if not returned to the local office on the successful termination of the contest, is a pending application that operates to exclude the land from the adverse appropriation of an intervening applicant..	259	Confirmation.	
To enter, filed with a second contest does not secure any right to the applicant if the successful contestant in the prior suit fails to exercise his preferred right.....	378	ACT OF MARCH 3, 1891.	
Arid Land.		An entry canceled without notice to the entryman at the passage of said act is in law an existing entry and confirmed by section 7 if otherwise within the provisions of said act.....	162
See <i>Reservoir Lands.</i>		An order of cancellation without notice to a record transferee is irregular, but not void; and an entry thus canceled prior to the passage of said act is not confirmed by section 7 thereof, as the provisions of said section are only applicable to entries subsisting at the passage of the act.....	175
Cancellation.		The confirmation of an entry under section 7 for the benefit of a transferee is not contemplated by said statute in case of a transfer prior to the issuance of final certificate.....	333
An entry inadvertently canceled on the report of a special agent, pending the application of the entryman for a hearing, should be reinstated, with due opportunity given for the entryman and intervening claimants to be heard.....	54	The confirmatory provisions for the benefit of transferees are not limited to cases where the encumbrance has been made of record.....	481
Order of, without notice to the entryman is ineffective.....	113, 162	The fact that proceedings have been instituted by the government against an entry at the date of its encumbrance does not defeat confirmation thereof for the benefit of a transferee.....	481
Of an entry without notice to a transferee, whose interest appears of record, while irregular, is not void for want of jurisdiction, if the entryman was duly notified of the adverse proceeding.....	175	Commutation.	
Certification.		See <i>Entry</i> , subtitle <i>Timber culture.</i>	
See <i>Patent.</i>		Contest.	
Certiorari.		See <i>Contestant</i> ; <i>Protest.</i>	
An application for, will not be granted, where it appears that the Commissioner's decision, if before the Secretary on appeal, would be affirmed.....	492	GENERALLY.	
A writ of, is not a writ of right, but lies in the discretion of the Secretary of the Interior, and issues when an affirmative showing is made of substantial injustice in the decision rendered below.....	529	The local office has no authority to entertain and act upon an application to contest an approved swamp-land selection.....	591
Circulars and Instructions.			
See <i>Tables of</i> , page XIX.			
Coal Land.			
The preference right of entry conferred by section 2348, R. S., is dependent upon the			

	Page
Allowed during the pendency on appeal of a prior suit involving the same land is without jurisdiction	377
During the pendency of an appeal the local office has no jurisdiction to entertain a, affecting the land involved, and evidence submitted at such a hearing can have no effect as against the entry under attack....	448
Should not be allowed on an issue that has been considered and finally determined in a prior suit involving the rights of the entryman	485
An entryman is entitled to be heard on an issue raised as to the qualifications of an adverse claimant, though such issue may have been tried and determined as between said claimant and a third party in a prior proceeding	479
Where a second, is filed on grounds set forth in the first, with an additional allegation as to the disqualification of the first contestant as an entryman, and the entry under attack is canceled as the result of the first suit, and the contestant therein makes entry under his preferred right, it is not competent for the local office to order a hearing on the second, as against the entry then of record.....	522
The failure of the local office to dismiss a, for default on the part of the contestant will not operate to prevent the filing of a second, and the issuance of notice thereon, nor interfere with any rights attaching thereunder.....	234
A second, may be properly entertained on a charge that the entryman has failed to comply with the law since the hearing in the former suit.....	317
Filed during the pendency of a prior suit must fail if before service of notice thereunder the entryman without knowledge of such contest has cured his default, and it is neither alleged nor proven that the prior suit was collusive.....	558
One who assists another to procure an entry by furnishing the money for the requisite fees, will not be permitted to attack the good faith of said entry in his own interest..	186
The failure of an intervening entryman to specify any reason, on due opportunity given, why his entry should not be canceled and the preferred right of a successful contestant recognized, warrants the cancellation of his entry and precludes such entryman from thereafter attacking the entry of the successful contestant on a charge that should have been set up under the rule to show cause.....	522
After a hearing has been directed by the Department on the charge set forth in an affidavit of, the subsequent retraction of the statements in the corroboratory affidavit does not warrant the General Land Office in revoking the order for the hearing issued under departmental direction	285

	Page.
The charge that a, was begun under a speculative contract with a third party, if proven, will not affect the subsequent entry of the tract involved, after its restoration to the public domain, by the widow of the contestant in her own right, the contestant having died prior to the conclusion of the suit	256
Rights of adverse entrymen, dependent upon priority of settlement, may be adjudicated in the absence of a formal contest as between them on evidence submitted by them in defense of their rights against a third party.....	400
On alleged priority of settlement being withdrawn on a disclaimer of interest on the part of the adverse entryman, and his application to amend his entry so as to embrace different land, should be reinstated, with all rights incident thereto, on the withdrawal of the entryman's application for amendment	341
The receiver, acting alone, has no authority to dismiss a.....	548
HOMESTEAD.	
On the ground of priority of settlement, must fail if the allegation is not established by some preponderance of the evidence....	50
In a, against an entry on the ground of a prior settlement right, the burden of proof is upon the contestant to show that his settlement antedates both the entry and settlement of the contestee, and if he fails to show such priority the entry must stand.....	201
In a, involving priority of settlement, doubt as to the fact of priority, or a finding of simultaneous settlement, does not justify an arbitrary division of the land between the parties, or an award thereof to the highest bidder.....	201, 400
Against a soldier's homestead declaratory statement is invalid, and a subsequent amendment thereof does not confer any priority as against an intervening contest begun after the homesteader has made entry under his declaratory statement.....	2
In a, against the entry of a deceased homesteader the heirs should be made party thereto, but, if they are not so included in such proceeding, and the Commissioner thereafter remands the case with leave to amend, such right of amendment, so allowed, is not defeated by a subsequent intervening contest.....	55
Contestant.	
See <i>Protestant.</i>	
An intervening entry will not defeat the preferred right of a successful, who fails to receive notice of cancellation, if such failure is not due to want of diligence on his part.	259
One who files an affidavit of contest pending the disposition of a prior suit against the same entry is not entitled to notice of cancellation if the entry is canceled under the prior proceedings.....	378

	Page.		Page.
In a contest wherein the, alleges a superior right in himself to the land it is incumbent upon him to establish his qualifications as an entryman	472	The act of July 6, 1894, providing for the completion of donation claims, treated lands covered by donation notifications as reserved thereby from other disposition	569
Under the supervisory authority of the Department a preference right of entry may be accorded a party through whose efforts an entry is canceled, though he may not be entitled to be heard as a, against such entry.	514		
Desert Land.		Entry.	
See <i>Entry</i> .		See <i>Application, Final Proof</i> .	
The mere fact that a tract of arid land is traversed by an irrigating canal is not sufficient in itself to constitute reclamation thereof, nor take it out of the class of lands subject to desert entry	138	GENERALLY.	
The act of March 3, 1877, did not reduce the price of, within the limits of railroad grants to single minimum; nor did the amendatory act of March 3, 1891, operate to reduce the price of such lands embraced within entries under the original act, but on which final proof had not been submitted at the passage of the amendatory act.	450	Made in the interest of another is fraudulent and must be canceled	140
By the provisions of sections 6 and 7, added to the act of March 3, 1877, by the amendatory act of March 3, 1891, the price of desert lands entered under the act of 1891 is fixed at one dollar and twenty-five cents per acre, irrespective of their situation with relation to the limits of railroad grants	574	Can not be amended under section 2372, R. S., if the certificate of the original purchaser has been assigned, or his right transferred	389
		An intervening adverse claim of record bars the allowance of an amendment under the provisions of section 2372, R. S.	389
		The notice given an entryman of the revocation of an order suspending his, is insufficient if not definite and certain in its terms	240
		Inadvertently canceled on the report of a special agent pending application for hearing should be reinstated	54
		DESERT LAND.	
		See <i>Final Proof; Payment</i> .	
		An adverse settlement claim will not defeat a, if due priority of right is not shown thereunder	436
		By the act of August 4, 1894, extending the time for compliance with the law, Congress relieved all entrymen from expenditure and proof for one year, and the entry year, not the calendar year, was meant. In the application of said provisions to particular cases, if the entryman was in default for a year ending in 1894 the act should be applied to cure the default for that year; if not in default for the year ending in 1894, he should be excused for the entry year beginning in 1894	293
		An entryman under the act of 1877 who, after the expiration of his entry, and prior to the passage of the act of July 26, 1894, elects to proceed under the amendatory act of 1891, takes, by way of the extension of time under said act of 1894, the same privilege as though his entry had been originally made under said act of 1891	293
		HOMESTEAD.	
		The right to make a second, will not be accorded to one who relinquishes his prior entry on account of a money consideration or its equivalent	87
		Second, allowed prior to the actual cancellation of the first, though irregular, may stand, in the absence of other objection	440
		An application to make a second, under the act of December 29, 1894, must be denied where the first entry is canceled on a contest charging abandonment	404
		When it appears that an entry fails because of the entryman's negligence in the	
Donation Claim.			
On the death of a qualified claimant who has complied with all the requirements of the law in the initiation of his claim, and subsequent maintenance thereof, up to the date of his death, the heirs of such claimant become qualified grantees irrespective of any question as to their citizenship	166		
Under section 8, act of September 27, 1850, proof of compliance with law up to the date of the donee's death is all that is required in the matter of final proof on the part of the heirs, and it is not material in such case by whom said proof is submitted	166		
A plea of equitable estoppel set up by intervening adverse claimants, as against the rights of heirs under a, on account of their alleged failure to assert their rights in due season, cannot be considered by the Department, if it finds that under the donation law said heirs are entitled to a patent; and especially is the Department limited to such course, in view of the fact that said law prescribes no limit of time within which final proof may be made by the claimant or his heirs at law	166		
The provisions of the act of July 26, 1894, are not applicable to a, pending before the Land Department at the passage of said act, and in which final proof had been submitted prior thereto	166		

	Page.
matter of ascertaining prior adverse rights, he will not be allowed to make a second, if at the date of his application for such privilege there is a qualified adverse claimant for the land applied for.....	87
If one in good faith, claiming the right to make a second, settles upon the land subject to entry, and applies for the restoration of his homestead right, and permission to enter the land so settled upon, and is adjudged to be entitled to make such entry, such judgment validates his acts of settlement.....	63
Embracing non-contiguous tracts may be equitably confirmed where the non-contiguity arises through the necessary cancellation of the entry as to one of the subdivisions covered thereby, on account of a prior adverse claim thereto, and where said entry was made in ignorance of such adverse right.....	38
TIMBER CULTURE.	
Rights under the timber-culture law are initiated by the application to enter.....	1
An entryman is not entitled to commute his entry under the act of March 3, 1891, if he is not a bona fide resident of the State in which the land is situated.....	9
Evidence.	
Filed after the close of the hearing and the appeal from the decision thereon may be considered in the interest of the government.....	34
Rule 35 of Practice does not require a commission to issue to the officer who may be designated to take evidence thereunder....	140
It is within the supervisory authority of the Secretary of the Interior to take cognizance at any time of the action of a court of record convicting a party of perjury committed in the testimony given by him in the case under consideration.....	580
Filing.	
A pre-emption, made subject to a withdrawal under the arid-land act of October 2, 1888, that is awaiting action by Congress, may be suspended until such action is taken.....	483
Final Proof.	
<i>See Payment.</i>	
On the submission of pre-emption, under an order of republiation, the proof as originally made should not be accepted in the presence of a protest against such action by an adverse claimant.....	189
In the disposition of a case arising on a protest against, where a hearing is ordered to determine priority of right, and evidence duly submitted, the respective rights of the parties as well as the regularity of the proof should be considered.....	358
Submitted on a desert entry of unsurveyed land, if found unsatisfactory, and the entry-	

	Page.
man fails to furnish supplemental proof as required, may be rejected, and the entry canceled.....	410
When submitted under amended Rule 53 of Practice, pending the disposition of a contest involving the land, it should be held for appropriate action in the event the entry is adjudged valid, and until such time no action can be legally taken thereon by way of proceedings on protest in the local office.....	444
The Territory of Alaska is constituted a land district by statute, and proof on entries therein must be made within said district.....	194
Homestead.	
<i>See Entry; Oklahoma Lands.</i>	
A settler under the act of May 14, 1880, who has complied with the law for the requisite period at the date of application to enter, has a vested and devisable interest.....	188
To exclude land from entry on account of the limestone thereon, it must appear that the land is more valuable for the stone than for agriculture.....	353
The amendment of sections 2289 and 2290, R. S., by the act of March 3, 1891, does not authorize entry under the homestead law of lands included within the limits of an incorporated town.....	462
The sale by a settler of part of the land settled upon disqualifies him as an applicant for the right of entry under the homestead law.....	87
Where a single woman makes an entry, and thereafter marries a man who has a similar claim, and the husband dies, the widow is entitled to submit proof under the claim of her deceased husband, and also maintain her own claim, by compliance with the law in the matter of residence, if no adverse right attached thereto during the time her legal residence was on the land covered by her husband's entry.....	52
SOLDIERS' ADDITIONAL.	
The validity of an entry is not affected by the fact that it is made for the benefit of another.....	462
There is no statutory authority for the certification of additional rights, nor is such action necessary to the exercise of the additional right of entry either by the soldier or his transferee.....	152
The act of March 3, 1893, providing for the perfection of title under entries made on "certificates of right," was for the protection only of persons holding under the certificates issued by the Commissioner of the General Land Office in accordance with the circular regulations of May 17, 1877.....	495
Under the act of August 18, 1894, validating outstanding additional certificates in the hands of bona fide purchasers, a dupli-	

	Page.	Page.
cate certificate may issue to such a purchaser, in the name of the soldier, on due showing of the loss of the original, and the further fact that it has not been located...	123	
The act of August 18, 1894, providing for the approval of a certain class of entries, does not contemplate the confirmation of entries made on land not subject thereto, and hence can not be invoked for the protection of such an entry made on lands occupied for trade and business.....	502	
Indemnity.		
See <i>Railroad Grant; School Land; Swamp Land.</i>		
Indian Lands.		
See <i>Oklahoma Lands.</i>		
The Secretary of the Interior has due authority under the law, and by virtue of his supervisory power, to cancel the entries of such purchasers of Otee and Missouria, as are in default in the matter of deferred payments	143	
Directions given for notice to all purchasers of Otee and Missouria, that opportunity will be given for payment of arrears with a rebate of ten years' interest (as agreed to by the Indians), and that on failure to settle in such manner their entries will be canceled.....	143	
Instructions and Circulars.		
See <i>Tables of</i> , page XIX.		
Isolated Tract.		
An eighty-acre tract will not be ordered into market as an, where one of the forty-acre subdivisions embraced therein is part of a quarter section the whole of which is vacant public land.....	590	
Jurisdiction.		
See <i>Contest; Practice.</i>		
In the exercise of its proper supervision over the disposition of the public lands the Department may waive questions affecting the regularity of proceedings below, and render such judgment as seems just and proper in the case.....	313	
Land Department.		
The local officers are not required to transact business out of office hours, but official acts thus performed are not invalid.....	546	
The receiver acting alone has no authority to dismiss a contest.....	548	
Mineral Land.		
See <i>Coal Land; Mining Claim; School Land.</i>		
In proceedings under a protest against an agricultural entry, in which the mineral character of the land is alleged, the burden of proof is with the agricultural claimant, if the land is returned as mineral in the surveyor-general's report then in force.....	34	
The burden of proof rests with a protestant who attacks an agricultural entry on the ground of the "known" mineral character of the land at date of entry, irrespective of the fact that the land may have been returned as mineral after the allowance of the agricultural entry.....	34	
Land must be held mineral in character if mineral has been found thereon, and the evidence shows that a person of ordinary prudence would be justified in further expenditures, with a reasonable prospect of success in developing a valuable mine.....	417	
In a controversy as to the character of Alaskan land between a town-site applicant and a mineral claimant, where the mining claim is of record at the date of the town-site application, a settlement prior to the act of March 3, 1891, confers no right that relieves the town-site applicant from the burden of proof.....	417	
Land containing gold in sufficient quantities to justify men of ordinary prudence in the expenditure of money and labor in mining developments must be regarded as mineral in character.....	34	
The absence of active mining operations will not be held to negative an allegation as to the mineral character of the land, where such land is at the time involved in litigation	35	
The provisions of the act of March 3, 1883, with respect to the public offering of Alabama lands returned as containing coal or iron, must be followed, whether the land is properly or improperly so classified.....	251	
Land containing petroleum does not fall within the contemplation of the mineral laws	222	
To exclude land from appropriation under the homestead law, on the ground that it contains a valuable bed of limestone, it must affirmatively appear that the land is more valuable on account of the stone than for agriculture.....	353	
Mining Claim.		
A lode or vein is not "known to exist" within a, from the recorded notice of the location thereof, in the absence of a prior discovery of a valuable vein or lode therein...	476	
In the case of a mineral entry by an association there must be a discovery shown on each twenty acres of the land so entered...	222	
Compliance with law on the part of a mineral claimant, who is at such time holding under color of title, will accrue to his benefit on the acquirement of the legal title	267	
Where a claimant owns adjoining claims the annual work may be done on one of said claims, if such work is designed for the improvement or development of the group. In such case, however, the burden of proof is upon the owner to show that the work		

	Page.
done tends to the development of the property as a whole; and that such work is a part of a general scheme of improvement.....	267
The failure of a mineral claimant to perform the requisite amount of annual work on his claim renders the same subject to relocation	267
In the notice posted on a, the book and page of the record should be given of the location on which the official survey is made, and failure to comply with this requirement will necessitate new notice.....	504
If not properly described in the survey, it is incumbent upon the Secretary, if the matter comes before him, to require a new survey, and new notice of application, and if during the period of republication an adverse claim is filed it is entitled to consideration.....	395
The local officers may properly refuse to accept and file an adverse claim tendered out of office hours on the sixtieth day of publication; but if such claim, so tendered, is accepted and filed it must be regarded as filed in time	546
The adverse proceedings provided for in section 2325 R. S., contemplate only suits between adverse mineral claimants, and does not have in view adjudications respecting the character of land as between agricultural and mineral claimants.....	173
In determining whether an adverse judicial proceeding has been instituted within the statutory period, the Department will not undertake to review an order of a court of competent jurisdiction recognizing the initiation of such proceedings within said period, while the suit so begun is pending within said court.....	20
A mineral claimant, who in his application temporarily excludes part of his claim in conflict with an adverse agricultural entry, does not thereby absolutely waive all claim to the land so excluded, but may thereafter assert his right thereto, by way of protest against the proof of the agricultural entryman	34
A judicial award of the right of possession to an adverse placer claimant as against a lode applicant does not preclude departmental inquiry on the allegation of the lode claimant that said placer claim, as subsequently applied for, embraces known lodes, if such question was not in issue before the court, nor determined by its judgment; but if such allegation of the lode claimant is sustained on such inquiry, he will be limited to the land necessary to the use and enjoyment of the lode	95
A judicial determination that an adverse claimant is not entitled to possession is conclusive upon the Department, irrespective of any reasons the court may have assigned for its judgment.....	395

	Page.
A protest against a mineral application, filed after the period of publication, will not be considered by the Department on appeal, unless it is shown that the protestant has an interest in the ground involved, and that the law has not been complied with by the applicant.....	69
The final certificate of a mineral entry will not be allowed to embrace the name of one who fails to show that he owned an interest in the claim at the date of application, or that subsequently, and prior to entry, he acquired such interest from a legal applicant.....	112
The cancellation of a mineral entry does not in itself render the ground covered thereby subject to relocation.....	113
A mineral entry canceled without notice to the entryman must be reinstated irrespective of any intervening adverse claim.....	113
A lode location on a bed or ledge of limestone is not authorized under the provisions of the mining laws	353, 395
A placer applicant will not be allowed to amend his application so as to embrace therein veins or lodes discovered by others after the location of the placer claim, but prior to the application therefor, and not included in said application as originally submitted	95
The discovery and location of a placer establishes the right to the possession of the superficial area within its boundaries for all purposes incident to the use and operation of the same as a placer; such location, however, does not give title or right of possession to lodes within its limits, or preclude the right of discovery and location thereof by others.....	95
In the exercise of the right to make placer entry of building stone conferred by section 1, act of August 4, 1892, a discovery preceding the entry is necessary, and no right attaches in favor of the entryman until he makes application to enter.....	322
Under the provisions of section 1, act of August 4, 1892, no rights are secured prior to application, and if at such time the lands are not subject to entry the claim under said act must be rejected.....	329
Prior to the passage of the act of August 4, 1892, there was no authority to locate and purchase lands chiefly valuable for building stone under the placer mining laws. (See also p. 516, of this volume)	329
Land containing petroleum is not for such reason subject to entry as a placer.....	222

Notice.

See *Practice*.

Oklahoma Lands.

See *Town Lot*, and *Township*.

Presence within the Territory, after the act authorizing the President to open the

	Page.		Page.
same to settlement, but prior to the proclamation issued thereunder, will not disqualify the settler if he was not then within said Territory for the purpose of selecting lands, and by his presence therein secured no advantage.....	63	until a deed is made thereunder, and, prior to such time, would therefore not relieve an entryman from the disqualification imposed by section 20, act of May 2, 1890, upon persons who are "seized in fee simple of one hundred and sixty acres of land".....	547
Entry within the Territory during the prohibited period by passing through the country over a public highway does not operate to disqualify an applicant for land within the Sac and Fox country.....	186	Offering.	
A person who at the hour of opening is rightfully on reserved land, within said Territory (the "government acre") is by reason of such presence disqualified from making the run on the day of opening, but is not necessarily disqualified from thereafter making entry of lands in said Territory if by his presence therein he secured no advantage over others.....	522	Withdrawal of "offered" lands abrogates the offering and brings them within the category of "unoffered" lands.....	412
By the proclamation of the President declaring the Cherokee Outlet open to settlement, and providing regulations for the acquisition of settlement rights therein, a strip of land one hundred feet in width immediately within the outer boundary of the entire tract then opened to settlement was set apart for the occupancy of intending settlers; and, if it be conceded that the Secretary of the Interior could thereafter modify said regulation, such action could only be taken after the notice required by the statute.....	533	Patent.	
Persons making the run from the hundred-foot strip of land set apart for their occupancy are not disqualified as settlers by the fact that in entering thereon they passed over an adjacent Indian reservation.....	533	The inadvertent issuance of a, on an entry that is in partial conflict with a prior entry deprives the Department of further jurisdiction over the tract in controversy; and a final certificate therefor, subsequently issued on the earlier entry, must be canceled, though the original entry on which such certificate rests may be permitted to remain of record.....	165
Under the statutes of Kansas the ownership of land is not divested by the execution of a mortgage thereon, hence a mortgagor in that State cannot plead that by reason of such mortgage he is not "seized in fee" of the said land, and therefore is not disqualified as a homesteader under section 20, act of May 2, 1890.....	251	Certification under the railroad grant of June 3, 1856, equivalent to.....	310
A quitclaim deed of a small tract of land to township authorities for "road purposes," executed by one who previously owned one hundred and sixty acres, effectually divests the grantor of title to the land so conveyed, and he is consequently thereafter not the owner of one hundred and sixty acres within the meaning of section 20, act of May 2, 1890.....	251	Certification under the act of August 2, 1854, is of no effect if the land was in fact excepted from the grant.....	343, 460
The special provision in section 20, act of May 2, 1890, limiting the right of homestead entry to persons not "seized in fee simple of one hundred and sixty acres, etc.," is not repealed by the general provisions in section 5, act of March 3, 1891, amending section 2289, R. S.....	547	Section 2448, Revised Statutes, is applicable only where the right to, exists in the entryman at the time of his death.....	457
A tax sale in the State of Kansas does not operate to divest the original owner of title		The Department may properly direct the cancellation of the record of an incomplete, that was in fact never issued, but was entered of record through mistake.....	588
		Payment.	
		*The tender of proof and, is an act that may be invoked by the claimant for his protection, but can not be used by a contestant to defeat the operation of the act of July 26, 1894, extending the time for proof and payment; nor will an intervening contest, resting alone on the charge of failure to make proof and payment within the statutory period, have such effect.....	248
		The purchase price of land to the receiver before the acceptance of final proof is at the risk of the purchaser.....	282
		The act of July 26, 1894, extended the time on desert entries for making proof and, for one year beyond the time at which the same were due, or would thereafter become due under the law as then existing. Said act is not limited to entries alone which were alive at that date, but is also applicable to entries which remained of record at the date of its passage.....	293
		The joint resolution of September 30, 1890, with respect to the extension of time for, is not applicable to a commuted homestead entry.....	304
		An extension of time in which to make, on a commuted homestead entry is not authorized by the joint resolution of September 30, 1890, nor by the act of July 26, 1894.....	467

*For "restrictive," in the second line on p. 249 read *retroactive*.

Practice.

See *Rules of, Cited and Construed.*
page XXI.

Revised rules of..... 592

The receiver, acting alone, has no authority to dismiss a contest, and such action can not be validated by a subsequent joint notice thereof from the register and receiver. 548

AMENDMENT.

Right of, when allowable, not defeated by intervening contest..... 55

The right to amend an affidavit of contest should be recognized where no new ground of attack is introduced thereby..... 285

APPEAL.

Will not lie from the action of the Commissioner in canceling an entry under directions issued in a departmental decision that has become final..... 478

The right to intervene and be heard on, may be properly accorded a protestant who shows an interest in the subject-matter of a contest..... 12

Should not be dismissed on account of insufficient proof of the service of notice thereof, without opportunity given to show that the service was in fact duly made, where the adverse party appears and does not object to the service..... 529

A motion to dismiss an, taken from an action lying within the discretion of the Commissioner will not be considered where the appeal has been duly allowed, and the case presents a new question for departmental adjudication..... 293

Notice of, served upon a duly recognized agent of a railroad company is a proper and sufficient service..... 331

On appeal from the denial of an application to contest an entry the appellant is not required to serve the entryman with notice thereof..... 412

Failure to, in time can not be excused on the ground that in the notice of the decision the period accorded for appeal was erroneously stated as thirty instead of sixty days, where the appellant has had the benefit of the full period, and the adverse party takes no advantage through said error..... 106

In a case decided by the local office where one of the parties affected adversely fails to, but another party thereto does, the whole case comes before the General Land Office for disposition on its merits, and not under rule 48 of practice..... 562

During the pendency of, the local office has no authority to allow contest proceedings against the lands involved..... 448

COSTS.

A contestant who seeks to secure the right of entry solely on the ground of priority of settlement is not required to pay the, incurred by other parties to the suit..... 251

NOTICE.

See *appeal.*

Of an order revoking the suspension of an entry must be definite in its terms to charge the entryman therewith..... 240

In the, of contest issued by the local office the charges as laid in the information need not be set out in the language of the informant; it is sufficient if the grounds and purpose of the contest are stated briefly..... 140

REHEARING.

Rule 114, amended..... 406

The transfer of a case, during the hearing, from one townsit board to another is no ground for a, where all the testimony is reduced to writing and before the board that rendered judgment..... 578

REVIEW.

Rule 114, amended..... 406

Affidavits should not be submitted with a motion for, for the purpose of supplying facts that should have formed a part of the case as presented in the first instance..... 28

Evidence submitted under a second contest allowed before the final disposition of the first can not be considered in support of a motion for, of the decision rendered in the prior case..... 377

Preemption.

An entry, covering land that is mineral in character, and made with the knowledge of prior mineral locations thereon, and of the fact that the land was at such time regarded by many in the vicinity as valuable for the mineral therein, must be canceled as having been allowed for "known" mineral land... 35

In the case of a filing made after the repeal of the pre-emption law the burden of proof rests with the pre-emptor, as against an adverse claimant, to show settlement prior to said repeal and residence as required by law..... 189

A pre-emptor who makes homestead entry of a part of the land embraced within his filing, thereby abandons all right under his pre-emption claim..... 539

Price of Land.

See *Public Land.*

Private Claim.

A patent having issued to the beneficiary in accordance with the terms of the special act of July 2, 1836, on application and payment for the land embraced therein, a conclusive presumption arises, as against a contrary claim on the part of the heir of said beneficiary, that all the requirements of said act were complied with by said beneficiary, including the relinquishment of the lands specified in said act, a condition on which said act was dependent for its operative force..... 130

	Page.
On the disallowance of, and direction given for the disposition of pending claims under the public land laws, due opportunity to be heard should be accorded such claimants.....	185
By the terms of section 14, act of March 3, 1891, a claim of ownership, asserted under a Mexican, can not be considered as against a homestead entry on which final certificate has issued prior to the confirmation of said grant.....	193

Private Entry.

The act of April 7, 1896, providing for the reinstatement and confirmation of certain, on condition that such action should only be taken in the absence of intervening adverse claims, contemplated, by such exception, <i>valid</i> adverse claims, and inquiry as to the character of apparent adverse claims may therefore be properly made on application for action under said statute.....	582
---	-----

Protest.

Filed by a State against the allowance of an entry should be corroborated in accordance with the rules of practice.....	313
---	-----

Protestant.

Who shows interest is entitled to intervene and be heard on appeal.....	12
---	----

Public Land.

Lands within an abandoned military reservation subject to disposition under the act of August 23, 1894, belonging to the single minimum class, must be sold at \$1.25 per acre, though appraised at a less figure..	14
---	----

Discretionary authority of the Secretary in fixing price of, under special statute must be presumed to have been exercised with full knowledge of the true status of the land.....	151
--	-----

The act of March 3, 1877, did not reduce the price of desert land within the limits of railroad grants to single minimum; nor did the amendatory act of March 3, 1891, operate to reduce the price of such lands embraced within entries under the original act, but on which final proof had not been submitted at the passage of the amendatory act.....	450
--	-----

By the act of March 3, 1891, amendatory of the act of March 3, 1877, the price of all desert lands entered under the amended law is fixed at one dollar and twenty-five cents per acre.....	574
---	-----

Railroad Grant.

See *Railroad Lands; Wagon Road Grant.*
GENERALLY.

Where lands have been erroneously awarded to a railroad company by decision of the General Land Office, the Secretary of the Interior may review such action without regard to the manner in which the matter is brought before him.....	433
--	-----

	Page.
The arrangement between the Northern Pacific, and the Lake Superior and Mississippi companies with respect to the latter company's line of road from Thomson's Junction to Duluth, was such a consolidation as was contemplated by the grant to the former company, by which said company effected its connection with Lake Superior, and thereby fixed the eastern terminus of its grant at Duluth.....	204

In the adjustment of the grant to the Northern Pacific between Thomson's Junction and Duluth the land covered by the prior grant to the Lake Superior company must be deducted, so that between said points the Northern Pacific company will take only the granted lands within the lateral limits of its own grant, which fall outside the limits of the former grant, and will be entitled to indemnity only for losses sustained outside the limits of the former grant.	204.
--	------

The terminal line of the Northern Pacific grant at Duluth must be fixed at right angles to the last section of twenty-five miles of the road.....	428
---	-----

All selections by the Northern Pacific company of lands east of the terminus established at Duluth should be canceled....	428
---	-----

The joint resolution of May 31, 1870, designated Portland as the point of connection between the branch line as provided for in the grant of 1864, and the extension to Puget Sound authorized by said joint resolution, and it follows, that in the establishment of a terminal line between the lands granted by said joint resolution, and those of a prior grant forfeited by the act of September 29, 1890, said line should be drawn through Portland.....	70
--	----

To the State of Iowa by the acts of May 15, 1856, and June 2, 1864, is a grant in place, the extent of which is determined by the location under the original grant, and the amount of lands earned thereunder ascertained by the road constructed west of Cedar Rapids, with the additional right to satisfy deficiencies by resorting to even-numbered sections within the six-mile limits, and both even and odd within the fifteen-mile limits, and if there is still a deficiency to resort to the even and odd sections along the modified line within twenty miles thereof.....	79
--	----

The status of lands withdrawn for indemnity purposes under the grant of 1856, for the benefit of the Omaha company, and afterwards falling within the primary limits of the grant of 1864, to the Wisconsin Central, was changed by operation of the latter grant, and definite location thereunder, from lands reserved for indemnity purposes, to granted lands, and, on the failure of the latter company to construct its road opposite said lands, the grant therefor was forfeited, and the title restored to the United States..	58
---	----

Page.
Made by the act of March 3, 1871, did not take effect until the relinquishment provided therein was duly filed and accepted by the Secretary of the Interior. 408, 541

An entry of land embraced within the act of May 6, 1870, granting certain lands for a common terminus of the Central and Union Pacific Railroad Companies, may be permitted to stand as against the protest of one of said companies, it appearing from the status of lands covered by said act that the purposes of the grant made thereby can not be accomplished. 326

The certification of land under a, in accordance with the provisions of the act of August 3, 1854, is of no operative effect if the land in fact was excepted from the grant. 343

By the certification of lands under the grant of June 3, 1856, they are as fully separated from the public domain and removed from departmental control as though patent had issued therefor. 310

LANDS EXCEPTED.

Land embraced within a pre-emption filing at the date of a railroad grant is excepted from the operation of the grant. 588

An unanceled pre-emption filing of record at the date when a, becomes effective excepts the land covered thereby from the operation of the grant, even though at such time the statutory life of the filing has expired. 15

A pre-emptor who makes homestead entry of a part of the land embraced within his filing thereby abandons all right under his pre-emption claim, and though the filing may not, at such time, be canceled, it is thereafter not evidence of the existence of a pre-emption claim, and will not defeat the operation of a, as to the tract not included in the homestead entry. 539

Land embraced within the notification of a donation claim at the date of the grant and the definite location of the road is excepted from the operation of said grant, though claims of such character are not specifically named in the excepting clause. 569

Land embraced within an unanceled donation notification is excepted thereby from the operation of a, on definite location. 302

An application to enter, erroneously rejected and pending on appeal, serves to defeat a railroad grant on definite location as to the land covered thereby. 433

The occupancy of a tract in connection with land covered by an original homestead entry, with a view to establishing a claim thereto, as an additional homestead, excepts the tract so occupied from the operation of a railroad grant on definite location. 381

A claim of occupancy and settlement is not effective as against a, if the claimant is not a qualified settler. 436

A settlement right, set up as against a, is ineffective if it appears that the alleged set-

Page.
tler had prior thereto exhausted his rights under the settlement laws. 331

A settlement on public land with intent to appropriate the same under the desert land law does not operate to except the land from the effect of a. 247

The joint resolution of May 31, 1870, was in the nature of a new grant, and only such lands as were in a condition to pass under the terms of the grant to the company, at the date of the passage of said resolution, were intended to be granted thereby. 445

In determining what lands were passed to the altered main, or branch line, as provided for by the joint resolution of May 31, 1870, said resolution must be considered as in the nature of a new grant, and that only such lands as were public lands at the date of the passage of said resolution were intended to be granted thereby. 265

INDEMNITY.

An indemnity selection must fail in the absence of a valid basis therefor. 543

In the case of an indemnity selection list where the losses are not arranged tract for tract, and a tract is included therein that is in fact not lost to the grant, any applicant for a tract embraced within said list is entitled to claim that the failure in the loss assigned relates to his tract. 380

In the rearrangement of specifications of loss in bulk, so as to show a specific loss for each tract selected, the correction of a clerical error in the description of a tract included in the original assignment of losses, will not be regarded as the substitution of a new basis in support of the list, nor be held to invalidate such list as against the subsequent acquisition of adverse rights. 324

In the rearrangement of an indemnity list, under the directions issued in the La Bar case, it is not essential that the rearranged list should be signed by the selecting agent of the company. 552

A railroad company is entitled to six months from date of actual notice of the order issued under the La Bar case in which to file rearranged indemnity lists. 552

A list of indemnity selections in which due specifications of loss are assigned, should not be rejected on account of the company's failure to designate losses for prior selections, as required by the circular of August 4, 1885, but should be suspended awaiting compliance with said requirement; and a list so filed operates to protect the right of the company from the date of its presentation. 489

Indemnity selections of the Northern Pacific resting on alleged losses east of Superior City, regular and legal under the existing construction of the grant at the time when made, should be protected under the changed construction of the grant, with due oppor-

	Page.	Page.
tunity to assign new bases, as against intervening adverse claims.....	351	
Between Thomson and the city of Duluth the Northern Pacific company will not be entitled to indemnity for any lands to which the Lake Superior and Mississippi company may have been entitled under its grant....	428	
Priority of selection determines the right as to odd-numbered sections within the overlapping indemnity limits of the St. Paul, Minneapolis and Manitoba Ry. Co., St. Vincent Extension, and the Northern Pacific R. R. Co., and not within the withdrawal on general route of the latter company.....	454	
The odd-numbered sections within the limits of the Yakima Indian Reservation did not pass under the grant to the Northern Pacific company, and afford legal bases for indemnity selections by the company.....	543	
The occupancy of land for the sole purpose of speculating in the improvements thereon does not constitute a <i>bona fide</i> settlement that will except the land from indemnity selection.....	543	
Improvement of land under the timber-culture law will not operate to exclude the same from indemnity selection.....	1	
In a case between an applicant for the right of entry, and a company, claiming under an indemnity selection, where the application is rejected on account of conflict with the selection, and the appeal from such action is dismissed for want of regularity by the Commissioner, who in the same decision holds the selection invalid, the right of the applicant should be considered when final action is taken on the selection.....	513	
WITHDRAWAL.		
On general route for the branch line of the Northern Pacific road did not operate to reserve lands for the benefit of the main line.....	6	
An executive withdrawal for indemnity purposes is in violation of the terms imposed in the grant of July 27, 1866, and is without effect except as notice of the limits within which the company would be entitled to select indemnity.....	500	
No rights are acquired as against a, by a homestead entry of lands theretofore withdrawn for the benefit of such grant.....	161	
ACT OF JUNE 22, 1874.		
For earned lands relinquished under the act of June 22, 1874, the company acquires a vested right to select indemnity therefor, anywhere within the limits of the grant, and subsequent legislation, forfeiting the grant to the extent of unconstructed road, will not limit said right of selection to the lands unaffected by the forfeiture.....	565	
ACT OF APRIL 21, 1876.		
A settlement right, acquired prior to the receipt of notice at the local office of the withdrawal on definite location, is within the protective provisions of section 1, act of April 21, 1876.....	6	
A desert land entry made prior to the receipt of notice of withdrawal at the local office, by an actual settler, is protected under the provisions of section 1, and the operation of the statute is not defeated in such case by the fact that the entry was made after the passage of the act.....	436	
The provisions of section 1 protect a homestead settlement right acquired within the limits of a railroad grant prior to the time when the notice of withdrawal is received at the local office.....	435	
The confirmation of entries under section 1 is solely for the benefit of the individual claimant, conditioned upon his compliance with law, and was not intended to confirm the entry absolutely as against the right of the company so as to except the land from the grant in favor of any other settler.....	115	
SECTION 7, ACT OF SEPTEMBER 29, 1890.		
The completion of the Gulf and Ship Island road entitles the company to select indemnity, for lands relinquished, anywhere within the indemnity limits of the grant.....	566	
Railroad Lands.		
On the judicial vacation of a patent issued under a railroad grant, the Secretary of the Interior may lawfully fix a day when the lands embraced in such decree shall be open to entry.....	407	
The operation of the remedial act of August 5, 1892, as to an entry that falls within the terms of said act at the date of its passage, is not defeated by a subsequent relinquishment of the entry.....	586	
An indemnity selection, made for the protection of one whose claim under the public land laws has been rejected on account of the railroad grant, and who is consequently seeking title through the company, operates to reserve the land, while subsisting, from other disposition, and if finally canceled, the occupant of the land under the company's license is entitled to the right of purchase under the act of January 13, 1881, if otherwise within its terms.....	468	
ACT OF MARCH 3, 1887.		
<i>See Wagon Road Grant.</i>		
The right of a purchaser from a railroad company to perfect title under section 4, may be exercised without regard to whether his purchase was made before or after the passage of said act, if it was made in good faith, and before the land was held to be excepted from the grant.....	108	
An application for a patent under section 4, to lands erroneously certified on account of a railroad grant must be denied, where the want of good faith, both on the part of the original purchaser and the subsequent transferees is apparent.....	288	
The agreement of a transferee of the Mobile and Girard R. R. Co. to accept under		

	Page.
section 8, act of September 29, 1890, a <i>pro rata</i> share of the lands earned by said company, and the consummation of such agreement, do not operate as a waiver of the right of said transferee to subsequently apply for relief under section 4, as to lands purchased from said company but not secured through said <i>pro rata</i> adjustment.....	288
A congressional forfeiture of, for failure to construct the road, is also, in effect, a declaration by Congress that certified lands so forfeited were "erroneously certified," and the Department will not question such declaration in construing the provisions of section 4.....	310
A forfeiture of the unearned lands within a grant requires an adjustment of the grant in order to determine what lands were restored to the public domain by the act of forfeiture, and the determination of such matter is an "adjustment" within the meaning of section 4.....	310
An application for the right of purchase under section 5 may be entertained at any time after it is ascertained that the land involved is excepted from the grant, and without waiting for the final adjustment of the entire grant.....	508
The purpose of section 5 was to protect all persons who had parted with a valuable consideration, whether in money or other property, in payment for lands to which the company could give no valid title.....	301
Lands sold to purchasers in good faith as part of a railroad grant, but in fact excepted from the operation thereof, are within the purview of said section 5.....	508
The right of purchase accorded by section 5 extends to indemnity lands as well as those within the primary limits, and this is true of lands which at the date of purchase from the company had not been selected, as well as of those which had.....	508
The right of purchase under section 5 is limited to "the numbered sections prescribed in the grant," and therefore can not be exercised to secure title to even numbered sections selected under the indemnity provisions of the act of June 22, 1874.....	387
The fact that a purchaser from a railroad company does not, prior to his purchase, examine the records of the Land Department in order to ascertain the character of the company's title, is not sufficient to defeat his right of purchase, under section 5, as a "bona fide purchaser".....	508
The good faith of a purchaser from a railroad company is not affected by the fact that he is a stockholder therein, nor by the further fact that he gave preferred stock of the company in exchange for the land.....	301, 508
The right of a purchaser from a railroad company to acquire title under the provisions of section 5 is not in any degree dependent upon the good faith of the com-	

	Page.
pany in making the sale. The question of good faith in the transaction relates solely to the purchaser's connection therewith.....	301
The fact that a transfer from the company is by quitclaim deed can not of itself affect the right of purchase under said section 5; nor will the speculative value of the land be considered in determining the bona fides of the purchaser, especially where such point is raised by a stranger to the original transaction.....	216
On application to perfect title, under section 5, to land excepted from a railroad grant by pre-emption filings, the good faith of the applicant's purchase from the company is not impugned by the fact that prior to said purchase he had been register of the land district in which the lands were situated, and must therefore have known that said lands were excepted from the grant by said filings, where it appears that during said period the Department did not recognize a filing as sufficient to work an exception.....	216
The right of a purchaser from a railroad company to perfect title under section 5, where the title of the company fails, takes precedence over a subsequent adverse timber culture application.....	543
The right of purchase under said section 5 is not affected by a settlement claim initiated after the passage of said act.....	216
The successful contestant of an entry acquires no preference right that can prevail as against the right of a bona fide purchaser under section 5.....	508
A settler who successfully contests the adverse claim of a railroad company by showing that the land was, in fact, excepted from the grant does not thereby acquire a right of entry as against the privilege of a prior bona fide purchaser from the company, who is in open possession of the land, to perfect title under section 5.....	180
ACT OF SEPTEMBER 29, 1890.	
Lands restored to the public domain by the, are subject to settlement from the date of the passage of said act.....	58, 346
The right to purchase lands forfeited by the, and the acts amendatory thereof, is secured to persons thereto entitled between the dates of September 29, 1890, and January 1, 1897, and no adverse claim can attach between said dates.....	415
Under the provisions of the amendatory act of January 23, 1896, an applicant for the right of purchase, accorded by section 3, to settlers who have gone upon railroad lands with a view to purchasing the same from the company is not required to show actual residence, if he has enclosed and cultivated the land applied for.....	26
Forfeited by the, is subject to school indemnity selection.....	423

	Page.		Page.
ACT OF MARCH 2, 1896.		fifty cents per acre, and such price having been paid, it will not be held, on application for, that the discretion of the Secretary was exercised under a mistake as to the true status of said lands.....	151
Where the title of a purchaser of lands excepted from a railroad grant is confirmed by the demand should be made upon the company for the minimum government price of the land, with a view to judicial proceedings for the recovery of the value thereof as contemplated by said act.....	445	The payment of the purchase price of land to the receiver before the acceptance of final proof is at the risk of the purchaser, and if said proof is rejected and the receiver fails to account for the money so paid, the right to, from the government can not be recognized	282
If it appears, on answer to a demand for reconveyance of lands excepted from a railroad grant, that the title of a purchaser thereof is confirmed by, proceedings should then be instituted for the recovery of the value of the land.....	509	An entry made during the pendency of an appeal involving the land is "erroneously allowed," and the purchase money should be repaid, if the entry in question can not be confirmed	414
Hearing.		The purchaser of lands at a tax sale, at a time when the legal title thereto is in the United States, does not occupy the status of an assignee of the entryman under the statutory provisions with respect to.....	555
See <i>Practice</i> .		The return of purchase money, in case of an entry erroneously allowed and canceled, may be made on the application of one who shows a partial interest, according to the proportion of his interest.....	249
Relinquishment.		Reservation.	
Takes effect when it is filed in the local office and operates <i>eo instanti</i> to release the land from the effect of the filing or entry. The subsequent notation of the relinquishment on the records of the General Land Office is merely a clerical act.....	492	Lands within an abandoned military, subject to disposition under the act of August 23, 1894, belonging to the single minimum class, must be sold at \$1.25 per acre, though appraised at a less figure.....	14
The rule that a, executed after final proof and after sale of the land, is invalid can not be invoked on behalf of one who fails to show, under oath, any interest in the land, or that the entryman in fact had complied with the law	28	It is within the scope of Executive authority to reduce the area of a military, created by Executive order, so as to exclude lands on which improvements had been made prior to the establishment of said reservation	185
In the State of Kansas the father and mother inherit jointly the estate of a son who dies intestate, leaving no wife nor issue, and it therefore follows in the case of a timber culture entryman who thus dies, having an entry in said State, that if the father subsequently dies before the entry is carried to patent a valid relinquishment of said entry can not be executed, except by the joint action of the mother and the heirs of the deceased father.....	297	The act of July 5, 1884, providing for the disposition of abandoned military, is not applicable to a, restored to the public domain prior to the passage thereof, and as section 4 of said act repeals the act of August 18, 1856, with respect to such reservations in the State of Florida, it follows that in case of a, in said State, that is restored to the public domain prior to the act of 1884, and to which no rights had arisen under the repealed statute, there was no authority for the disposal thereof until the enactment of August 23, 1894, and that said act, and the amendatory act of February 15, 1895, must now govern the disposition of said lands....	237
An instrument executed by a homestead entryman purporting to waive all claim to any mineral land embraced within his entry, but which does not in terms surrender any specific legal subdivision, and was evidently not intended as an abandonment of any specific tract, should not be regarded as a	353	Section 5, act of July 5, 1884, providing for the disposition of abandoned military, may be properly construed in connection with the act of August 4, 1892, to warrant the allowance of a placer application for land containing building stone, in accordance with the latter act.....	516
Repayment.		Abandoned military, instructions approved December 24, 1896, with respect to Fort Crittenden.....	567
A desert land entry made in good faith under the general act of 1877 by one who has theretofore had the benefit of the special act of 1875 is an entry "erroneously allowed," and repayment of the money paid thereon may be properly allowed.....	61		
In case of an entry that is "erroneously allowed" for land not subject thereto, and canceled for that reason, may be granted without inquiry as to the truth or falsity of the final proof.....	137		
The Secretary, by virtue of the discretionary authority conferred by the act of June 8, 1872, having fixed the price of the lands therein referred to at two dollars and			

Reservoir Lands.

A pre-emption filing made subject to a withdrawal under the arid land act of October 2, 1888, that is awaiting action by Congress, may be suspended until such action is taken 483

Residence.

In the case of an attack upon a homestead entry, based on alleged priority of settlement, it is incumbent upon the contestant to show that his acts of settlement were followed by the establishment of, on the land to the exclusion of a home elsewhere 87.

Is not required on the part of a widow for the maintenance of her rights under an uncompleted homestead entry of her deceased husband, if she cultivates and improves the land 158

A homestead applicant is not required to establish, prior to the allowance of his application 475

The rule that a postmaster will not be heard to claim, outside of the delivery of his office is not applicable where it appears that such officer's resignation has been received by the Post-Office Department prior to the date of his settlement 480

On a proper showing a second year's leave of absence may be granted without requiring an intervening period of personal presence on the land 200

Where an application for leave of absence is wrongfully denied, and afterwards allowed on appeal, the applicant will be protected as to any absence during the period covered by the application 200

Res Judicata.

The doctrine of, will not prevent departmental action where such course is the only one by which substantial justice can be secured and the subject-matter remains within the jurisdiction of the Department. 216

A decision of the Department directing a hearing on an application for survey, in which the doctrine of riparian ownership is considered and held not applicable, brings such question within the rule of, and the Department will not thereafter consider the same in the disposition of the case on the facts submitted at the hearing 430

An application to enter properly rejected by final decision of the Department under the rulings then in force is, and can not be reinstated with a view to action under a changed construction of the law 452

A decision of the supreme court in which a departmental construction of a statute is held erroneous does not warrant the Department in vacating and reversing final decisions rendered in accordance with such construction 455

The doctrine of, as between the parties to a controversy, will not prevent the govern-

ment from cancelling an entry where it is apparent that it can not be perfected without perjury on the part of the entryman... 514

Review.

See *Practice*.

Revised Statutes.

See *Tables of, Cited and Construed*, page XXI.

Right of Way.

A right of way under the act of March 3, 1875, is fully protected by the terms of the act as against subsequent adverse rights, and a reservation of such right of way, in final certificates and patents issued for lands traversed thereby, is therefore not necessary, and should not be inserted..... 67

The provisions of the act of March 3, 1891, conferring privileges for irrigation purposes over the public domain and reservations of the United States, do not contemplate the allowance of such rights over lands reserved by the government for reservoir sites 275

Circular of November 27, 1896, with respect to reservations of, in final certificates and patents 458

Regulations of December 23, 1896, concerning, under the act of January 21, 1895... 519

River.

See *Survey*.

School Lands.

Land known to contain coal prior to the admission of the State to the Union is excepted from the operation of the school grant 116

Where a mineral entry has been allowed on, the protest of the State will not be considered with a view to a hearing in the absence of a definite allegation that the land was in fact not mineral land or known to be such at the date the school grant attached. 313.

By section 2, act of April 28, 1870, extending the jurisdiction of the State of Nebraska over the territory added thereto by the provisions of said act, Congress conferred upon said State all the rights incident to the original enabling act, and it therefore follows that the reserved school sections embraced within such added territory passed to said State by such transfer of jurisdiction, though the statute does not in terms make an express grant thereof to the State..... 348

The act of February 28, 1891, amending sections 2275 and 2276, R. S., is applicable to all the public-land States, and operates as a repeal of all special laws theretofore enacted, so far as in conflict therewith; and under the provisions thereof the State of California is entitled to select indemnity for school sections lost to the State by reason of their mineral character..... 423

The return of sections sixteen and thirty-six by the surveyor-general as mineral land

is sufficient evidence of its mineral character to entitle the State to select indemnity therefor in all cases where said return is not overcome by competent evidence to the contrary	423
Lands lying within the limits of a railroad grant forfeited by the act of September 29, 1890, are subject to selection as indemnity for, lost in place	423

Scrip.

Porterfield, is locatable only upon lands that have been surveyed under authority of the government	319
---	-----

Selection.

See *Railroad Grant; School Land; States.*

Settlement.

The notice of a claim given by, is confined to the technical quarter section on which the settlement is made	50
--	----

The conditions attendant upon the opening of Oklahoma, to require the recognition of extremely slight initial acts of, in determining priorities between adverse claimants, if such primary acts are followed by residence within such time as clearly shows good faith

10

A contestant alleging priority of, as against the right of a record entryman, is not entitled to a favorable judgment, if the fact as alleged is not established by some preponderance of the testimony

50, 201

If one claiming the right to make a second homestead entry settles and applies for the restoration of his homestead right, and permission to enter the land so settled upon, and is adjudged to be entitled to make such entry, such judgment validates his acts of ..

63

As between parties claiming priority of, preference must be given to the one who first performs some act on the land indicative of an intent to appropriate the same ..

74

Made ostensibly for the purpose of securing a homestead, but in fact with a view to speculation in town lots, is lacking in good faith, and should not be accepted as the basis of a homestead entry

87

Will not be held to relate back to the alleged initial act, if such act is not followed by substantial and bona fide acts of settlement and improvement

87

Under the act of May 14, 1880, the right of a homestead settler relates back to the date of, and if at the date of his application to enter he has prior thereto lived on the land and complied with the law for the statutory period, his interest therein becomes at once a vested and devisable right

188

A finding of simultaneous, does not justify an arbitrary division of the land nor an award to the highest bidder

201

There is no authority under the law, in cases of simultaneous, for offering the right of entry to the highest bidder

201, 400

Made by one who has at such time an ex-

isting homestead entry for another tract, must be held valid where the settler is entitled to make a second entry	440
---	-----

States.

Circular of November 27, 1896, with respect to selections within mineral belt	459
---	-----

The preferred right of selection conferred upon the State by the act of March 3, 1893, is not operative as against bona fide settlement rights existing at the time the plat of survey is filed in the local office ..

147

Under the provisions of the act of August 3, 1854, the certification of lands under the agricultural college grant, that in fact passed under the swamp grant, is of no operative effect

460

Statutes.

See *Acts of Congress, Cited and Construed*, page XIX.

The words "adverse claim" in the act of April 7, 1896, held to mean valid adverse claim	582
---	-----

Survey.

See *Alaska*.

The acceptance by the Commissioner of the General Land Office of a, as returned by the surveyor-general, with directions that the plat shall be filed in the local office, amounts to an approval	230
---	-----

Restoration of lost and obliterated corners, regulations of October 16, 1896

361

Records of public, transferred to certain States

375

Subdivision of sections; see regulations of October 16, 1896

375

The manual of surveying instructions requires the meander of a tide-water stream on both sides from its mouth up to the point where the tides cease

393

Swamp Land.

When the field notes of survey show that land is swamp in character, and it is listed as such by the State, and the list approved, it will require positive evidence by witnesses thoroughly cognizant of the condition of the land at or near the date of the grant to justify revocation of the approval	148
--	-----

The effect of the decision in the case of *Morrow et al. v. State of Oregon et al.*, 17 L. D., 571, was to cancel swamp lists 30 and 31 and to annul all claims of the State and its alleged assignees to all of the tracts therein described for the reason that said lands were, at the date of the grant, covered by an apparently permanent body of water

178

The approved formula "swamp and overflowed lands unfit for cultivation" employed in the returns of the surveyor-general follows the words of the statute, and must be taken as sufficiently indicating the character of the land, without the additional state-

	Page.
ment that the lands were swamp and overflowed at the date of the swamp grant.....	230
Under the first paragraph of section 2488, R. S., the return of land as swamp and overflowed by the U. S. surveyor-general for the State of California is conclusive evidence as to the character of the land so returned and represented as such on the approved township surveys and plats; and lands thus returned must be certified to the State as insuring thereto under the swamp grant.....	230
In the absence of an affirmative showing that a tract of land was swamp in character at the date of the grant, the Department will not order a hearing to determine its character, where by the field notes of survey it is returned as agricultural land.....	305
The failure of the State to select a tract as, that is returned as agricultural, within the two years after survey as prescribed by the statute, will be held sufficient to preclude the subsequent assertion of such right by the State in the presence of an intervening bona fide adverse claim.....	305
A claim for swamp indemnity must be rejected where it appears that the tracts of land employed as a basis therefor are included within a prior waiver of all claims thereto executed by a duly authorized agent of the county.....	184
Timber and Stone Act.	
The withdrawal of offered lands abrogates the offering and brings them within the category of unoffered lands, and hence subject to timber-land entry, if restored to the public domain.....	412
Timber Culture.	
See <i>Application; Entry.</i>	
An entry will not be canceled for failure to secure satisfactory results where good faith on the part of the entryman is manifest.....	54
An entryman can not be required to show compliance with the law after his entry is canceled, and while the land is covered by the intervening entry of another.....	54
Timber Trespass.	
There is no authority in the Department to accept in settlement of a, an amount less than that found due the government.....	199
Town Lot.	
See <i>Town Site.</i>	

IN OKLAHOMA.

Occupancy of a, as the tenant of another at the date of a town-site entry confers no right to a deed upon such occupant.....	196
Occupancy of a, as the basis of a claim thereto, to be effective must be maintained up to the date of the town-site entry.....	196
The municipality may become a party to a contest between applicants for a, with a view to the assertion of its own rights under section 4, act of May 14, 1890.....	196
The right of an assignee claiming through an occupant, who has complied with the law, to receive a deed is not affected by the fact that the application of such assignee is in the interest of one who was disqualified as an original lot occupant on account of being inside the Territory at the hour of opening.....	384

Town Site.

See *Mineral Land.*

The amount of land reserved by a town-site settlement may be properly limited to the legal subdivision on which actual settlement is made where the town-site claim is for the purpose of securing an entry of lands additional to a prior town-site settlement..	74
The transfer of a case from one board to another during the trial will not affect final action where all the evidence is before the latter at the time of its decision.....	578

Transferee.

See *Alienation; Confirmation.*

Wagon-Road Grant.

A diagram showing the limits of a, that has stood unquestioned for a long term of years, and under which rights have vested, will not be disturbed.....	94
An entry of land embraced within the limits of a, is not confirmed by section 1, act of April 21, 1876, for the reason that when allowed the diagram on file did not show said land to be within the grant, if, by the terms of the grant in fixing the terminus of the road, the fact that said land fell within the grant was apparent.....	339
The provisions of the act of March 3, 1887, apply only to land grants for railroad purposes and can not be invoked for the protection of a purchaser under a.....	579